



Community Foundation
for Kingston & Area



Update on Charities Law & Tax Developments



A Workshop

with

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The last year has seen a number of significant changes in the law as it affects charities. This seminar will give you an essential update on the latest in changes, including: The New Canada Not-for-Profit Corporations Law; The Ontario Good Governance Act; Recent changes to the Charities Account Act, Charitable Gifts Act, Accumulations Act and Religious Organizations Lands Act; 2010 Federal Budget Changes to Disbursement Quotas.

June 22, 6-9pm

The Wilson Room , Kingston Frontenac Public Library

\$20 - Refreshments will be served.

Reserve by calling 613 546 9696 or by email: foundation@cfka.org



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Charity Law Update

June 22, 2010



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Information is current to June 21, 2010. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.



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Charity Law Update

- New Canada Not-For-Profit Corporations Act
- Ontario Bill 65
 - Not-For-Profit Corporation Act, 2010
- Ontario Good Government Act, 2009
 - Charitable Properties Act, Charitable Gifts Act, etc.
- Recent Cases



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Canada Not-For-Profit Corporations Act (CNCA)

- Royal Assent 23 June 2009
- Regulations – still being drafted
- Themes – modernization, incorporation as of right, “natural person”, entrenching governance norms, definition of fiduciary duties, regulation of conflicts, regulatory framework
- Application



CNCA

- Soliciting v. non-soliciting
- Soliciting corporation is
 - A corporation that “received income” during the last 3 consecutive years >\$10,000 in the form of
 - donations (other than from members, directors, officers or employees or their spouses)
 - government grants or assistance, and
 - donations from other soliciting corporations
 - basically, a recipient of public funds



CNCA

- A soliciting corporation
 - On liquidation, must distribute assets to a “qualified donee”
 - Min. 3 directors, 2 non-management
 - Tougher audit and accountant rules
 - Must file statements with Director
 - May not use UMA

CNCA - Audit Requirements

Type of Corp/Gross Annual Revenues (GAR)		Requirements for Public Accountant (PA)	Review/Audit
SOLICITING Corporation with GAR of	Less than \$50,000	A PA must be appointed annually or members can waive (unanimously and annually)	If PA is appointed, review engagement is required but members can vote by simple majority to require an audit instead
	\$50,000 to \$250,000	PA must be appointed annually	Audit is required but members can agree by 2/3 majority to have a review engagement instead
	Over \$250,000	PA must be appointed annually	Audit is required



CNCA

- Statement of basic law for directors & officers
- Fiduciary duties:
 - To act honestly and in good faith in the best interests of the corporation;
 - To exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances
 - To comply with Act and regulations; the articles, by-laws and UMA
 - To verify the lawfulness of the articles and the purpose of the corporation.
- No exculpation clauses, but have fulfilled their duty by reliance in good faith on
 - financial statements of the corporation or
 - a professional's report



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CNCA

- Member remedies – cf. CBCA
 - Relief from oppression
 - Compliance and restraining orders
 - Derivative action
 - Just and equitable winding-up



CNCA

- For religious corporations:
 - derivative action, oppression and court-ordered liquidation not applicable to adjudicate tenets of faith
 - dissent and appraisal right not available at all
- religious corporation is not defined



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Bill 65

- An Act to Revise the Law in Respect of Not-for-profit Corporations (ONCA)
- First Reading 12 May 2010
- Second Reading and debate 17 May 2010
- Currently in committee



Bill 65

- Incorporation as of right
 - Incorporator can be a corporation
 - “public benefit corporation”
 - Charitable or receiving > \$10,000 public funds
 - Cf “soliciting” corporation under CNCA
- Natural person - no more *ultra vires*
- Default by-laws



Bill 65

- Minimum 3 directors
 - Can be increased by appointing up to 1/3 more
- Can have a minimum and maximum
- Ex officio directors are permitted (cf. CNCA)
- 2/3 must be members
- Maximum 3 year term
- Removal by ordinary resolution



Bill 65

- Audit v. review
 - Corporation must appoint an auditor or person to do review engagement
 - Public benefit corporation with
 - < \$100K revenue members may waive the requirement
 - \$100K to \$500K members may choose review engagement by a non-auditor
 - >\$500K – no option



Bill 65

- Non- Public Benefit Corporation
 - <\$500K in revenue – no auditor or review engagement
 - >500K – review engagement instead of an audit
- Choice is by special resolution
 - 80% of votes cast
- Choice must be made annually



Bill 65

- Directors and Officers
 - Conflict of interest (cf. OBCA)
 - Liabilities
 - Not significantly limited - cf. SNCA
 - Directors' Standard of Care-
 - “to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”



Bill 65

- Directors' defences
 - Due diligence
 - Reliance on officers and employees
 - Reliance on expert advice
 - Right to dissent
- Indemnification for directors & officers who:
 - Acted honestly, in good faith and with a view to the best interests of the corporation
 - Believed reasonably that their conduct was lawful



Bill 65

- Membership
 - by-laws must set out the conditions
 - members ex officio are possible
- If there are classes of members by-law must set out conditions for membership, change or termination
- Members may be disciplined
- Detailed provisions for meetings, voting, etc.
- Meetings may be held electronically if by-laws permit



Bill 65

- Remedies
 - Derivative Action
 - by current or former member, officer or director
 - An exception for a religious corporation (not defined)
 - Restraining Order
 - on application by a current or former member, officer or director or a creditor
 - where the corporation is not in compliance with the ONCA, the regulations, articles or bylaws
 - Investigation
 - where the corporation is alleged to have acted fraudulently or oppressively



Bill 65

- Fundamental change
 - a special resolution of members is required
 - each class of members is entitled to vote as a class if affected by the change
 - Even where the class of members otherwise has no right to vote
 - right for dissenters to object, have their interest terminated on payment of the membership interest in the corporation



Good Government Act, 2009

- On December 15, 2009, received Royal Assent
- Repealed the *Charitable Gifts Act*,
 - which restricted charities from owning more than a 10% interest in a business
 - the *Income Tax Act* (Canada) still relevant to this question
 - “cures” breaches of the *Charitable Gifts Act* that occurred prior to the repeal



Good Government Act, 2009

- Amended the *Charities Accounting Act*
 - OPGT may require information or documents respecting entities in which executors or trustees hold a “substantial interest”
 - “executors or trustees” includes directors of any charitable corporation
 - records include:
 - assets and liabilities
 - income and expenses for the entity
 - particulars of any fees
 - salary or remuneration paid to any person



Good Government Act, 2009

- substantial interest => 20% assets or control
- a court may make orders re
 - the management, operation, ownership or control of the entity
 - ensuring that the entity is operating in the best interests of the charitable purpose
 - Contravention is an offence with a fine not exceeding \$25,000.
- excess property not used in the charitable activity can be invested according to the *Trustee Act*



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Good Government Act, 2009

- *Accumulations Act* amended
 - the rules regarding accumulations do not and never have applied to a charitable purpose trust
- *Religious Organizations' Lands Act* amended
 - 40 year term limit for which a religious organization may lease land is repealed



Land Transfer Tax

- March 25, 2010, Ontario budget
 - amendments apply after March 25, 2010.
 - land transferred from trustees of an unincorporated charity to the corporate successor of the charity upon incorporation
 - the successor corporation assumes a mortgage
 - now exempt from Land Transfer Tax, provided that
 - corporation continues the same charitable purpose for the same members and
 - no consideration is paid, other than the assumption of existing liabilities



2010 Federal budget changes

- Charitable expenditure rule
 - Must spend 80% of previous year's tax-receipted donations other than enduring property
- Repealed effective for fiscal years that end on or after March 4, 2010



2010 Federal budget changes

- Capital accumulation rule
 - Must spend 3.5% of all assets not currently used in charitable programs if in excess of \$25,000
- Modified for years ended on or after March 4, 2010



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Capital accumulation rule

- \$25,000 limit increased to \$100,000 for charitable organizations
- Threshold remains at \$25,000 for charitable foundations



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2010 Federal budget changes

- Anti-avoidance rules strengthened
 - Amounts transferred between non-arms length charities
 - Election available for transferring charity



2010 Federal budget changes

- Effect of changes to the following concepts:
 - enduring property – repealed
 - capital gains reduction – repealed
 - capital gains pool – repealed
 - Specified gifts – effectively eliminated
 - Accumulation of property



New disbursement quota

- 3.5% of average value of assets not currently used in charitable programs
 - If assets exceed \$100,000 for charitable organizations
 - If assets exceed \$25,000 for charitable foundations



Effect of changes

- More even playing field among charities
- Reduced complexity
- Does this mean a charity has more flexibility with respect to the use of funds?

NO!



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Charity – back to basics

- A charitable organization must devote all resources to charitable activities carried on by the organization
- A charitable foundation must be operated exclusively for charitable purposes



Charity – back to basics

- Revocation can occur where a charity makes a disbursement by way of a gift, other than a gift:
 - Made to a qualified donee
 - Made in the course of charitable activities carried on by the charity



Charity – back to basics

- A private foundation cannot carry on any business
- A public foundation or charitable organization:
 - cannot carry on an unrelated business
 - can carry on a related business



Charity – back to basics

- Charitable activity
 - Not defined in the income tax act
 - Must be charitable
 - Must fall within the scope of the charity's objects
 - Cannot be involved in partisan political activities



Charitable activity

- Must be careful of social activities
- Must be careful of fundraising activities
- Charitable activity – relief of poverty; advancement of education; advancement of religion; other purposes beneficial to the community
- Must look at case law for more detail



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Fundraising

- Has been subject of intense discussion and disagreement
- Recognition that fundraising is a necessity
- Acceptable/ unacceptable fundraising
- Refer to Canada Revenue policy paper CPS-028



Fundraising

- Fundraising not a charitable activity unless substantially all of activity advances a charitable objective
- Four part test (must meet all)
 - is main objective fundraising?
 - Did activity include repeated fund requests?
 - Audience selected for ability to give?
 - Was compensation derived from giving



Fundraising

- Exception
 - Does event further charity's purposes (other than awareness of charity's mandate or work)
- Fundraising ratios
 - Under 35% - likely ok
 - 35% & above – some concerns/ assessment of fundraising?
 - >70% - serious concern - explanation



HST

- For charities will operate similar to GST
 - PSB's will be able to claim a proportionate rebate
 - The rate for charities will be 82% vs. the 50% received for GST
 - Will need to track Provincial (HST) and Federal (GST) component separately



HST

- A charity cannot register for GST/HST if it provides only exempt property/services
- Registration optional if providing taxable property & services and a small supplier



HST

- Small supplier
 - <\$250,000 in gross revenue (includes business & investment income, donations, grants, capital gains), or
 - Taxable supplies of \$50,000 or less



Taxable supplies - examples

- Memberships that provide benefits
- Membership providing supervision/
instruction in athletics/recreational
(exception for <14 years old)
- Business operations
- Lottery tickets
- Admission to place of amusement
- Refer to CRA publication RC4082



Cases- Banyan Tree

- *Robinson v. Rochester et al.* – the first certified class actions against a charity for a donation scheme
 - 2,825 individuals participated in the Banyan Tree Foundation Gift Program
 - Each participant pledged a donation to the Banyan Tree, but contributed only 15% from their own resources
 - 85% was financed – fees for the promoter-lender
 - participant received a charitable donation receipt for the full amount pledged
 - Charitable status of the Banyan Tree Foundation was revoked by CRA
 - the Foundation was operated for promoting a tax shelter and for the private benefit of its directors
 - No suit against the Foundation or its directors, just the promoter and the law firm who provided the legal opinion
 - Charities and their directors note the many warnings issued by CRA about leveraged donation schemes



Cases- *Fort Sackville Foundation v. Darby Estate*

- Darby left property to the “Heritage Society of Bedford” (N.S.) on conditions, and if they were not met, the property fell into the residue
 - there was no “Heritage Society of Bedford” and the “Bedford Heritage Society” had ceased to exist
 - The Fort Sackville Foundation claimed that it was the successor charity - Some members and purposes in common
- The court found no amalgamation and no successor where an entity ceased to exist
 - The cy-pres doctrine applies where:
 - the gift as it stands is either impossible or impractical to effect; and
 - the donor expressed a general charitable intent
 - The court held that neither test had been met –
 - the gift was not impossible or impractical because there was a gift-over
 - the conditions narrowed the gift so as to take away a general charitable intent
- As a result, the property passed to the residue



Cases - *BNS v. Common Ground Women's Centre*

- Deceased died in 2007, leaving a will dated 1997
 - will divided the estate “in equal shares among the following organizations which shall be in existence at my death...”,
- one of the listed charities was “Common Ground Women’s Centre...”
- Common Ground had ceased operations about 1997, and lost its charitable status
- although Common Ground had “legal” existence, the deceased intended the gift for charitable purposes
- *cy-pres* doctrine did not arise - Common Ground was not in existence, the residue passed to the remaining 17 charities, in equal shares



Cases - *Bentley v. Anglican Synod*

- Breakaway parishes in B.C. tried to retain property of the churches
- Clergy resigned but continued to use the church buildings - the bishop dismissed them and brought suit
- Breakaways argued a trust for traditional Anglican values
- Judge said if there was a trust it was for the Anglican Ministry determined by the Anglican Church
- Based his argument on the statute which required the consent of the bishop and the executive committee



Carries on a business

- Four general criteria reviewed to determine if a charity carries on a business:
 - Intended course of action
 - Potential to show profit
 - Existence of profit in past years
 - Experience and expertise of person(s)/organization(s) undertaking the activity



Investment vs. Business

Areas of concern:

- Rental, development, leasing activities
 - Use of excess capacity
- Royalty interests & interest in partnership units
 - Even if limited partner
- Aggressive investment trading techniques
 - Short sales/option trading/day trading



What is related business

- Policy Statement: CPS-019
 - Businesses run substantially by volunteers – charity employees not volunteers
 - Business that are **linked** to a charity's purpose and **subordinate** to that purpose
- Only for charitable organizations and public foundations – does not help private foundations



Other business issues

- Continuous or regular operation
- Linked to charity's purpose
 - use of profits for charitable purpose not sufficient
 - Must consider all factors



Carrying on Business

- *The House of Holy God v. Attorney General of Canada (CA)*
- The House of Holy God was deregistered
 - Ran a maple syrup operation
 - Paid employees to work in the business
 - Directors were paid for their work in the operation
- A charity can carry on a related business provided that it is either
 - linked to the charity's purpose and subordinate to that purpose or
 - run substantially by volunteers
- HHG failed to meet either test
- No evidence that the maple syrup operation fulfilled any teaching or religious function in itself
- That the profits were plowed back into the organization was irrelevant



Carrying on business

- Under the Bill 65, corporations are given the capacity, rights and powers of a natural person, subject to any limitation in the ONCA or in the corporation's articles
- the corporation's purposes may include those of a commercial nature, **but**
- the articles must state that the commercial purpose is intended only to advance or support the non-profit purposes of the corporation



Revisions to existing documents

- Many existing fund agreements have clauses related to enduring property/ 10 year capital retention
- Is it appropriate to consider changes?
- Is there a capital retention clause in your by-laws or other constituting documents?



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Reviewing Constitution - CNCA

- Application
 - Existing federal corporate NFPs
 - Existing federal charter NFPs
 - Provincial NFPs may continue under CNCA
- Transition
 - 3 years to apply for continuance
 - Director may dissolve if no application
 - Members must approve an application for continuance



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Reviewing Constitution - ONCA

- ONCA governs all non-share corporations in the province
- Social corporations have 5 years to continue under the new Act
- Provincial non-share corporations have 3 years to amend their constitutions to conform with the ONCA
- ONCA default provisions will apply after that
- Perfect time to review membership and governance structure



Sanctions

- New guidelines issued in April, 2007
- General approach (depending on severity)
 - Education letters issued by auditor to explain rules to charity
 - Compliance Agreement – terms spelled out, identifies problems and steps necessary to comply
 - Sanctions – a financial penalty, or suspension of charity's status as a qualified donee, or both
 - Revocation of the charity's status
- Charities subject to sanctions will be publicly disclosed on CRA's Charities website



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Not filing annual return

- Reminder notice is now issued one month prior to due date of return – if CRA has the correct address!
- Legislation allows for \$500 penalty for first time offence and \$500 penalty for repeat offences
- Canada Revenue Agency continues zero-tolerance policy and will move directly to revocation
- Financial penalty will be assessed on application for re-registration



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Receipts with incomplete information

- Example given is CRA's website address is missing on receipt
- Generally, anticipate using compliance agreements before proceeding to new sanctions
- Penalty for first time infraction – 5% of the eligible amount
- Penalty for repeat infraction – 10% of the eligible amount



Sanctions

- Gifts to non-qualified donees
 - Generally, anticipate using compliance agreements before proceeding to new sanctions
 - Penalty for first infraction is 105% of the amount of the gift
 - Penalty for repeat infraction is 110% of the amount of the gift



Sanctions

Infraction	Likely CRA approach	First Infraction	Repeat Infraction
Carrying on business activities	Compliance Agreement	5% of gross revenue	100% of gross revenue
Control of a corporation	Compliance Agreement	5% of dividends paid	100% of dividends paid
Undue benefit	Compliance Agreement	105% of the benefit amount	110% of the benefit amount
False information – penalty < \$25,000	Sanction	125% of eligible amount	125% of eligible amount
False information – penalty > \$25,000	Sanction	125% of eligible amount and suspension of tax receipting	125% of eligible amount and suspension of tax receipting



CRA Penalties and Sanctions

- New graduated sanctions allows for progressive severity
 - education
 - compliance agreement
 - sanction (e.g. financial penalty or suspension); and
 - revocation
- *Christ Apostolic Church of God Mission International* had entered into a compliance agreement with CRA following an audit
- CRA reviewed and found substantial non-compliance – withdrew the agreement and revoked the charitable status
- Federal Court of Appeal confirmed
- Some questions about how far one can rely on CAs – has graduated system made CRA more aggressive?



Cases- *OSPACA v. Toronto Humane Society*, 2010

- April 1, 2010, Justice Brown approved a settlement in the ongoing litigation involving the OSPCA and the Toronto Humane Society
- 12 days later, THS moved to vary it
 - Issue was the fate of pit-bull “Bandit” who had been ordered destroyed in 2004, and had since bitten three more people
- Directors of charitable organizations have fiduciary duties toward the charity
 - “The Board of Directors of the THS has dropped the ball big-time on the issue ... [this] is not a good start to implementing a settlement which was supposed to put a new face on the THS.”
- The courts to oversee the management of charitable property - even to order the destruction of charitable property
 - “Whichever option the THS decides to choose, it must be implemented by 5 p.m. tomorrow, Thursday, April 15, 2010. If I learn that “Bandit” remains in the possession or control of the THS after that deadline, I will reconvene a further hearing on my own motion pursuant to the court’s broad jurisdiction to supervise charities.”



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Q & A