
LAW SOCIETY OF UPPER CANADA
7th Annual Estates and Trusts Law Summit

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(Current to November 26, 2004)

**ESSENTIAL RECENT DEVELOPMENTS IN
CHARITY LAW**

By Terrance S. Carter, B.A., LL.B. and Trade-mark Agent
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A. INTRODUCTION

This paper is intended to provide an overview of the essential legislative, regulatory and common law developments in charity law over the past twelve months, as well as explaining the practical implications of these changes.¹ While this paper primarily focuses on developments in Ontario, it also highlights those in other jurisdictions. The extensive and complex legislative reform proposed under the *Income Tax Act* (the “Act” or “ITA”)² is examined, including provisions curtailing tax shelter donation schemes, as well as changes to enact the intermediate sanction rules, restrictions on trading charitable donations, a new appeals regime and revisions to the calculation of the disbursement quota that applies to gifts received by registered charities.

In addition, this paper summarizes and comments on recent publications by the Charities Directorate of Canada Revenue Agency (“CRA”), which administers the ITA in relation to charities. These include publications

* The Author would like to thank the following colleagues from Carter and Associates for their assistance: Theresa L.M. Man for her contributions on the sections entitled “Curtailling Tax Shelter Donation Schemes Involving Donation of Property”, “Other Legislative Proposals from the February 2004 Amendments”, “September 2004 Amendments Implementing the March 2004 Budget”, and “Disbursement Quota Rules in September 2004 Amendments”, Bruce W. Long & Mervyn F. White for their contributions on the section entitled “Bill C-45, *An Act to Amend the Criminal Code*”, Mark J. Wong for his contributions on the section entitled “Application of PIPEDA to charitable and non-profit organizations.” and D. Ann Walters for research assistance in compiling this paper. Any errors are those of the author.

¹ For an overview of earlier changes to the *Income Tax Act* up to November 2003, see “Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts,” The Law Society of Upper Canada, Sixth Annual Estates and Trusts Forum, November 19, 2003, available at www.charitylaw.ca.

² R.S.C. 1985, c. 1 (5th Supp.).

regarding consultations on two new policy statements,³ as well as a recently released online resource paper.⁴ Finally, this paper explores other legislative initiatives and recent case law that impact charities, in order to provide practitioners, executive staff of registered charities, and volunteers, with a comprehensive resource tool, as much as possible, concerning the essential developments that have occurred in charity law over the past twelve months.

B. THE CHANGING NATURE OF THE CHARITABLE AND NON-PROFIT SECTOR

Before describing the recent changes that have occurred in charity law, it is important to first understand the changing nature of the charitable and not-for-profit sector. In this regard, Statistics Canada's new report, "Cornerstones of the Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations" (the "NSNVO Survey"),⁵ released in September 2004, provides the first comprehensive study of nonprofit and voluntary organizations in Canada. The NSNVO Survey complements information previously gathered by the National Survey on Giving, Volunteering and Participating (the "NSGVP"), which tracked the donations and volunteer support that Canadians provide to non-profit and voluntary organizations.⁶ Based on information collected in 2003 for the National Survey of Nonprofit and Voluntary Organizations ("NSNVO"), which surveyed 13,000 incorporated nonprofit organizations and registered charities, the report provides essential baseline information on the number of organizations operating in Canada (161,227 non-profit and voluntary organizations, 56% of which have charitable status); the areas in which they operate; the financial and human resources they rely on; regional variations; and the challenges faced by nonprofit and voluntary organizations in fulfilling their missions.⁷

³ "Applicants Assisting Ethnocultural Communities," *Policy Statement*, released on September 16, 2004, available at: <http://www.cra-arc.gc.ca/tax/charities/policy/ethno-e.html>; ("Ethnocultural Communities"); and "Proposed Guidelines for Registering a Charity: Meeting the Public Benefit Test," *Policy Statement*, released on September 30, 2004, available at <http://www.cra-arc.gc.ca/tax/charities/consultations/publicbenefit-e.html> ("Public Benefit").

⁴ "Charities in the International Context", last updated October 3, 2004, available at <http://www.cra-arc.gc.ca/tax/charities/international-e.html>.

⁵ Statistics Canada, "Cornerstones of the Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations," September 2004, is available at <http://www.statcan.ca/english/freepub/61-533-XIE/61-533-XIE2004001.htm>.

⁶ The NSGVP survey is conducted every three years and was last conducted in 2000.

⁷ For a more detailed discussion of "Cornerstones of Community: Highlights of the National Survey of Non-Profit and Voluntary Organizations" see *Charity Law Bulletin* No. 57 dated October 31, 2004, available at: www.charitylaw.ca.

One of the key findings from the NSNVO Survey is that more than three-quarters of organizations reported that their revenues and the number of volunteers they engage either remained stable or increased from 2000 to 2003, 36% stated that their revenues had increased, 42% said their revenues remained the same, while 22% said their revenues had declined. Also, more than 80% of organizations with paid staff, reported that the number of their employees either remained stable or increased. At the same time, many organizations reported problems fulfilling their mission and a significant number reported difficulties due to increasing demands for services or products.

In addition, the NSNVO Survey demonstrates that there is a clear divide between those organizations that are relatively well resourced and those that are not. A small number of organizations with large annual revenues account for the vast majority of total revenues, largely from government sources, paid staff, and volunteer positions, while small organizations on the other side of the divide depend more on income earned from non-governmental sources and volunteers to fulfill their missions.

C. RECENT CHANGES TO THE *INCOME TAX ACT* AFFECTING CHARITIES

1. Introduction

Since December 2002, the Department of Finance and CRA have released a series of proposed changes to the Act that affect charities. These proposed changes include the following:

- a) Draft Technical Amendments to the Act were released on December 20, 2002 (the “December 2002 Amendments”).⁸
- b) Income Tax Technical News No. 26 was released on December 24, 2002 (“Technical News No. 26”) in relation to new guidelines on split-receipting.⁹
- c) The 2003 Federal Budget was released on February 28, 2003 (the “February 2003 Budget”), which expanded the definition of “tax shelter” to include “gifting arrangements.” The proposals announced in the February 2003 Budget were introduced into the House of Commons by Bill-C28:

⁸ Details regarding the December 2002 Amendments have been summarized in *Charity Law Bulletin* No. 21 dated April 30, 2003, available at <http://www.carters.ca/pub/bulletin/charity/2003/chylb21.pdf>.

⁹ Details regarding the Technical News No. 26 have been summarized in *Charity Law Bulletin* No. 23 dated July 31, 2003, which can be accessed at <http://www.carters.ca/pub/bulletin/charity/2003/chylb23.pdf>.

*An Act to implement certain provisions of the budget tabled in Parliament on February 18, 2003, which was passed into law on June 19, 2003.*¹⁰

- d) Further amendments to the Act were released at 6:00 p.m. on December 5, 2003 (the “December 2003 Amendments”) that will have the effect of curtailing tax shelter donation programs involving the donation of property, restricting the use of limited-recourse debts as tax shelters, and further amending proposals put forward in the December 2002 Amendments.
- e) The December 2002 Amendments and the December 2003 Amendments were further amended and consolidated in the Revised Draft Technical Amendments released by the Minister of Finance on February 27, 2004 (the “February 2004 Amendments”).¹¹ The February 2004 Amendments have received first reading in the House of Commons,¹² but have yet to be enacted.
- f) The Department of Finance released the Federal 2004 Budget on March 23, 2004, (the “March 2004 Budget”).
- g) Lastly, and most recently, draft amendments to the Act were released on September 16, 2004, (the “September 2004 Amendments”) to implement the changes announced in the March 2004 Budget.

What follows is an overview of some of the more important aspects of these proposed changes to the Act.

2. Curtailing Tax Shelter Donation Schemes Involving Donation of Property

a) Introduction

On December 5, 2003, at 6 p.m., the December 2003 Amendments were announced by the then Deputy Prime Minister and Minister of Finance, having the effect of limiting tax benefits from charitable donations made under tax shelter donation arrangements. The Department of Finance was taking steps to curtail the scope of tax shelter donation arrangements after receiving public complaints and concerns with respect to donation promoters selling the “buy-low, donate-high”

¹⁰ The portion of the 2003 Budget concerning tax shelter donation schemes involving donors donating property to charities at a value in excess of the donors’ acquisition cost was briefly commented upon in *Charity Law Bulletin* No. 30 dated December 16, 2003, which can be accessed at <http://www.carters.ca/pub/bulletin/charity/2003/chylb30.pdf>.

¹¹ Copies of the Legislative Proposals, Draft Regulations and Explanatory notes are available at: <http://www.fin.gc.ca/toce/2004/ita04-introe.html>.

¹² Bill C-69.

schemes that often provide the donor exceptionally high tax-benefits. The Department of Finance, like CRA, was concerned that the government was losing substantial amounts of tax dollars when the taxpayer/donor was able to claim higher tax deductions than he/she was otherwise entitled to.

i) Limiting tax shelter donation schemes involving donation of property

The February 2003 Budget expanded the definition of “tax shelter” in subsection 237.1(1) of the Act to apply to property acquired by a person under a gifting arrangement in respect of which it is represented that the acquisition of the property would generate any combination of tax credits or deductions that in total would equal or exceed the cost of acquiring the property in question, and that the property acquired will be the subject of a gift to a qualified donee or of a political contribution. The December 2003 Amendments proposed to insert a new subsection 248(35) in the Act, of which subparagraph (a) provides that if the taxpayer acquires the property through a “gifting arrangement,” then the fair market value of the property donated, for purposes of the charitable donation receipt issued by the receiving charities, shall be “deemed” to be the lesser of (i) the “fair market value of the property otherwise determined” and (ii) the cost (or the adjusted cost base in the case of capital property) of the property “to the taxpayer immediately before the gift is made” (the “Deeming Provision”). As such, it is irrelevant when the property was acquired by the donor through the gifting arrangement. Subsection 248 (36) states that the Deeming Provision in paragraph 248(35)(a) does not apply to inventory, real property situated in Canada, certified cultural property, publicly traded shares or ecological gifts. Paragraph 248 (35)(a) applies to gifts made on or after 6 p.m., December 5, 2003. The wording of paragraph 248(35)(a) introduced by the December 2003 Amendments was brought forward and included in the February 2004 Amendments.

ii) Other applications of the deeming provision

In introducing the Deeming Provision for donation of property acquired through gifting arrangements, the Department of Finance went further than simply curtailing the tax shelter donation schemes addressed by paragraph 248(35)(a). The Department of Finance further

introduced paragraph 248(35)(b) to provide that the Deeming Provision also applies to donation of property under two other situations, namely, (1) pursuant to subparagraph 248(35)(b)(i), if the property was acquired by the donor less than three years before the day that the gift is made, and (2) pursuant to subparagraph 248(35)(b)(ii), if it is “reasonable to conclude that, at the time the taxpayer acquired the property, the taxpayer expected to make a gift of the property.” Under the former scenario, if a donor acquires property and donates the property within three years from the date of acquisition, then the fair market value of the property shall be deemed to be the donor’s cost or adjusted cost base. Under the latter scenario, regardless of when the donor acquired the property (even outside of the three-year limitation period), as long as it is “reasonable to conclude” that the donor had the intention to make a gift at the time when the property was acquired, then the Deeming Provision would apply. The burden is on the donor to prove that he or she did not have an intention to make a gift when the property was acquired.

Pursuant to subsection 248(36), paragraph 248(35)(b) does not apply to inventory, real property situated in Canada, certified cultural property, publicly traded shares, or ecological gifts. As well, the opening wording of paragraph 248(35)(b) provides that the Deeming Provision does not apply to situations where the gift is made as a consequence of the donor’s death. Paragraph 248(35)(b) applies to gifts made on or after 6 p.m. on December 5, 2003.

iii) Restricting the use of tax shelter donations involving limited recourse debt

In addition to the donation of property to charities under the gifting arrangements of tax shelter donation schemes, another type of gifting arrangement which the Department of Finance felt the need to restrict involves limited-recourse debts incurred by donors (also known as “leveraged loans” or “leveraged donation shelters”). This usually involves a donor borrowing monies from a lender, followed by the donor donating the borrowed fund together with some of his or her own funds to a charity in return for a charitable donation receipt for the cumulative amount donated. At the same time, the donor pays a fee or other charges to the promoter, which fee or charges would be used to purchase property or to be invested for a return that would, over the term of the loan, be sufficient to pay off the loan borrowed.

The February 2003 Budget, in expanding the definition of “tax shelter” in section 237.1(1) of the Act to include property acquired under a gifting arrangement, also expanded the definition of “tax shelter” to include includes a gifting arrangement under which it may reasonably be expected, having regard to representations made, that if a taxpayer makes a gift or contribution under the arrangement, a person (whether or not it is the taxpayer himself or herself) will incur an indebtedness in respect of which recourse is limited, now also contained in the February 2004 Amendments.

The December 2003 Amendments propose to curtail the use of these arrangements by introducing a series of amendments to the Act, including the insertion of new subsection 143.2(6.1) to the Act, the amendment of the wording of subsection 143.2(13) before paragraph (a), the insertion of new paragraph (b) to subsection 248(31) that was introduced by the December 2002 Amendments¹³, as well as the insertion of new subsection 248(34) to the Act. These amendments only apply to donations made after February 18, 2003. A summary of the amendments follows.

The proposed paragraph 248(31)(b) of the Act provides that the amount of gift made by the donor would be reduced by the amount of the limited-recourse debt incurred as determined pursuant to the newly proposed subsection 143.2(6.1). Subsection 143.2(6.1) of the Act introduces a new definition of “limited-recourse debt” which has two aspects. Firstly, pursuant to paragraphs 143.2(6.1)(a) and (b), a “limited-recourse debt” is a limited-recourse amount, which is defined under section 143.2(1) to mean “the unpaid balance of any indebtedness for which recourse is limited, either immediately or in the future and either absolutely or contingently,” that can “reasonably be considered to relate to the gift.” In situations where recourse is not limited, the debt may be “deemed” to be a limited-recourse debt under the current subsection 143.2(7) of the Act unless there are bona fide arrangements in writing to repay the debt within 10 years, and interest is paid annually, within 60 days after the debtor’s taxation year, at not less than CRA’s prescribed rate. Secondly, pursuant to paragraph 143.2(6.1)(c), a “limited-recourse debt” means any indebtedness, whether or not

¹³ See *Charity Law Bulletin* No. 21 dated April 30, 2003 available at www.charitylaw.ca.

recourse is limited, that can “reasonably be considered to relate to the gift”, for which there is a “guarantee, security or similar indemnity or covenant” in respect to that debt or any other debts.

The cumulative effect of the paragraph 248(31)(b) and subsection 143.2(6.1) is to reduce the amount of the gift made by the donor by the amount of the loan borrowed if the indebtedness is of limited recourse to the lender or if there is a “guarantee, security or similar indemnity or covenant” in respect to that debt or any other debts. The December 2003 Amendments also proposed the addition of subsection 248(34) to the Act that would deem repayments of the limited-recourse debt as gifts in the year it is repaid. Lastly, subsection 143.1(13) is amended so that it is applicable to gifts and monetary contributions by including references to “gift or monetary contribution” in this subsection.

iv) Anti-avoidance rule

The December 2003 Amendments also introduced an anti-avoidance rule in the new subsection 248(37) of the *Act*, which states that if “one of the reasons for a series of transactions” that includes a disposition or acquisition of property of a donor is to increase the amount that would be deemed to be the fair market value of the gift under subsection 248(35), then the cost of the property for the purpose of subsection 248(35) shall be deemed to be the lowest cost to the donor to acquire the property in question or “an identical property at any time.” This subsection applies to gifts made on or after 6 p.m. on December 5, 2003.

v) Practical implication of recent amendments

The application of the proposed Deeming Provision to gifts made outside of tax shelter donation arrangements under paragraph 248(35)(b)(i) of the Act, if the February 2004 Amendments, which incorporated changes introduced by the December 2003 Amendments, are passed will have serious practical implications on how charities will need to operate in terms of acceptance of gifts and the issuance of charitable donation receipts.

Firstly, charities will be required to inquire of donors of gifts-in-kind when the property donated was acquired by the donors. Where possible, a written confirmation will need to be obtained from the donors in this regard to evidence the date of acquisition. Where property was acquired by the donors less than three years before the date of donation, the charitable donation receipt will need to reflect the deemed fair market value of the property, being the lesser of the appraised fair market value and the cost of acquisition by the donor. Where property was acquired by the donors more than three years before the date of the donation, then the charitable donation receipt will need to reflect the appraised fair market value of the property.

Secondly, where the Deeming Provision applies, then the charity will need to inquire of the donor to determine the amount of the adjusted cost base of the gifted property, where applicable. From a practical standpoint, this would be a difficult if not impossible task for many charities to undertake, particularly smaller charities.

Thirdly, although the burden is on the donors to prove the lack of intention to make a gift when the property was acquired, it raises a concern whether charities will be required to inquire of donors of gifts-in-kind to determine whether the donor had the intention to make a gift at the time when the donor acquired the property, regardless of when the property was acquired. On the one hand, without charities making the necessary inquiries, it is unclear what value should be reflected in the charitable donation receipt that the charities are required to issue to the donor. On the other hand, since charities are obviously grateful to receive donations, it will be difficult for charities to make such inquiries of its donors regarding whether they had any intention to make a gift when the property was acquired.

Fourthly, there is the possibility that the Deeming Provision could lead to unintended negative results, such as catching the donation of privately held shares where the donor exchanged the original shares for shares of another class for the purpose of donating them to a charity. As such, hopefully the wording of the Deeming Provision will be amended before being passed into law to address any unintended results.

b) Issues for charities that have been involved in tax shelter donation programmes

Where a charity has been involved in a tax shelter donation scheme prior to the announcement of proposed changes to the Act provisions on December 5, 2003, the following are some of the issues that the charity will need to be considered:

- A tax shelter registration does not in itself give the donation program any protection;
- There may be difficulties in establishing the fair market value of the goods being donated,¹⁴
- The onus is on the charity to arrange a qualified appraisal of the donation, not on the promoter or the donor;
- There may be an issue of establishing donative intent by the donor;
- It is important to determine whether the donations are gifts of capital or inventory, determined preferably by means of an independent tax opinion;
- Possible third party penalties may be levied against a charity's for improper valuation of the fair market value of items donated;
- Potential assessment challenges of donors by CRA with possible claims against the charity;
- Potential problems in complying with a charity's disbursement quota;
- Due diligence requirements on the part of the charity in receiving, monitoring and disbursing products that are donated;
- Did the charity to obtain independent legal advice;
- Where a legal defence fund has been promised, questions of sufficiency need to be considered and whether it is available for the benefit of the charity as opposed to donors;
- Possible loss of charitable status by the charity; and
- Possible exposure of directors for personal liability to donors who are reassessed.

Given the numerous warnings by CRA leading up to the announcement of proposed legislation by the Department of Finance on December 5, 2003, charities that did become involved in tax shelter donation schemes may have cause for concern if CRA decides to initiate an assessment of a charity that was involved in one of these schemes. In the future, charities and their boards of directors will want to be extremely cautious before becoming involved in any donation program that promises results to the donor or the charity that seem too good to be true, because they probably are.

¹⁴ *Klotz v. Canada*, [2004] T.C.J. No. 52 (T.C.C.).

3. Other Legislative Proposals from the February 2004 Amendments

a) Introduction

In addition to consolidating and amending the anti-tax shelter provisions introduced in the December 2003 Amendments, the February 2004 Amendments constitute a consolidation of, and further amendment to, previously proposed technical amendments introduced by the Department of Finance in the December 2002 Amendments,¹⁵ and the December 2003 Amendments,¹⁶ as well as introducing additional technical amendments to the Act. Although the March 2004 Budget brought sweeping changes to the Act that affect charities, as described below, the changes embodied in the February 2004 Amendments were not impacted by the March 2004 Budget.¹⁷

b) Consolidation of amendments

i) Revised definition of gift for income tax purposes

At common law, property must be transferred voluntarily, without any contractual obligation and with no advantage of a material nature returned to the donor. Subsections 248(30) to (33) of the Act, introduced by the December 2002 Amendments, create a new concept of “gift” for tax purposes to provide a tax benefit to a donor even when the donor (or a person not dealing at arm's length with the donor) receives an advantage, provided that the value of the property exceeds the amount of advantage received. These subsections have been further amended by both the December 2003 and February 2004 Amendments. The Explanatory Notes to the February 2004 Amendments indicate that these subsections are added to “clarify the circumstances under which taxpayers and donees may be eligible for tax benefits available under the Act in respect of impoverishment of a taxpayer in favour of a donee.”

¹⁵Details regarding the December 2002 Amendments have been summarized in *Charity Law Bulletin* No. 21 dated April 30, 2003, which is available at www.charitylawbulletin.ca/2003/chylb21.pdf.

¹⁶Details regarding the December 2003 Amendments have been summarized in *Charity Law Bulletin* No. 38 dated February 19, 2004, which is available at www.charitylawbulletin.ca/2003/chylb38.pdf.

¹⁷*Charity Law Bulletin* No. 41 dated March 30, 2004 summarizing the March 2004 Budget's and its effect on charities can be accessed at: www.charitylawbulletin.ca/2004/chylb41.pdf.

The new subsection 248(30) of the Act introduced by the December 2002 Amendments defines the “eligible amount of a gift” to be the amount by which the fair market value of the property that is the subject of the gift exceeds the amount of any advantage received in respect of the gift. This subsection is amended slightly under the December 2003 Amendments to clarify that it is also applicable to monetary contributions made to registered parties and candidates. Subsection 248(30) is included in the February 2004 Amendments without further changes and applies to gifts made after December 20, 2002.

The definition of “advantage” is set out in subsection 248(31) that was introduced by the December 2002 Amendments. This subsection was substantially amended by both the December 2003 and February 2004 Amendments. It has now become paragraph 248(31)(a) of the Act, which provides that the amount of advantage in respect of a gift includes the value, at the time when the gift is made, of “any property, service, compensation or other benefit” that the donor, “a person or a person who does not deal at arm’s length” with the donor, or “another person or partnership who does not deal at arm’s length with and holds, directly or indirectly, an interest” in the donor, has “received, obtained or enjoyed, or is entitled, either immediately or in the future and either absolutely or contingently, to receive obtain or enjoy” that is (i) in consideration of, (ii) in gratitude of, or (iii) in “any other way related to the gift.” (Changes to the original wording from the December 2003 Amendments have been underlined in the foregoing sentence.) Paragraph 248(31)(a) applies to gifts made after December 20, 2002, save and except that the provision concerning the phrase “in any other way related to the gift” in subparagraph 248(31)(a)(iii) applies to gifts made on or after 6 p.m. on December 5, 2003.

This expansion of the definition of “advantage” in subsection 248(31) of the Act to include an advantage that is “in any other way related to the gift” has broad implications. The advantage can be received prior to, at the same time as, or subsequent to the making of the gift by the donor. As well, it is not necessary for a causal relationship to exist between the making of the gift and the receiving of the advantage if they are “in any other way” related to each other. Furthermore, the definition of advantage is silent regarding from whom the advantage

may be provided. Presumably, it could also include advantages provided by third parties, even unbeknownst to the charity issuing the charitable donation receipt.

Subsection 248(33) of the Act, introduced by the December 2002 Amendments, provides that the cost of property to the donor is the fair market value of the property at the time when the gift is made. Paragraph 248(32)(a) provides that if the amount of the advantage does not exceed 80% of the fair market value of the property, then the existence of an advantage to the donor will not necessarily disqualify the transfer from being a gift. Where the amount of an advantage exceeds 80% of the fair market value of the property, paragraph 248(32)(b) provides that it is up to the donor to establish to the satisfaction of the Minister of National Revenue (the “Minister”) that the transfer was made with the intention to make a gift. Subsection 248(32) as it was introduced by the December 2002 Amendments remains unchanged under the December 2003 Amendments, save and except the insertion of a clarification that the gifts in question are gifts made to “qualified donees”. Subsection 248(33), introduced by the December 2002 Amendments, also remains the same under the December 2003 Amendments, save and except the insertion of a clarification that this subsection also applies to monetary contributions made to registered parties and candidates. The wording of subsections 248(32) and (33) in the December 2003 Amendments is included in the February 2004 Amendments without further changes. These subsections apply to gifts made after December 20, 2002.

ii) New definitions of charitable organizations and public foundations

Under the December 2002 Amendments, the definitions of charitable organizations and public foundations in subsection 149.1(1) were amended by replacing the previous “contribution” test with a new “control” test. The rationale for amending the definitions is to permit such charities to receive large gifts from donors without concern that they may be deemed to be private foundations. The changes to subsection 149.1(1) introduced by the December 2002 Amendments are consolidated in the February 2004 Amendments.

The original provisions of the Act require that not more than 50% of the capital contributed or otherwise paid to a charitable organization or public foundation can be contributed by one person or members of a group of such persons who do not deal with each other at arm's length. This is usually referred to as the "contribution" test. As a result of inquiries from the public, the Department of Finance proposed to amend the definition of both charitable organizations and public foundations in order to "ensure that in certain circumstances large donations are not prohibited" by permitting a person, or a group of persons not dealing with each other at arm's length, to contribute more than 50% of the charity's capital as long as such a person or group does not control the charity in any way or represent more than 50% of the directors, trustees, officers and similar officials of the charity. In general, this new definition is retroactively applicable to January 1, 2000. The changes introduced by the December 2002 Amendments are included in the February 2004 Amendments with the addition of minor wording in subparagraph (d)(ii) of both definitions to clarify the meaning of the new definition.

Registered charities that wish to apply under subsection 149.1(6.3) to change their designation as a result of the amendments described above will be required to apply within 90 days of when the February 2004 Amendments receive Royal Assent. These registered charities will then be deemed to be registered as charitable organizations, public foundations, or private foundations, as the case may be, in the taxation year that the Minister specifies.

As a result of the introduction of a "control" test, the convoluted rules under the Act in relation to "control" will become applicable, specifically due to the inclusion of the phrase "controlled directly or indirectly in any manner whatever" contained in the new definitions. However, the application of the rules concerning "control" in the charitable context is unclear, since these rules are premised upon application to commercial arrangements in a business context rather than for charitable corporations. As such, charity law practitioners will need to carefully review these rules when establishing charitable organizations and public foundations involving a major donor who contributed more than 50% of the capital for a charity, especially in the case of establishing a multiple corporate structure, in order to ensure

that the charity in question will not inadvertently be caught by these rules that might otherwise lead to the unintended result of a charity being deemed a private foundation. As well, the current relationship of multiple corporate structures should also be reviewed in order to assess whether this new control test may have an undesirable effect.

iii) Revocation of charitable registrations

Subsection 149.1(2), (3), and (4) of the Act provide for circumstances under which the charitable status of a charity may be revoked. Pursuant to the December 2002 Amendments, subsections 149.1(2), (3), and (4) will be amended to provide that gifts made by a charity to a non-qualified donee would become cause for revocation of the charitable status of the charity. These changes are included in the February 2004 Amendments without change and would apply to gifts made by charities after December 20, 2002. As a result of the possible loss of charitable status in making a disbursement to a non-qualified donee, charities will need to be more cautious than ever when making disbursements and ensure that all disbursements are either made in the course of carrying out their charitable activities or to qualified donees and that no disbursements are made to non-qualified donees unless there is an agency, joint venture or partnership agreement in place in accordance with the requirement of CRA.

c) New amendments

In addition to consolidating and amending legislative changes introduced by the December 2002 and December 2003 Amendments, the February 2004 Amendments also introduced two new changes to the Act.

i) Substantive gift

The February 2004 Amendments proposed the insertion of a new subsection 248(38) that applies to gifts of capital property and eligible capital property made on or after February 27, 2004, in order to prevent a donor from avoiding the application of the Deeming Provision set out in subsection 248(35) by disposing the property to a qualified donee and then donating the proceeds of disposition to either that qualified donee or to another qualified donee that

does not deal at arm's length with the qualified donee that purchased the property from the donor, rather than donating the property directly to the qualified donee. The property disposed of by the donor is referred to as a "substantive gift" in this subsection. Under these situations, the Deeming Provision set out in subsection 248(35) would apply and the fair market value of the substantive gift and proceeds of sale would be "deemed" under subsection 248(38) to be the lesser of the fair market value of the substantive gift and the cost, or the adjusted cost base in the case of capital property, of the substantive gift to the taxpayer immediately before the disposition of the property to the qualified donee. This subsection does not apply to property exempted under subsection 248(36) referred to above.

ii) New qualified donees

The February 2004 Amendments also propose to amend sections 110.1 and 118.1 of the Act by expanding the list of "qualified donees" as defined in section 149.1(1) to include municipal or public bodies performing a function of government in Canada. The Tax Court of Canada, in the case *Otineka Development Corporation Limited and 72902 Manitoba Limited v. The Queen*¹⁸ held that an entity could be considered a municipality for the purpose of paragraph 149(1)(d.5) on the basis of the functions it exercised. However, the Quebec Court of Appeal in *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec*¹⁹ held that an entity could not attain the status of a municipality by exercising municipal functions but only by statute, letters patent or order. In response to the Quebec Court of Appeal decision in *Tawich*, the February 2004 Amendments expand the definition of qualified donee in order to ensure that municipal or public bodies performing a function of the government in Canada are included.

¹⁸ 94 D.T.C. 1234, [1994] 1 C.T.C. 2424.

¹⁹ 2001 D.T.C. 5144.

4. September 2004 Amendments Implementing the March 2004 Budget

a) Introduction

As indicated above, on September 16, 2004, the Department of Finance released draft amendments to the Act (“the “September 2004 Amendments”) that, when adopted, will implement the initiative of the Federal Government in rewriting the tax rules concerning the taxation and administration of charities as set out in the March 2004 Budget²⁰. In general, these initiatives include changes to the Act in the following areas:

- New intermediate sanctions and related matters, such as the transfer of assets upon revocation of charitable status and new rules regarding the annulment of registered charities;
- No trading in charitable donations;
- New appeal regime for registered charities, including a new internal reconsideration process and the appeal of taxes and penalties to the Tax Court of Canada;
- Transparency and accessibility of information concerning registered charities, including release of more information to the public concerning registered charities and organizations that are denied registration, inclusion of more information on official tax receipts, and increased information on the CRA website; and
- New disbursement quota rules.

These initiatives represent the most significant revision of the tax rules affecting charities under the Act in the last twenty years and will affect charities for many years to come. The following portion of this paper details the scope and timing of these changes and discusses the implications that these proposals will have on existing as well as prospective charities.

²⁰ See Charity Law Bulletin No. 41 for a detailed discussion of the March 2004 Budget. *Charity Law Bulletin* No. 41 dated March 30, 2004 is available at www.charitylaw.ca.

- b) Intermediate sanctions and related matters
 - i) Intermediate taxes and penalties

The September 2004 Amendments introduced a new section 188.1 to put in place intermediate taxes and penalties to address the concern that the only recourse that CRA could impose on a registered charity²¹ that did not comply with the requirements of the Act was to revoke its status as a registered charity. The Explanatory Notes to the September 2004 Amendments state that these penalties on registered charities are “more appropriate than revocation for unintended or incidental breaches of the Act,” and that these penalties apply in respect of “activities that charities are not permitted to undertake.” The Explanatory Notes also explain that “some penalties are progressive, increasing in severity for repeat infractions within a period of 10 years.” In the March 2004 Budget, there was no mention of the length of the period that would be used in assessing penalties for repeat offences. In the September 2004 Amendments, a ten year period is introduced in this regard. However, it would appear that using a ten year period may seem harsh, particularly where there could be a whole new regime running a charity with no knowledge of past transgressions. One can easily envision situations in which completely unrelated staff at different times, make similar mistakes in good faith. A shorter period may be more appropriate, in the absence of some form of culpable conduct.

The Explanatory Notes also clarify that these sanctions apply “notwithstanding the discretion of the Minister to revoke the registration of a charity in respect of the same activities.” These sanctions include taxation of gross revenue derived from business activities, suspension of tax-receipting privileges, monetary penalties, and taxation of gifts and transfers to other registered charities. These changes are introduced concurrently with amendments to section 189 of the Act, which introduces a process for assessment and dispute resolution.²² These measures will apply in respect of taxation years that begin after March 22, 2004. The proposed amendments to the Act in this regard can be summarized as follows:

²¹ The *Income Tax Act* defines a registered charity in subsections 248(1) and 149.1(1)

²² See *Charity Law Bulletin* No. 56 dated October 31, 2004 for a detailed explanation of changes to the Act in this regard.

(1) Carrying on business

Subsection 188.1(1) imposes a penalty equal to 5% of the gross income earned from any business in a taxation year if (a) the business is carried on by a private foundation, or (b) the business is “not a related business in relation to” a charitable organization or a public foundation in question. Upon a repeat infraction within ten years of a previous infraction under either subsection 188.1(1) or 188.1(2), the penalty is increased to 100% of the gross revenue earned from the applicable businesses in a taxation year. In other words, all repeat infractions within ten years are subject to 100% penalties. In addition, upon repeat infractions, subsection 188.2(1) provides that the registered charity’s tax-receipting privileges shall be suspended.²³

(2) Control of corporation by a charitable foundation

Pursuant to paragraph 188.1(3)(a), if a “charitable foundation” (i.e. either a public foundation or a private foundation) acquires control over a corporation “within the meaning of subsection 149.1(12)” of the Act, then the foundation would be subject to a penalty that is equal to 5% of the dividend received by the foundation in a taxation year during the period when the corporation is so controlled by the charity. The Explanatory Notes explain that if the foundation either “continues to control the corporation or has again acquired control of a corporation” within ten years of a previous infraction under either paragraph 188.1(3)(a) or paragraph 188.1(3)(b), then the penalty will be equal to 100% of the dividend received pursuant to paragraph 188.1(3)(b).

(3) Conferment of undue benefits

Paragraph 188.1(4)(a) imposes a penalty equal to 105% of any “undue benefit” conferred by a registered charity on any person. Pursuant to paragraph 188.1(4)(b), the penalty is increased to 110% of the amount of undue benefit conferred upon repeat

²³ See details in section C.4.b)ii) below regarding the procedures required in order to suspend this privilege.

infractions within ten years. In addition, upon repeat infractions, subsection 188.2(1) also provides that the registered charity's tax-receipting privileges shall be suspended.²⁴

“Undue benefit” is a new term under the Act and is broadly defined under subsection 188.1(5). Pursuant to subsection 188.1(5), “undue benefit” includes the following:

- ♦ a disbursement by way of a gift,²⁵ and
- ♦ the amount of any part of “income, rights, property or resources” of the charity that is “paid, payable, assigned or otherwise made available for the personal benefit of any person”:
 - (i) who is a “proprietor, member, shareholder, trustee or settlor” of the charity;
or
 - (ii) who has “contributed or otherwise paid into the charity more than 50% of the capital of the charity”, or
 - (iii) who “deals not at arm’s length with a person” mentioned in (i) or (ii) above,
or with the charity.

The benefit may be conferred by the charity. The benefit may also be conferred by “another person, at the direction or with the consent of the charity,” that the charity would otherwise have a right to that benefit.

However, an undue benefit does not include a disbursement or benefit that is:

- (a) an amount that is “reasonable consideration or remuneration” for “property acquired by or services rendered to” the charity; or
- (b) a gift made or a benefit conferred “in the course of a charitable act in the ordinary course of the charitable activities carried on by the charity, unless it can reasonably be considered that the eligibility of the beneficiary for the benefit relates solely to the relationship of the beneficiary to the charity”, or

²⁴ See details in section C.4.b)ii) below regarding the procedures required in order to suspend this privilege.

²⁵ But see explanation below regarding exception in paragraph 188.1(5)(c) exempting a gift to a qualified donee.

- (c) a gift to a qualified donee.

Paragraph 188.1(5)(c) provides that an undue benefit includes a disbursement by way of a gift but does not include a gift to a qualified donee. In other words, a gift to a non-qualified donee would be within the meaning of undue benefit. The March 2004 Budget indicates that a gift that is restricted under subsections 149.1(2), (3) or (4) of the Act would be subject to a 105% tax on the amount of undue benefit, and 110% tax on the amount of undue benefit and suspension of tax-receipting privileges. Although no specific reference in this regard is made in the September 2004 Amendments, it would appear that the proposal in the March 2004 Budget is implemented through paragraph 188.1(5)(c).

This definition of “undue benefit” is so broad that it would include a benefit conferred by the charity or by a third party and may lead to unintended results. For example, the broad wording of paragraph 188.1(5)(b) would seem to create an undue benefit in a situation where a donor to a religious charity, such as church, who is also a member, has a daughter who is to be married in the church but whose eligibility to be married in the church is conditional upon the daughter becoming a member in that church. It is hoped that this definition would be amended before it is enacted in order to ensure that unintended results are not caught.

- (4) Failure to file information

Pursuant to subsection 188.1(6), a penalty of \$500 will be imposed on a charity that fails to file or is late in filing the annual information return required under subsection 149.1(14) of the Act for a taxation year. The penalty is the same for repeat infractions.

- (5) Incorrect information on official donation receipts

Subsection 188.1(7) imposes a penalty equal to 5% of the amount reported on an official donation receipt as representing the amount in respect of which a taxpayer may

claim a deduction under subsection 110.1(1) or a credit under subsection 118.1(3), if the information shown on the receipt is not in accordance with the Act or the *Income Tax Act Regulations*. Pursuant to subsection 188.1(8), the penalty upon repeat infractions within ten years is increased to 10% of the amount shown on the receipt. In this regard, concurrent with the introduction of subsections 188.1(6) and (7), it is proposed that sections 3501 and 3502 of the *Income Tax Act Regulations* be amended to require that official donation receipts issued after 2004 include the current internet address of CRA.

(6) False information on official donation receipts

Subsection 188.1(9) of the Act imposes a penalty equal to 125% of the amount shown on a receipt “issued by, on behalf of or in the name of another person,” on a person who “makes or furnishes, participates in the making of or causes another person to make or furnish a statement” on the said receipt that the person “knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct (within the meaning assigned by subsection 163.2(1)), is a false statement (within the meaning assigned by subsection 163.2(1)).”²⁶ If the person is “an officer, employee, official or agent” of a registered charity, then the penalty may be imposed on the registered charity. Subsection 188.1(10) provides that if a person is liable for penalties under both section 163.2 and subsection 188.1(9) in respect of the same statement, then the penalty is limited to the greater of those two penalties. In addition, if the total penalty for a taxation year exceeds \$25,000 under subsection 188.1(9), then subsection 188.2(1) provides that the registered charity’s tax-receipting privileges shall also be suspended.²⁷ In other words, if the receipted amount is over \$20,000 and if a penalty is assessed under subsection 188.1(9), then subsection 188.2(1) would apply and the charity’s tax-receipting privileges shall also be suspended.

²⁶ Section 163 of the Act imposes civil penalties on third parties. Subsection 163.2(1) provides that “culpable conduct” means “conduct, whether an act or a failure to act” that is (a) “tantamount to intentional conduct”, (b) “shows an indifference as to whether this Act is complied with” or (c) “shows a willful, reckless or wanton disregard of the law.”

²⁷ See details in section C.4.b)ii) below regarding the procedures required in order to suspend this privilege.

(7) Delay of expenditure

Subsection 188.1(11) imposes a penalty equal to 110% of the fair market value of property transferred from one registered charity to another registered charity by way of a gift where it “may reasonably be considered that one of the main purposes for the making of the gift was to unduly delay the expenditure of amounts on charitable activities.” In such a situation, each of the two charities are “jointly and severally, or solidarily” liable for the penalty.

ii) Procedures to suspend tax-receipting privileges

Section 188.2 of the Act introduced by the September 2004 Amendments confers the power on the Minister to suspend tax-receipting privileges under certain circumstances.

Subsection 188.2(1) provides that once the Minister issues an assessment giving notice by registered mail of a penalty under any of the following three situations, then the registered charity would be suspended from issuing official donation receipts for a period of one year, seven days after the mailing of the said assessment:

- (a) subsection 188.1(2);
- (b) paragraph 188.1(4)(b); or
- (c) subsection 188.1(9) if the total penalties for a taxation year exceeds \$25,000 as explained above.

Subsection 188.2(2) goes on to provide that the Minister may also suspend a registered charity’s tax-receipting privilege under two additional situations:

- (a) if the charity contravenes any of sections 230 to 231.5 of the Act, i.e. sections of the Act relating to administration and enforcement, such as the requirement to keep proper books and records; or

- (b) if it may “reasonably be considered” that the registered charity has “acted in concert” with another charity in avoiding the effect of a suspension by accepting a gift or transfer of property on behalf of the suspended charity.

Paragraph 188.2(3)(a) provides that the issuance of the assessment notice by the Minister under subsection 188.2(1) or (2) would have the effect of deeming the registered charity in question not to be a qualified donee for purposes of the Act during the one year period commencing seven days after the mailing of the assessment by the Minister. In addition, paragraph 188.2(3)(b) provides that if the registered charity is offered a gift during the said one-year period, then the charity must inform the donor of the following before accepting the gift:

- (i) the charity has received the said assessment notice from the Minister;
- (ii) no charitable deduction or credit may be claimed by the donor; and
- (iii) the gift made would not be a gift made to a qualified donee.

Subsection 188.2(4) provides that the registered charity in question may, after having filed a notice of objection to a suspension, file an application with the Tax Court of Canada for a postponement of that portion of the period of suspension that has not elapsed until the time determined by the Court. Subsection 188.2(5) provides that the Court may grant such an application only if it would be “just and equitable” to do so.

From a practical standpoint for donors, although registered charities whose tax-receipting privilege have been suspended have to advise donors of the same under paragraph 188.2(3)(b), it would be helpful to charities for CRA to publish on its website a list of all registered charities whose tax-receipting privilege has been suspended in order to avoid donors making donations to these entities.

- iii) Summary of intermediate taxes and penalties

The following chart was included in the March 2004 Budget to provide specifics of the infraction in question, together with taxes and penalties that apply for both first infractions

and repeat infractions. We have expanded the chart by including the relevant sections of the Act set out in the September 2004 Amendments.

Infraction	Tax or Penalty (Unless registration of the charity is revoked)			
	First infraction		Repeat infraction (Repeated acts or omissions will increase the probability of revocation)	
	Penalty	Proposed sections of the Act	Penalty	Proposed sections of the Act
Late filing of annual information return	\$500 penalty	188.1(6)	\$500 penalty	188.1(6)
Issuing of receipts with incomplete information	5% penalty on the eligible amount stated on the receipt	188.1(7) [also see amendments to sections 3501 and 3502 of the <i>Income Tax Act Regulations</i>]	10% penalty on the eligible amount stated on the receipt	188.1(8) [also see amendments to sections 3501 and 3502 of the <i>Income Tax Act Regulations</i>]
Failure to comply with certain verification and enforcement sections of the Income Tax Act (230 to 2315), e.g. keeping proper books and records	Suspension of tax-receipting privileges	188.2(2)	Suspension of tax-receipting privileges	188.2(2)
Charitable organization or public foundation carrying on an unrelated business	5% tax on gross unrelated business revenue earned in a taxation year	188.1(1)	100% tax on gross unrelated business revenue earned in a taxation year and suspension of tax-receipting privileges	188.1(2) and 118.2(1)
Private foundation carrying on any business	5% tax on gross business revenue earned in a taxation year	188.1(1)	100% tax on gross business revenue earned in a taxation year, and suspension of tax-receipting privileges	188.1(2) and 118.2(1)
Foundation acquires control of a corporation	5% tax on dividends paid to the charity by the corporation	188.1(2)(a)	100% tax on dividends paid to the charity by the corporation	188.1(3)(b)
Undue personal benefit provided by a charity to any person.	105% tax on the amount of undue benefit	188.1(4)(a) [“undue benefit is defined in 188.1(5)]	110% tax on the amount of undue benefit and suspension of tax-receipting privileges	188.1(4)(b) and 188.2(1) [“undue benefit is defined in 188.1(5)]
A gift that is restricted under subsections 149.1(2), (3) or (4) of the Act	105% tax on the amount of the gift	188.1(4)(a) [“undue benefit is defined in 188.1(5)]	110% tax on the amount of the gift	188.1(4)(b) and 188.2(1) [“undue benefit is defined in 188.1(5)]

Infraction	Tax or Penalty (Unless registration of the charity is revoked)			
	First infraction		Repeat infraction (Repeated acts or omissions will increase the probability of revocation)	
	Penalty	Proposed sections of the Act	Penalty	Proposed sections of the Act
Issuing receipts in a taxation year for eligible amounts that in total do not exceed \$20,000 if there is no gift or if the receipt contains false information	125% tax on the eligible amount stated on the receipt	188.1(9) and (10)	125% tax on the eligible amount stated on the receipt	188.1(9) and (10)
Issuing receipts in a taxation year for eligible amounts that in total exceed \$20,000, if there is no gift or if the receipt contains false information	Suspension of tax-receipting privileges and 125% tax on the eligible amount stated on the receipt	188.2(1) and 188.1(9) and (10)	Suspension of tax-receipting privileges and 125% tax on the eligible amount stated on the receipt	188.2(1) and 188.1(9) and (10)
Delaying expenditure of amounts on charitable activities through the transfer of funds to another registered charity	The charities involved are jointly and severally, or solidarily, liable for 110% of the amounts so transferred	118.1(11)	The charities involved are jointly and severally, or solidarily, liable for 100% of the amounts so transferred	118.1(11)
Assisting another registered charity in avoiding the effect of a suspension of tax-receipting privileges by accepting gifts or transfer of property on behalf of the suspended charity	Suspension of tax-receipting privileges	188.2(2)	Suspension of tax-receipting privileges	188.2(2)

c) Other matters relating to penalties

i) Reduction of penalties

The September 2004 Amendments provide that where a charity is required to pay taxes or penalties which total more than \$1,000 in a particular taxation year, the charity will be permitted to reduce the tax or penalty liability by certain amounts. Specifically, new subsection 189(6.3) applies to registered charities that the Minister assesses for penalties under section 188.1 for a taxation year in excess of \$1,000. The charity may reduce the liability by the value of property transferred to an eligible donee in the one-year period following the assessment date, exceeds the consideration given to the charity. New

subsection 189(6.3) applies to notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.²⁸

ii) Interest on penalties

Subsection 189(7) of the Act currently applies in respect of interest applicable to liabilities under Part V of the Act. This subsection is replaced with subsection 189(9) of the Act. New amended subsection 189(9) modifies subsection 161(11) for the purposes of liabilities under Part V. In this regard, interest on penalties under section 188.1 of the Act accrues only on the balance remaining one year after the liability was first assessed. Subsection 189(9) applies in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.²⁹

iii) Appeals

Appeals from decisions concerning refusal to grant registered charitable status or revocation of registered charitable status will continue to be made to the Federal Court of Appeal. However, appeals of taxes and penalties will be directed to the Tax Court of Canada. Specifically, subsection 189(8.1) clarifies that a taxpayer may not appeal to the Tax Court of Canada in respect of an issue that could be the subject of a notice of objection filed under new subsection 168(4) of the Act.³⁰ This amendment applies in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent. This is discussed in greater detail later.

d) Refusal to register

New subsection 149.1(22) will be included in the Act to require the Minister to provide notice by registered mail to a person where the application for registration as a charity by the person is

²⁸ See *Charity Law Bulletin* No. 55 dated October 30, 2004 for details on these changes, including the definition of “eligible donee.”

²⁹ See *Charity Law Bulletin* No. 55 dated October 30, 2004 for details on these changes.

³⁰ See *Charity Law Bulletin* No. 55 dated October 30, 2004 and *Charity Law Bulletin* No. 56 dated October 31, 2004 for details on these changes.

denied. The introduction of subsection 149.1(22) is concurrent with the introduction of new subsection 168(4) of the Act, which provides a person a right to file a notice of objection in respect of a decision of the Minister.³¹ Subsection 149.1(22) applies in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

e) Annulment

The September 2004 Amendments provide explicit authority for the Minister to annul an organization's registration under certain circumstances. In this regard, similar to new subsection 149.1(22), new subsection 149.1(23) requires the Minister to provide a notice by registered mail to a person where the registration of the person as a registered charity is annulled, if the person was registered in error or if the person has ceased to be a charity "solely as a result of a change in law."

Once annulled, the organization is deemed not to have been registered at all, and, as such, the annulment would not invoke any revocation tax. New subsection 149.1(24) provides that official receipts issued by a registered charity prior to the annulment will be accepted as valid notwithstanding the annulment, as long as the receipts would have been valid were the registration had not been annulled.

Subsections 149.1(23) and (24) apply in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent. Similar to the reason for the introduction of new subsection 149.1(22), these two subsections are introduced concurrent with the introduction of new subsection 168(4) of the Act, which provides a person a right to file a notice of objection in respect of a decision of the Minister.³²

³¹ See explanation in relation to new subsection 168(4) in *Charity Law Bulletin* No. 56 dated October 31, 2004, which is available at www.charitylaw.ca.

³² See explanation in relation to new subsection 168(4) in *Charity Law Bulletin* No. 56 dated October 31, 2004, which is available at www.charitylaw.ca.

f) Revocation

i) Revocation tax

The Minister retains the right to revoke the registration of a charity in the event of severe breaches of the Act, including where the organization is being operated for purposes that are not charitable or where an organization obtained its registration status on the basis of false or deliberately misleading information. The September 2004 Amendments provide for a modified regime of the imposition of revocation tax under Part V of the Act. These new measures, save and except subsection 188(3.1), will apply to notices and certificates issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent. Subsection 188(3.1) applies to taxation years that begin after March 22, 2004. In short under this modified regime, revocation tax has been tightened as evidenced in the sections discussed below:

(1) Deemed year-end on notice of revocation

Subsection 188(1) of the Act currently imposes a revocation tax on charities in respect of which the Minister has revoked a registration. A revoked charity has one year from the date of revocation to file a return that discloses the extent to which the charity has divested itself of its assets to other registered charities or qualified donees. The balance of the net assets of a revoked charity, after the divestiture, must be paid to the Crown as a revocation tax.

As a result of the March 2004 Budget proposal, subsection 188(1) is amended to provide a one-year “winding-up period” to begin on the date the Minister issues a notice of intention to revoke the registration of a charity (under any of subsection 149.1(2), (3), (4), (4.1) and 168(1)) or if it is determined, under subsection 7(1) of the *Charities Registration (Security Information) Act*, that a certificate issued in respect of the charity under subsection 5(1) of the Act is reasonable. Specifically, the taxation year of the revoked charity is deemed to have ended on the date of the notice, a new

taxation year of the revoked charity is deemed to begin immediately after that date, and the revoked charity is deemed not to have established a fiscal period before that day. The one-year winding-up period may be extended pursuant to subsection 188(1.2).³³ Amended subsection 189(8)³⁴ of the Act continues to provide for assessment by the Minister of the tax in a manner similar to that for taxpayers liable under Part I of the Act.

(2) Calculation of revocation tax

A new subsection 188(1.1) is added to establish how the revocation tax is to be calculated. This formula for calculation is different from the formula under the current paragraph 188(1)(a). Pursuant to the new subsection 188(1.1), the revocation tax is equal to the difference between amount “A” and amount “B”. Amount “A” is defined in subsection 188(1.1) to include the following three amounts:

- a) the fair market value of the property of the revoked charity at the end of that taxation year that is deemed to have ended under subsection 188(1);
- b) the amount of an “appropriation” (under subsection 188(2))³⁵ in respect of property transferred to another person in the 120-day period that ended at the end of that taxation year; and
- c) income earned by the revoked charity, including all gifts and other income that would otherwise be subject to tax under section 3 of the Act if the charity were taxable.

Amount “B” is defined in subsection 188(1.1) to include the following three amounts:

- a) A debt of the charity that is outstanding at the end of that taxation year;

³³ See explanation in relation to new subsection 188(1.2) in Section f)i)(3) below.

³⁴ See explanation in relation to new subsection 189(8) in Section f)v) below.

³⁵ See explanation in relation to new subsection 188(2) in Section f)i)(5) below.

- b) An expenditure made by the charity during the winding-up period on charitable activities carried on by it; and
- c) An amount equal to property transferred to “eligible donees”³⁶ exceeds the consideration given by the “eligible donees” for the charity, if such a transfer is made within the winding-up period but before the latter of the end of the winding-up period and the day referred to paragraph 188(1.2)(c).³⁷ The Explanatory Note explain that if the charity does not file a notice of objection in respect of an assessment of the revocation tax, the time for making such a gift to an eligible donee is limited to one year from the date on which the taxation year is deemed to end.

(3) Winding-up period

As indicated above, the September 2004 Amendments introduces a “winding-up period”, which, pursuant to new subsection 188(1.2), begins immediately after the date the Minister issues a notice of intention to revoke the registration of a charity (under any of subsections 149.1(2), (3), (4), (4.1) and 168(1)) or if it is determined, under subsection 7(1) of the *Charities Registration (Security Information) Act*, that a certificate issued in respect of the charity under subsection 5(1) of the Act is reasonable. The winding-up period ends at the latest of three dates:

- a) the day on which the charity files a return under subsection 189(6.1) in respect of the revocation tax, but not later than one year after the notice or certificate was issued;
- b) the day of the last assessment of revocation issued by the Minister; and
- c) if the charity has filed a notice of objection or has appealed in respect of the assessment, the day on which the Minister may decide to take a collection action under section 225.1 of the Act in respect of the tax payable.

³⁶ See explanation in relation to eligible donees in new subsection 188(1.3) in Section f)i)(4) below.

³⁷ See explanation in relation to the winding-up period in new subsection 188(1.2) in Section f)i)(3) below.

In this regard, page 115 of the Explanatory Notes, set out in the attached Schedule “A” to this paper, provides an explanation of the application and interplay of sections 188 and subsections 189(6.1), 189(6.2).

(4) Eligible donee

The September 2004 Amendments require that the assets of a registered charity whose charitable status has been revoked can only be transferred to “eligible donees”, rather than to the full list of qualified donees under the Act. In this regard, when calculating the amount “B” in paragraph 188(1.1)B(c), new subsection 188(1.3) provides that a registered charity is an “eligible donee” if it satisfies all of the following requirements:

- a) more than 50% of the members of the board of directors or trustees of the registered charity deal at arm’s length with each member of the board of directors or trustees of the charity;
- b) it is not the subject of a suspension of the ability to issue official donation receipts under subsection 188.2(1);
- c) it does not have unpaid liabilities under the Act or under the *Excise Tax Act*;
- d) it has filed all information returns required by subsection 149.1(14); and
- e) it is not subject to a certificate under the *Charities Registration (Security Information) Act*.

However, the wording of this definition “assumes” that an eligible donee must be a registered charity, without this requirement. It would appear appropriate for the Department of Finance to make it an explicit requirement that an eligible donee must be a registered charity that satisfies the above-noted five criteria. From a practical standpoint, since CRA does not provide a list of registered charities that qualify as eligible donees, it would be difficult for the revoked charity to determine if the transferee is an eligible donee. As such, unless information is published by CRA in this regard, the revoked charity would need to exercise diligence to determine this

information either by obtaining confirmation from CRA or by obtaining assurance from the transferee registered charity.

(5) Shared liability or revocation tax

Subsection 188(2) is amended to impose a liability for the revocation tax payable by a revoked charity under subsection 188(1) jointly and severally, or solidarily, with persons who receives property from the revoked charity 120 days before the end of the taxation of the year that is deemed to have ended under subsection 188(1). The shared liability is not to exceed the total of all appropriations, each of which is the amount by which the fair market value of such a property so received by the person exceeds the consideration given by the person in respect of the property.

(6) Non-application of revocation tax

New subsection 188(2.1) provides that the Part V revocation tax does not apply in two situations:

- a) where the Minister notifies the charity that the intention to revoke has been abandoned; or
- b) where the Minister has re-registered the charity within the one-year winding-up period and that the charity has paid all other amounts owing under the Act or the *Excise Tax Act* and has filed all information returns required to be filed under the Act on or before that time.

New subsection 188(3.1) also provides that the Part V revocation tax does not apply to a transfer that is a gift to which the new subsection 188.1(11) applies. As explained above, new subsection 188.1(11) introduced by the September 2004 Amendments impose a penalty equal to 110% of the fair market value of property transferred from one registered charity to another registered charity by way of a gift where it “may reasonably be considered that one of the main purposes for the making of the gift was

to unduly delay the expenditure of amounts on charitable activities.” In such a situation, each of the two charities are “jointly and severally, or solidarily” liable for the penalty. This amendment applies for taxation years that begin after March 22, 2004.

ii) Revoked charity to file returns

New subsection 189(6.1) requires a taxpayer that is liable for a revocation tax under new subsection 188(1.1) to file a return, within one year from the date of the certificate or notice, without notice or demand, and to estimate and pay tax payable. The person must also file any information returns required to be filed under subsection 149.1(14) of the Act. This new subsection will apply to notices and certificates issued by the Minister after the later of December 31, 2004, and 30 days after Royal Assent.

iii) Reduction of revocation tax and penalties

As explained earlier, the September 2004 Amendments provide that where a charity is required to pay taxes or penalties which total more than \$1,000 in a particular taxation year, the charity will be permitted to reduce the tax or penalty liability by certain amounts.

Specifically, subsection 189(6.2) applies if the Minister assesses revocation tax under subsection 188(1.1) in excess of \$1,000 at a time that is less than one year after the day of the notice or certificate is issued. When this subsection applies, the amount of revocation tax during the balance of the one-year period (also known as “post-assessment period”) is reduced by (1) the amount of expenditure by the charity in the post-assessment period in respect of charitable activities that exceed its net income in that period, and (2) the amount of property transferred by the charity to eligible donees in that period exceeds the consideration given to the charity. However, subsection 189(6.2) is nullified if, after the one-year period, the Minister issues an assessment of the revocation tax under new subsection 188(1.1), and any reduction in tax liability by such transfer and expenditures is incorporated into that assessment.

Similarly, new subsection 189(6.3) applies to registered charities that the Minister assesses for penalties under section 188.1 for a taxation year in excess of \$1,000. The charity may reduce the liability by the value of property transferred to an eligible donee in the one-year period following the assessment date, exceeds the consideration given to the charity. New subsections 189(6.2) and (6.3) apply to notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

iv) Minister may assess at any time

Subsection 189(7) of the Act currently applies in respect of interest applicable to liabilities under Part V of the Act. This subsection is replaced with subsection 189(9) of the Act. New subsection 189(7) now clarifies that the Minister may at any time assess a taxpayer under Part V, notwithstanding the authority of the Minister to revoke the registration of a registered charity. This subsection applies at the later of December 31, 2004 and 30 days after Royal Assent.

v) Provisions applicable to Part V

Subsection 189(8) provides that certain provisions of Part I of the Act relating to returns, assessments, payments and appeals are applicable to the taxes payable under Part V in respect of registered charities. This subsection is amended consequential to amendments to revocation tax under section 188 and the introduction of penalties and suspension of tax-receipting privileges under new sections 188.1 and 188.2. This amendment applies in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent. Furthermore, subsection 189(8.1) clarifies that a taxpayer may not appeal to the Tax Court of Canada in respect of an issue that could be the subject of a notice of objection filed under new subsection 168(4) of the Act.

vi) Interest

As explained above, subsection 189(7) of the Act currently applies in respect of interest applicable to liabilities under Part V of the Act. This subsection is replaced with subsection

189(9) of the Act. New amended subsection 189(9) modifies subsection 161(11) for the purposes of liabilities under Part V. In this regard, interest on revocation tax under subsection 188(1.1) accrues only on the balance remaining at the time that is one year after the day on which the person was issued a certificate under the *Charities Registration (Security Information) Act* or a notice by the Minister of an intention to revoke the registration of a charity. In addition, interest on penalties under section 188.1 of the Act accrues only on the balance remaining one year after the liability was first assessed. Subsection 189(9) applies in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

g) Restrictions on trading charitable donations

Individuals who make charitable donations may carry forward their unused credit balances for up to five years. Similarly, corporations may also carry forward unused charitable donation deductions for up to five years. However, the Act does not permit individuals or corporations to sell or transfer these unused claims to other taxpayers.

In order to ensure that an individual who could not otherwise use surplus charitable donation tax credits also cannot do so indirectly by means of a transfer of property to a corporation, a new subsection 110.1(1.2) is proposed to be inserted into the Act. Paragraph 110.1(1.2)(a) provides that unused charitable donation deductions of a corporation are deductible only for taxation years that end before the time that control of the corporation is acquired by a person or a group of persons. This will ensure that unused charitable donation deductions cannot be traded by having unused charitable donation deductions of a corporation treated in a manner that is similar to the treatment accorded to capital losses. Paragraph 110.1(1.2)(b) goes on to deny an unused charitable donation deduction in respect of a gift made by any corporation before the control of the corporation is acquired by a person or a group of persons, if the property that is the subject of the gift was acquired by the corporation (before the making of the gift) under an arrangement under which it was expected that control of the corporation would be so acquired and a gift would be so made. This new rule does not apply where the person or group of person who acquires control of

the corporation is a qualified donee that received the gift in question. These amendments will apply in respect of gifts made after March 22, 2004.

h) Appeals regime

The March 2004 Budget attempts to make the appeal process more accessible and affordable for registered charities and unsuccessful applicants for charitable status than has been the case in the past. As a result of this initiative, the following amendments to the Act are introduced in the September 2004 Amendments. However, the new objection and appeal process will not apply to an applicant or a registered charity that is subject to a certificate under the *Charities Registration (Security Information) Act*.

i) Internal reconsideration process

The March 2004 Budget proposes to extend the application of CRA's existing internal objection review process to notices of a decision by the Minister. In this regard, section 168 of the Act deals with circumstances in which the Minister may revoke the registration of a charity or a registered Canadian amateur athletic association.

New subsection 168(4) of the Act is proposed to be inserted into the Act to permit an organization that wishes to avail itself of a new internal reconsideration process by filing a notice of objection within 90 days from the issuance by CRA of the notice being objected to. The results of the review will be communicated in writing and no appeal can be made to a court unless the objection process has been exhausted. In particular, subsection 168(4) provides that a person may file a notice of objection if the person objects to a notice of intention to revoke the registration of a charity (subsection 168(1)), revocation of a charity's registration (subsections 149.1(2), (3), (4), or (4.1)), designation of a charity as a private or public foundation or charitable organization (subsection 149.1(6.3)), denial of applications for charitable status (new subsection 149.1(22)), or annulment of a charity's registration (new subsection 149.1(23)). The filing of a notice of objection is a required step before the person may appeal to the Federal Court of Appeal under subsection 172(3). New subsection 168(4)

applies in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

Subsection 168(3) of the Act currently provides that, notwithstanding (a) the issuance of a notice of intention from the Minister to revoke the registration of a charity pursuant to subsection 168(1) of the Act or (b) an application from a person to the Federal Court of Appeal for a stay of publication of such a notice under subsection 168(2) of the Act, the registration of the charity is revoked as of the time that a certificate issued under the *Charities Registration (Security Information) Act* is determined to be reasonable. As a result of the introduction of new subsection 168(4), subsection 168(3) is expanded to include a third scenario (in addition to scenarios (a) and (b) above) in respect of notices of objection filed under 168(4). This means that the registration is also revoked as of the time that a certificate issued under the *Charities Registration (Security Information) Act* is determined to be reasonable notwithstanding that the person may have filed a notice of objection under subsection 168(4).

It is also important to note that subsection 168(2) remains unchanged. This means that the Minister retains the option to publish in the Canada Gazette a copy of a notice of intention to revoke the registration of a charity, if at least 30 days have elapsed since the notice was issued. The Explanatory Notes to the September 2004 Amendments clarify that after the time of publication, the registration of a charity is revoked, notwithstanding that an objection may have been filed. The charity may apply to the Federal Court of Appeal for an extension of the 30-day period.

ii) External appeals process

Appeals from decisions concerning refusal to grant registered charitable status or revocation of registered charitable status will need to continue to be made to the Federal Court of Appeal. This is unfortunate, as an appeal in this regard is a very costly process that few charities are in a financial position to pursue.

In this regard, subsection 172(3) of the Act currently provides a person with a right to appeal to the Federal Court of Appeal against a decision of the Minister to, *inter alia*, refuse the person's registration as a charity or a notice of intention by the Minister to revoke the registration of a charity or a refusal to designate a charity as a charitable organization, public foundation or private foundation, etc.

As a result of the introduction of the filing of notice of objection under new subsection 168(4), paragraphs 172(3)(a) and (a.1) are amended so that the right to appeal to the Federal Court of Appeal against a decision of the Minister in respect of a notice issued under any of subsections 149.1(2) to (4.1), (6.3), (22) or (23) or 168(1), will then apply in respect of the confirmation of the Minister of such a decision in response to a notice of objection filed under subsection 168(4). In addition, a person who has filed a notice of objection under subsection 168(4) will have the option to appeal the decision after 90 days have elapsed from the filing of the said notice of objection because, under that circumstance, the Minister would be deemed to have refused the objection.

As a result of the introduction of subsection 168(4) and the amendment of subsection 172(3), subsection 172(4) has to be amended to remove the right of registered charities to appeal to the Federal Court of Appeal within a 180-day appeal period because it is no longer applicable under the new appeal regime. Furthermore, the appeal period of 30 days set out in subsection 180(1) for the institution of an appeal to the Federal Court of Appeal is also amended to provide that for decisions of the Minister in respect of charities and applicants for status as a registered charity, this 30-day period begins from the day on which the Minister responds to a notice of objection filed under the new subsection 168(4).

However, appeals of taxes and penalties will be directed to the Tax Court of Canada. Specifically, subsection 189(8.1) clarifies that a taxpayer may not appeal to the Tax Court of Canada in respect of an issue that could be the subject of a notice of objection filed under new subsection 168(4) of the Act. The amended subsections 172(3), 172(4) and 180(1)

apply in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

- i) Transparency and accessibility of information
 - i) Information pertaining to registered charities

Prior to the March 2004 Budget, the public could only obtain copies of annual information returns, governing documents with the names of directors, registration letters, and notices of revocation in relation to registered charities. The March 2004 Budget proposes to authorize the Minister to release to the public additional information where such information has been submitted to the Minister after 2004. The Explanatory Notes explain that the proposal is intended to “further enhance transparency and accessibility by making new information available on registered charities, the registration process, regulatory decisions, and compliance activities.”

In this regard, subsection 241(3.2) currently permits a government official to release certain information relating to a registered charity, including the charity’s governing documents, the application for charitable status, names of directors of the charity, notification of registration, and letter of revocation of registration. The September 2004 Amendments propose to amend subsection 241(3.2) by amending paragraph (e) and inserting new paragraphs (f) to (h) to allow for the disclosure of the following information to the public:

- ♦ Letters to a charity relating to grounds for revocation or annulment (paragraph 241(3.2)(e));
- ♦ Financial statements that are filed with the annual information return (paragraph 241(3.2)(f));
- ♦ The decision of CRA regarding a notice of objection filed by a registered charity (paragraph 241(3.2)(g));

- ◆ The identification of the registered charity which is subject to a sanction, the type of sanction imposed, as well as the letter sent to the registered charity relating to the grounds for the sanction (paragraph 241(3.2)(g)); and
- ◆ Information to support an application by a registered charity for special status or an exemption under the Act (e.g. request for permission to accumulate assets) (paragraph 241(3.2)(h)).

This amendment applies to documents sent by the Minister or that are filed or required to be filed with the Minister after the later of December 31, 2004 and Royal Assent.

ii) Information concerning organizations that are denied registration

Paragraph 241(4)(g) currently permits a government official to compile information in a form that does not directly or indirectly reveal the identity of the person to whom the information relates. The Explanatory Notes indicate that “in order to assist the charitable sector and the public in understanding how CRA determines whether an organization meets the criteria for registration as a registered charity,” it “may make available its reasons for denying the registration of organizations, in such a manner as to withhold the identity of an applicant.” Such information could include the governing documents of the applicant, information disclosed by the applicant in the course of making the application, a “copy of the notice of denial, and a copy of the decision, if any, of the Appeals Branch of CRA regarding a notice of objection, if any, filed by the organization.” This initiative could result in an additional source of information for potential applicants who can use this to better gauge the nature of the criteria CRA will endorse in granting charitable status.

iii) Additional information on official tax receipts

For official donation receipts issued after 2004, it is proposed that sections 3501 and 3502 of the Income Tax Act Regulations be amended to require that official donation receipts would need to include the current internet address of CRA.

5. Disbursement Quota Rules in September 2004 Amendments

a) Summary of disbursement quota rules prior to the proposed amendments

Before examining the new disbursement quota rules proposed in the September 2004 Amendments, it is first necessary to review the disbursement quota rules that are in place prior to the proposed amendments. The purpose of disbursement quota is “to ensure that most of a charity’s funds are used to further its charitable purposes and activities; to discourage charities from accumulating excessive funds; and to keep other expenses at a reasonable level.”³⁸ The disbursement quota for charitable organizations, public foundations and private foundations are different.³⁹ Disbursement quota is defined in paragraph 149.1(1) of the Act.⁴⁰

i) Charitable organizations

Prior to the proposed amendments, the disbursement quota for a charitable organization is the total of two figures, i.e. variables “A” and “A.1”, used in an algebraic formula contained in subsection 149.1(1) of the Act. Variable “A” is defined as 80% of the total of all amounts each of which the charity issued a donation receipt in its immediately preceding taxation year, other than the following:

- (a) a gift of capital received by way of bequest or inheritance;
- (b) a gift received subject to a trust or direction to the effect that the property given, or property substituted therefor, is to be held by the charity for a period of not less than 10 years (this is commonly known as “ten-year gifts”); and
- (c) a gift received from another registered charity.

³⁸ See Information Circular RC 4108, *Registered Charities and the Income Tax Act*, updated May 7, 2002, and available at <http://www.cra-arc.gc.ca/E/pub/tg/rc4108/rc4108eq.html>.

³⁹ For a discussion on the new definitions for charitable organizations, public foundations and private foundations proposed by draft amendments to the Act introduced on December 20, 2002 and consolidated in draft amendments to the Act introduced on February 27, 2004, please see *Charity Law Bulletin* No. 21 dated April 30, 2003 and *Charity Law Bulletin* No. 40 dated March 29, 2004.

⁴⁰ Although the definition for disbursement quota in paragraph 149.1(1) only makes reference to charitable foundations, this definition in effect also applies to charitable organizations – See paragraph 149.1(2)(b) and definition for “disbursement excess” in subsection 149.1(21) of the Act.

Variable “A.1” is defined to be 80% of the amounts that are (1) gifts of (i) capital received by way of bequests or inheritance for taxation years that begin after 1993 and (ii) ten-year gifts whenever they were received, (2) have previously been excluded from the charity’s disbursement quota when calculating variable “A” above, and (3) are spent by the charity in the year.

ii) Public foundations

Prior to the proposed amendments, the disbursement quota for a public foundation is set out in the following formula:

$$A + A.1 + B + \{C \times 0.045 [D - (E + F)]\} \div 365 + G$$

In other words, the disbursement quota for a public foundation is the total of the following amounts:

- ◆ Variables “A” and “A.1” are the same as above in relation to disbursement quota for charitable organizations.
- ◆ Variable “B” is 80% of all amounts received from other registered charities in its immediately preceding taxation year, other than specified gifts.⁴¹
- ◆ 4.5% of variable “D”, having first deducted variables “E” and “F” from “D” (where variable “C” in the formula is the number of days in the taxation year).
 - Variable “D” is the average value (i.e. the “prescribed amount”) of assets of the public foundation in the immediately preceding 24 months that was not used directly in charitable activities or administration of the foundation. Sections 3700 to 3702 of the *Income Tax Regulations* provide a detailed mechanism to calculate the “prescribed amount” for purposes of calculating “D”.

⁴¹ Summary Policy CSP – S12 dated September 3, 2003 indicates that a specified gift is “a gift from one registered charity to another, where the charities involved choose to make the transfer without affecting the disbursement quota of either charity.” A gift becomes a specified gift if the transferor charity identifies it as such in its information return for the year. Information Circular RC 4108, entitled *Registered Charities and the Income Tax Act*, explains that the transferor charity cannot use a specified gift to satisfy its own disbursement quota. If the recipient charity is a charitable foundation, specified gifts received would not increase its disbursement quota. If the recipient charity is a charitable organization, it would not benefit from receiving a specified gift because it does not have to include gifts received from other registered charities.

- Variable “E” is 5/4 of the total of “A” and “A.1” for the year, i.e. 100% of the amounts included when calculating “A” and “A.1” referred to above, rather than 80%.
- Variable “F” is 5/4 of “B”, i.e. 100% of all amounts received from registered charities in its immediately preceding taxation year, other than specified gift.

Variable “G” refers to a defined amount in the first 10 taxation years of a public foundation commencing after 1983, and therefore is no longer relevant today.

iii) Private foundations

For a private foundation, the disbursement quota is the same as that for a public foundation, except:

- ◆ When calculating variable “B”, 100% of all amounts received from a registered charity in its immediately preceding taxation year are included in the disbursement quota, rather than 80%.
- ◆ Variable “F” is the same as variable “B” (i.e. 100% of all amounts received from other registered charities in its immediately preceding taxation year), rather than 5/4 of “B” because 100% of the amounts has already been taken into account when calculating variable “B”.

iv) Summary

The following table summarizes the disbursement quota rules that are in place prior to the proposed September 2004 Amendments:

Registered Charities	Disbursement Quota = $A + A.1 + B + \{C \times 0.045 [D - (E + F)]\} \div 365 + G$			
	"A"	"A.1"	"B"	$\{C \times 4.5\% [D - (E + F)]\} \div 365$
Charitable Organizations	80% of the all amounts each of which the charity issued a donation receipt in its immediately preceding taxation year, other than: (a) a gift of capital received by way of bequest or inheritance; (b) a ten-year gift; and (c) a gift received from another registered charity	80% of the amounts that are (1) gifts of (i) capital received by way of bequests or inheritance for taxation years that begin after 1993 and (ii) ten-year gifts whenever received, (2) have previously been excluded from the charity's disbursement quota when calculating "A", and (3) are spent by the charity in the year	N/A	N/A
Public Foundations	same as above	same as above	80% of all amounts received from other registered charities in its immediately preceding taxation year, other than specified gifts	4.5% of ["D" - "E" - "F"] <ul style="list-style-type: none"> ◆ "D" = average value of assets of the foundation in the immediately preceding 24 months that were not used directly in charitable activities or administration of the foundation ◆ "E" = 5/4 of ("A" + "A.1") = 100% of ("A" + "A.1") ◆ "F" = 5/4 of "B" = 100% of all amounts received from registered charities in its immediately preceding taxation year, other than specified gift
Private Foundations	same as above	same as above	Same as above, except 100%, rather than 80%	Same as above, except that "F" = "B", not 5/4 of "B"

b) Proposed new disbursement quota rules

The following new algebraic formula for disbursement quota is introduced by the September 2004 Amendments:

$$A + A.1 + A.2 + B + \{C \times 0.035 [D - (E + F)]\} \div 365$$

The changes include the following:

- ◆ Variables "A", "A.1", "B", "D", "E", and "F" have been redefined;
- ◆ New variable "A.2" has been introduced;
- ◆ 4.5% disbursement quota has been reduced to 3.5%; and
- ◆ New concepts of "enduring property" and capital gains pool" have been introduced.

The implications of the above changes are commented upon below.

c) Reduction of Disbursement Quota Rate

The September 2004 Amendments propose to reduce the 4.5% disbursement quota that applies to public and private foundations to a more manageable rate of 3.5%. Apparently, the formula that is used by the Department of Finance for the September 2004 Amendments is based on the current real rate of return minus 20% attributable to administrative costs. The March 2004 Budget indicates that the rate is to be reviewed periodically to ensure that it continues to be representative of long-term rates of return. However, this flexibility has not been built into the new disbursement quota formula in the Act. This would mean that changes in the economy in future that may again lead to the impracticality of the 3.5% disbursement would necessitate future amendments to the Act. In the event that a registered charity is not able to meet the reduced 3.5% disbursement quota, it can still apply for dispensation to reduce the disbursement quota in accordance with subsection 149.1(5) of the Act. The reduction of the 4.5% disbursement quota to 3.5% applies to taxation years that begin after March 22, 2004.

d) Extension of 3.5% Disbursement Quota to Charitable Organizations

Prior to the proposed amendments, only public and private foundations are subject to a disbursement quota upon its capital assets not used in charitable activities or administration. However, the September 2004 Amendments propose that the reduced 3.5% disbursement quota on capital assets also apply to charitable organizations. This amendment is achieved by changing the reference to “public foundation” or “charitable foundation” in the definition for disbursement quota in subsection 149.1(1) to “registered charity” and inserting references to “charitable organization” where applicable. The reduced 3.5% disbursement quota will apply to public and private foundations with taxation years that begin after March 22, 2004. For charitable organizations registered after March 22, 2004, however, the 3.5% disbursement quota will apply to their taxation years that begin after March 22, 2004. For charitable organizations registered before March 23, 2004, the 3.5% disbursement quota will apply to their taxation years that begin after 2008. Paragraph 149.1(2)(b), dealing with the circumstances under which the charitable status for charitable organizations may be revoked, has also been amended to reflect that the 3.5% disbursement quota applies to charitable organizations. Alternate wording for paragraph

149.1(2)(b) has also been introduced to deal with the transaction period for charitable organizations between 2004 and 2008. However, it appears that paragraph 149.1(21)(c) regarding “disbursement excess” for charitable organizations has not been amended to provide a corresponding amendment. Hopefully this will be amended in the final form of the draft legislation before it is introduced into Parliament.

With the removal of this key distinction between charitable organizations and foundations, there will be little functional difference between the two, other than the 50% income disbursement rules. It would therefore not be surprising if the Department of Finance, as a matter of policy, eventually eliminates the distinction between charitable organizations and foundations altogether so that there would be only two categories of charities, i.e. charities and private foundations. It will be interesting to see what may transpire in this regard over the next few years.

e) New concept of “enduring property”

The September 2004 Amendments introduce a new concept of “enduring property” and propose to amend the amount for variable “A” when calculating the disbursement quota to include 80% of the total of the eligible amounts of gifts for which the charity issued donation receipts in its immediately preceding taxation year, other than the following gifts that are:

- (a) enduring property; or
- (b) received from another registered charity.

The proposed definition for “enduring property” in subsection 149.1(1) will include the following:

- (a) a gift received by the charity by way of a bequest or inheritance, including a gift deemed by subsection 118.1(5.2) or (5.3) of the Act ⁴²;

⁴² Details regarding amendments to subsection 118.1(5.2) and (5.3) of the Act concerning gifts of life insurance proceeds, registered retirement income fund and registered retirement savings plan as a result of direct beneficiary designation are explained in Section e)iv) below.

- (b) a ten-year gift received by the charity (i.e. the “original recipient charity”) with the gift, or property substituted for the gift, subject to a trust or direction that the property is to be held by the original recipient charity or by another registered charity (i.e. “transferee”) for a period of not less than 10 years from the date the original recipient charity received the gift, except that the trust or direction may permit the original recipient charity or the transferee to expend the property before the end of 10 years to the extent permitted under the definition for disbursement quota in order to meet the disbursement quota requirement; and
- (c) a gift received by the charity as a transferee of an enduring property under (a) or (b) above from either an original recipient charity or another transferee charity, provided that if it is an enduring property under (b), the gift is subject to the same terms and conditions under the trust or direction.

The new definition applies in respect of taxation years that begin after March 22, 2004. The following are several observations regarding the new concept of “enduring property”:

i) New broad concept

The term “enduring property” is very broad and includes gifts of bequest or inheritance and ten-year gifts that are included in the formula for variable “A” prior to the proposed amendments, as well as life insurance proceeds, registered retirement income fund and registered retirement savings plan as a result of direct beneficiary designation, and gifts received by the charity as a transferee of an enduring property that are gifts by way of bequest or inheritance and ten-year gifts from either an original recipient charity or another transferee charity, provided that if the gift is a ten-year gift, the gift is subject to the same terms and conditions under the trust or direction.

ii) Gifts by way of bequest or inheritance: income vs. capital

In relation to gifts received by a charity by way of bequest or inheritance, these gifts will no longer be limited to “gifts of *capital* received by way of bequests or inheritance” [emphasis added] under the definition of disbursement quota prior to the proposed amendments. This

means that a testamentary income interest received by a charity would now be included as part of an enduring property.

iii) Ten-year gifts subject to ability to encroach

The definition of “enduring property” will also permit ten-year gifts that are subject to trusts or directions that may permit the original recipient charity or the transferee to expend the ten-year gifts before the end of 10 years to the extent permitted under the definition for disbursement quota in order to meet the disbursement quota requirement. Our comments concerning the limit on the encroachment is set out in Section f) below.

iv) Gifts made by way of direct designation

As a result of amendments to the Act introduced by the 2000 Federal Budget, payments of life insurance proceeds [paragraph 118.1(5.2)], registered retirement income fund or registered retirement savings plan [paragraph 118.1(5.3)] as a result of direct beneficiary designation were deemed to be gifts for the purposes of section 118.1 in respect of deaths that occur after 1998, provided that requirements under subsections 118.1(5.1), (5.2) and (5.3) are met. As such, upon the death of an individual, a charitable donation tax receipt can be provided to the estate and the executor can claim the donation tax credit on the deceased’s terminal income tax return. However, CRA’s technical interpretation document number 2002-0133545 dated January 16, 2003 confirms that “these payments have not been deemed to be gifts for purposes other [than] section 118.1, they are not gifts for purposes [of] the calculation of the DQ pursuant to the definition in subsection 149.1(1) of the Act and, therefore, are not included therein.”⁴³

The September 2004 Amendments address this issue by amending subsections 118.1(5.2) and (5.3) and the definition of enduring property, by including these gifts as enduring property, and therefore are included in the calculation of the disbursement quota. These gifts will be subject only to the 3.5% disbursement quota while they are held as capital by the charity and will then become subject to the 80% disbursement quota requirement in the year in which

⁴³ See also CRA’s *Registered Charities Newsletter*, dated April 2, 2003.

they are disbursed. This amendment applies in respect of deaths after 1998, which retroactivity may lead to hardship for charities that relied on the earlier position of CRA that such direct designation would not be included in the charities' disbursement quota from the enactment of subsections 118.1 (5.1) to (5.3) in 2000 to the present.

v) Transfer of ten-year gifts

Paragraph (c) of the definition for "enduring property" will permit a ten-year gift to be transferred to another registered charity during the ten-year period as if the ten-year gift had been received directly from the original donor, without the amount transferred affecting the disbursement quota for both the transferor charity and the recipient charity. This is further explained in Section g) below concerning inter-charity transfers.

f) Encroachment of enduring property

Prior to the proposed amendments, variable "A.1" of the disbursement quota requires the inclusion of gifts received by a charity by way of bequest or inheritance or ten-year gifts that have previously been excluded in the calculation of disbursement quote under variable "A" in the year they are expended. As explained in the March 2004 Budget, since an annual disbursement quota is applied to funds held by charities, sometimes, charities may prefer to meet its obligations to satisfy the disbursement quota by realizing capital gains rather than disbursing investment income earned from these funds, especially where the return on the investment is weighted heavily in favour of capital gains. However, "if the charity does so, . . . it must then meet an 80 per cent disbursement obligation to the extent that the proceeds of disposition are expended by the charity."⁴⁴

The difficulty caused the wording in the Act is addressed by the September 2004 Amendments by amending variable "A.1" of the disbursement quota by allowing the charity to encroach on the capital gains of enduring property up to a maximum of the "capital gains pool" of the charity, which is another concept introduced by the September 2004 Amendments. In this regard, variable "A.1" is proposed to be defined to be equal to 80% of the amount by which the total amount of enduring

⁴⁴ See the March 2004 Budget.

property owned by the charity to the extent that it is expended in the year exceeds the lesser of (i) 4.375 per cent (i.e. 5/4 of 3.5%) of the amount determined for variable “D” and (ii) the capital gains pool of the charity for the taxation year. This proposal will apply to taxation years that begin after March 22, 2004. It is important to note the following in relation to the new definition of variable “A.1”:

i) Limit on encroachment

This formula permits expenditure of enduring property provided that the expenditure is the lesser of (i) 4.375 per cent (i.e. 5/4 of 3.5%) of the amount determined for variable “D” and (ii) the capital gains pool of the charity for the taxation year.

(1) Calculation of variable “D”

The calculation for the amount for variable “D” remains substantially the same as the definition prior to the proposed amendments, i.e. the average value (i.e. the “prescribed amount”) of assets of the charity in the 24 months immediately preceding that taxation year that was not used directly in charitable activities or administration of the charity. The reference to variable “D” for purposes of calculating the limit on the encroachment does not take into account the variables “E” or “F” as required when calculating the 3.5% disbursement quota as described in the formula $\{C \times 0.035 [D - (E + F)]\} \div 365$.

(2) “Capital gains pool”

The new definition “capital gains pool” applies for the purpose of the definition “disbursement quota”, applicable to taxation years that begin after March 22, 2004. Generally, the capital gains pool of a registered charity for a taxation year is the total of all capital gains of the charity from the disposition of enduring properties after March 22, 2004, less the total disbursement requirement of the charity under variable “A.1” of the definition for disbursement quota in respect of the expenditure of such enduring properties in a preceding taxation year that began after March 22, 2004. However, the capital gains from a disposition of a bequest or inheritance received by the charity before 1994 is not included. It is important to note that the capital gains pool only consists of all capital gains realized by the disposition of enduring property, rather than

accrued gains. Further, the concept of the “capital gains pool” appears to be based on a tax policy in imposing an arbitrary cap on the ability of charities to encroach on the original capital of testamentary gifts and ten-year gifts in order to meet the 3.5% disbursement quota, instead of being able to encroach up to the amount required to satisfy the 3.5% disbursement quota.

To summarize, as explained in the Explanatory Notes that accompanied the September 2004 Amendments, “[t]he requirement to disburse 80% of the amount of an enduring property expended in the year is extended to such property received by way of gift in the same year” and it further provides that “[h]owever, this requirement is reduced by the lesser of 3.5% of the investment assets of the charity and 80% of the “capital gains pool” of the charity.”

ii) Exclusion of certain enduring property

When calculating variable “A.1”, the following enduring properties will not be included:

- enduring properties included in variable “A.2;”
- enduring properties received by the charity as “specified gifts,” and
- a bequest or an inheritance received by the charity in a taxation year that included any time before 1994.

The above exceptions in relation to variable A.2 and “specified gifts” are commented upon in Section g) below concerning inter-charity transfers.

iii) Gifts received and spent in the same year

Prior to the proposed amendments, long-term gifts (i.e. ten-year gifts and gifts received by way of bequest or inheritance) are subject to an 80% disbursement quota to the extent that the registered charity liquidates and spends the capital in the year following the year in which the gift is received. The rules prior to the proposed amendments, however, do not address the situation where the charity receives a long-term gift and disburses it in the same year. The September 2004 Amendments eliminate this loop-hole by removing the requirement under the calculation of variable “A.1” gifts that have previously been excluded from the

charity's disbursement quota. As such, it applies the 80% disbursement quota to gifts that are liquidated in the same year that they are received.

g) Inter-charity transfer

i) Gifts transferred to charitable organizations

Prior to the proposed amendments, only transfers from registered charities to public and private foundations are subject to the 80% disbursement quota, which mean that transfers from registered charities to charitable organizations are exempt from the 80% disbursement quota. The September 2004 Amendments propose that all transfers from one registered charity to another, including transfers to charitable organizations, will be subject to the 80% disbursement requirement. The only exceptions are transfers involving specified gifts and enduring property. This is achieved by applying variable "B" to charitable organizations. Variable "B" is now defined to mean as follows:

- (a) in the case of private foundations, variable "B" is the total of all amounts received by it in its immediately preceding taxation year from a registered charity, other than specified gifts or enduring properties; and
- (b) in the case of charitable organizations and public foundations, variable "B" is the same as the case for the private foundation, except that the inclusion rate is 80%, rather than 100%.

This means that gifts of enduring property received from another registered charity will no longer be subject to the disbursement quota of the recipient charity in the year after the year in which it is received. Such gifts will be subject to the same requirements as those that apply to gifts of enduring property received from other persons. The exception for a "specified gift" will continue to apply. These changes will apply to transfers received by charitable organizations in taxation years that begin after March 22, 2004.

ii) Transfer of ten-year gifts

Due to a drafting error in the definition of the disbursement quota in the Act prior to the proposed amendments, if a charity transfers a ten-year gift to another charity, the transferee charity has to expend 80% of the ten-year gift in the year following the transfer of the gift. In order to avoid the recipient charity having to include the amount it received in its disbursement quota and having to expend 80% of the amount in the following year, the recipient charity is required to recognize the amount received as a specified gift. However, in order for the amount transferred to be recognized as a specified gift, the amount has to be designated as such by the transferor charity. The disposition of the property as a specified gift by the transferor charity means that the transferor charity is not permitted to include the amount transferred in meeting its disbursement quota to off-set the inclusion of the amount transferred in the calculation of the disbursement quota as a result of the expenditure of the ten-year gift. To overcome this difficulty, the transferor charity or the transferee charity would have to obtain relief from CRA by applying for dispensation from the application of the disbursement quota under subsection 149.1(5) of the Act.

In order to address this anomaly, the September 2004 Amendments propose to exempt the transfer of enduring property from variable “B”. The effect of this would be that a gift of enduring property received by a charity would not need to be included in the disbursement quota of the recipient charity. This exemption, therefore, would not require that the enduring property received be expended in the following year by the recipient charity. With respect to the transferor, this anomaly is proposed to be resolved by a new variable “A.2”, which is defined in paragraph 149.1(1) to mean the fair market value (at the time of the transfer) of enduring property (other than enduring property that was received by the charity as a specified gift) transferred by a charity in the taxation year by way of gift to a qualified donee.

In this regard, the Explanatory Notes indicate that a different disbursement requirement applies for an enduring property that is expended by way of gift to a qualified donee. The charity must disburse 100% of such an amount (which requirement is satisfied by the gift itself). This means that the transferor charity would be able to include the amount of enduring property it transfers to a qualified donee in order to meet its disbursement quota requirement,

which would off-set the increase in disbursement quota of the transferor charity as a result of disposing of the enduring property to the qualified donee. This proposal also applies to taxation years after March 22, 2004.

If the enduring property being transferred was inadvertently designated by the transferor charity as a specified gift, such designation would not cause any negative effect on the disbursement quota on the recipient charity because variable "B" also exempts specified gifts received by the charity from being included in the recipient charity's disbursement quota. However, such a designation would lead to an unintended negative effect on the disbursement quota of the transferor charity, because the disposal of a specified gift is not exempt from variable "A.2" and, therefore, the amount must be included in the disbursement quota of the transferor charity, leading to the same unfavourable result caused by the drafting error in the Act prior to the proposed amendments. A possible way to resolve this is to amend variables "A.1" and "A.2" to also exempt specified gifts "transferred by" the charity in question.

iii) Transfer as a result of penalty

The Explanatory Notes indicate that subsection 149.1(1.1) of the Act provides that a gift or expenditure made by a registered charity will not be considered in determining whether it has met its annual disbursement quota if the gift is made by way of a specified gift or if the expenditure is on political activities. Subsection 149.1(1) will be amended by the September 2004 Amendments, consequential to the amendment of Part V of the Act in respect of taxes and penalties for which the charity is liable under subsection 188(1.1) or section 188.1 of the Act. Now paragraph 149.1(1.1)(c) provides that a transfer to another registered charity under that Part does not qualify as an expenditure for the purposes of calculating the transferor's disbursement quota. This amendment will apply in respect of notices of intention to revoke the registration of a charity and to notices of assessment issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

h) Summary of the proposed new disbursement quota rules

The following table summarizes the new disbursement quota rules:

Registered Charities	Proposed Disbursement Quota = A + A.1 + A.2 + B + {C x 0.035 [D - (E + F)]} + 365				
	"A"	"A.1"	"A.2"	"B"	{C x 0.035 [D - (E + F)]} + 365
Charitable Organizations and Public Foundations	<p>80% of all eligible amount of gifts for which the charity issued donation receipts in its immediately preceding taxation year, other than:</p> <p>(a) gifts of enduring property;</p> <p>(b) gifts received from other registered charities.</p> <p>"Enduring property" means property that is:</p> <p>(a) gifts of bequest or inheritance, including life insurance proceeds, RRSPs, and RRIFs by direct beneficiary designation</p> <p>(b) ten-year gifts</p> <p>(c) gifts received by the charity as a transferee of enduring property that are gifts of bequest or inheritance and ten-year gifts from either an original recipient charity or another transferee charity, provided that if the gifts are ten-year gifts, the gifts are subject to the same terms and conditions under the trust or direction</p>	<p>80% of the amount by which the total amount of enduring property owned by the charity to the extent that it is expended in the year exceeds the lesser of</p> <p>(i) 4.375 per cent (i.e. 5/4 of 3.5%) of the amount determined for "D" and</p> <p>(ii) the capital gains pool of the charity for the taxation year</p> <p>"Enduring property" not included in "A.1" =</p> <p>(a) enduring properties included in "A.2";</p> <p>(b) enduring properties received by the charity as "specified gifts"; and</p> <p>(c) a bequest or an inheritance received by the charity in a taxation year that included any time before 1994</p> <p>See definition for "capital gains pool" in the note below</p>	<p>the fair market value (at the time of the transfer) of enduring property (other than enduring property that was received by the charity as a specified gift) transferred by a charity in the taxation year by way of gift to a qualified donee</p>	<p>80% of all amounts received from other registered charities in its immediately preceding taxation year, other than specified gifts and enduring property</p>	<p>3.5% of ["D" - "E" - "F"]</p> <ul style="list-style-type: none"> ◆ D" = average value of assets of the charity in the 24 months immediately preceding the taxation year that were not used directly in charitable activities or administration of the charity ◆ "E" = A.2 + 5/4 of ("A" + "A.1") ◆ "F" = 5/4 of "B" = 100% of all amounts received from registered charities in its immediately preceding taxation year
Private Foundations	same as above	same as above	same as above	Same as above, except 100%, rather than 80%	Same as above, except that "F" = "B", not 5/4 of "B"

NOTE: "Capital gains pool" of a registered charity for a taxation year = the total of all capital gains of the charity from the disposition of enduring properties after March 22, 2004, less the total disbursement requirement of the charity under variable A.1 of the definition for disbursement quota in respect of the expenditure of such enduring properties in a preceding taxation year that began after March 22, 2004. However, the capital gain from a disposition of a bequest or inheritance received by the charity before 1994 is not included.

The above is a summary of the proposed new rules regarding disbursement quota for charities. Although many aspects of the proposed new rules reflect a bona fide attempt by the Department of Finance to address a number of problems facing charities involving the disbursement quota, the complexities introduced by the new disbursement quota rules are such as to make them difficult, if not impossible, for the average charity to understand, let alone comply with. Even with a more detailed Disbursement Quota Worksheet for the Registered Charity Information Return - T3010A to assist in the annual calculation of the disbursement quota, charities will still be left in a vulnerable position. This is because charities not only need to be able to compute the disbursement quota at their fiscal year end for purposes of completing their T3010A, they also need to have a good working knowledge of the computation of the disbursement quota that they are required to satisfy in order to enable them to make informed decisions when planning their receipt and disbursement of funds throughout the year so that their decisions will not negatively impact their ability to meet their disbursement quota requirements. In this regard, the proposed new disbursement quota rules will be too complicated for volunteers, and even professionals, involved with charities to understand and to comply with.

In addition, there are concerns about the application of the proposed 3.5% disbursement quota being extended from charitable foundations to charitable organizations and the exemption of transfers of capital to charitable organizations from other registered charities being removed. This is a major change in tax policy by the Department of Finance that would blur the line between public foundations and charitable organizations to the point that the need for public foundations may be eliminated all together, leaving only charitable organizations and private foundations.

D. RECENT PROPOSED POLICIES FROM CANADA REVENUE AGENCY (CRA)

1. Introduction

CRA regularly publishes a wide array of resource materials, including summary policies⁴⁵ policy statements,⁴⁶ and newsletters⁴⁷ that impact the way charities operate. Policy statements represent

⁴⁵ See http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp_menu-e.html.

⁴⁶ See http://www.cra-arc.gc.ca/tax/charities/policy/policies_list-e.html.

carefully considered positions on how the ITA applies to major issues affecting charities. In this regard, CRA recently launched consultation papers on two proposed policy statements: “Applicants Assisting Ethnocultural Communities”⁴⁸ and “Guidelines for Registering a Charity: Meeting the Public Benefit Test.”⁴⁹ In addition, CRA released a new online publication on “Charities in the International Context.”⁵⁰ These are essential resource materials for current and prospective registered charities, as they outline the CRA standards that will need to be met in order to acquire and, or maintain charitable status under the ITA. The scope of these proposed policies, and their impact on registered charities, is outlined in the next sections of the paper.

2. Consultation on Proposed Policy: “Applicants Assisting Ethnocultural Communities”

The purpose of the following analysis of the proposed policy statement on “Applicants Assisting Ethnocultural Communities,” is to focus on comments concerning activities that will be considered “unacceptable ethnocultural work” under the heads of “relief of poverty” and “advancement of religion.” However, before doing so, the purpose and scope of the policy statement needs to be outlined.

In this regard, CRA indicates that the primary goal of the proposed policy on “Applicants Assisting Ethnocultural Communities” is to “develop the most comprehensive and useful guidelines possible.” To this end, the policy sets out detailed guidelines for registering community organizations that assist disadvantaged ethnocultural communities in Canada. It acknowledges that, increasingly, ethnocultural groups represent a significant part of Canadian society and that community organizations in this sector provide much needed services to assist new Canadians in navigating the challenges and disadvantages they face. The proposed CRA policy is, therefore, meant to inform these community organizations of the framework within which they can attain charitable status for the purposes of the ITA. As a starting point, these organizations that assist ethnocultural groups and wish to acquire charitable status must qualify under one, or a combination, of the four heads of charitable purposes established by the House of Lords

⁴⁷ See <http://www.cra-arc.gc.ca/tax/charities/newsletters/cnews-index-e.html>.

⁴⁸ Available at: <http://www.cra-arc.gc.ca/tax/charities/policy/ethno-e.html>.

⁴⁹ Available at: <http://www.cra-arc.gc.ca/tax/charities/consultations/publicbenefit-e.html>.

⁵⁰ Available at: <http://www.cra-arc.gc.ca/tax/charities/international-e.html>.

decision in *Special Commissioners of Income Tax v. Pemsel*,⁵¹ which are relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community.

According to the proposed policy statement, an ethnocultural group is defined by the shared characteristics that are unique to, and recognized by that group. Some examples of shared characteristics are ancestry, language, country of origin and national identity. In addition, the proposed policy statement points out that religion can be a shared characteristic as long as it is inextricably linked to the group's racial or cultural identity. Section 3 of the proposed policy statement points out that ethnocultural work includes providing settlement assistance in the form of housing, interpretation, language training, providing referral services and meeting needs not adequately addressed by existing programs, facilities or services. This is distinct from promoting multiculturalism, which according to CRA, lacks the "necessary element of altruism to enable it to qualify as a charitable purpose." While it is clear that promoting a particular culture is strictly prohibited, the activities that qualify as unacceptable ethnocultural work under the heads of "relief of poverty" and "advancement of religion" are not clearly articulated in the policy statement.

a) Relief of poverty

According to section 26 of the proposed policy statement, an example of acceptable ethnocultural work is that geared towards:

[E]asing or alleviating poverty through the provision of the necessities of life, limited to ethnocultural communities who are poor.

In contrast, it is unacceptable to provide assistance "that is not considered a necessity or providing access to amenities beyond those available to most people." It can reasonably be foreseen that in dealing with ethnocultural communities, the definition of "necessities" could vary from one group to another. Therefore, a more precise definition of necessities besides "food shelter and clothing" as articulated in section 22 appears to be necessary. It is hoped that the consultation process will foster the necessary dialogue through which CRA will be able to provide more context concerning

⁵¹ *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.).

what standards should be applied in determining what will qualify as a “necessity” for a particular ethnocultural group.

b) Advancement of religion

The way in which the proposed CRA policy statement articulates how a community organization could qualify under the head of advancement of religion may unwittingly suggest a narrowing of the definition of advancement of religion at common law. Specifically, in section 35 of the proposed policy statement, the following is stated in relation to advancement of religion:

In this category of charity, if the undertaking promotes the spiritual teachings of the religion concerned, public benefit is usually assumed. However, religion cannot serve as a foundation or a cause to which a purpose can conveniently be related. If the group’s purposes are more secular than theological, it does not qualify as advancing religion. For example, opposing abortion and promoting or opposing same-sex marriage, while in keeping with the values of some religious believers and religions, cannot be considered charitable purposes in the advancement of religion category.

Section 36 of the proposed policy statement goes on to provide some examples of both acceptable and unacceptable objects for religious worship based on a specific linguistic community. Among the acceptable examples of objects are the following:

[T]he promotion of spiritual teachings of the religion concerned and the maintenance of the spirit of the doctrines and observances on which it rests.

In contrast, the following is listed as an unacceptable charitable object:

[T]he pursuit of purposes that are more secular than theological.

This presumably would include those purposes previously listed, i.e. opposing abortion and promoting or opposing same-sex marriage.

There is concern that in reviewing sections 35 and 36 of the proposed policy statement, they could be read to mean that activities that are undertaken for the purpose of advancing religion, which

could be viewed as also having a secular purpose to them, would be characterized by CRA as activities that are not supporting advancing religion. Specifically, the proposed policy statement does not explain to what extent secular purposes can be pursued, how the determination of what a secular purpose is, as opposed to a theological purpose, is to be made and what the implications are where a purpose is determined to be both secular and theological in nature. As a result, it is unclear whether, for example, spiritual teachings, which to others may be mere secular issues can be accommodated under advancement of religion. This requirement could be read as narrowing the scope within which religion can be advanced. Therefore, the position reflected in this proposed policy could result in narrowing the activities and ventures that current religious charities could undertake, and provide obstacles for new religious charities in qualifying for charitable status under the ITA.

3. Consultation on “Proposed Guidelines for Registering a Charity: Meeting the Public Benefit Test”

The proposed policy statement on “Meeting the Public Benefit Test” seeks to clarify the rules relating to the requirement of “public benefit” – one of the criteria all applicants must meet in order to be considered charitable at common law. The review of the guidelines focuses on the introduction of the rebuttable presumption of public benefit and the level of uncertainty it fosters. The guidelines propose a two-part public benefit test that requires proof that a tangible benefit is being conferred and that the benefit has a public character. The test addresses what it means to be the public of the proposed charity and what applicants must prove in order to satisfy this test.

a) The rebuttable presumption in general

In relation to the question of when proof of public benefit is required, CRA states the following in section 3.1.1 of the draft policy statement:

The extent to which an applicant charity is required to meet the first part of the public benefit test will depend, in large part, under which category the proposed purposes fall. When the purposes fall within the first three categories of charity, a presumption of public benefit exists.

However, CRA then goes on to indicate that the presumption of public benefit for the first three categories of charity can be challenged when the contrary is shown:

The presumption however, can be challenged. So when the “contrary is shown” or when the charitable nature of the organization is called into question, proof of benefit will then be required. For example, where a religious organization is set up that promotes beliefs that tend to undermine accepted foundations of religion or morality, the presumption of public benefit can be challenged. When the presumption is disputed, the burden of proving public benefit becomes once again the responsibility of the applicant organization. [emphasis added]

b) The rebuttable presumption and the advancement of religion

In indicating that the presumption of public benefit can be challenged when the “contrary is shown,” CRA cites the decision in *National Anti-Vivisection Society v. Inland Revenue Commissioners*.⁵² However, no case citation was provided by CRA as the basis for the example of when the public benefit presumption may be rebutted under advancement of religion, as stated above. In this regard, reference should be made to the decision in *Re Watson*, in which the court stated that “a religious charity can only be shown not to be for the public benefit if its doctrines are adverse to the foundations of all religion and subversive of all morality...”⁵³ [emphasis added]. The statement by the courts in this case, and particularly the use of the qualifier “all,” is significantly different in substance from the statement by CRA above that does not include the qualifier “all.”

As a result, there is a question raised that this proposed CRA policy statement, although likely unintentionally, may be seen as unnecessarily narrowing the circumstances where the presumption of public benefit under advancement of religion can be challenged, i.e. from a situation where a religious organization promotes beliefs that are contrary to the foundations of all religion and subversive to all morality to one where a religious organization promotes beliefs that are contrary to any accepted foundation of religion or morality. Accordingly, the questions then become when and under what circumstances does the presumption of public benefit become rebuttable.

⁵² [1948] A.C. 31 at 42.

⁵³ *Re Watson*, [1973] 3 All E.R. 678.

Based on the proposed CRA policy statement, the answers to these questions are not as clear and nuanced as they could be. As a result, given the wide-range of religious beliefs on many different issues, it is possible that some religious organizations might in certain situations be subject to a challenge of their presumed public benefit under advancement of religion because one or more of their promoted beliefs might be significantly different from those which are believed to be accepted societal norms dealing with morality, i.e. in accordance with the more broad-based standard of religion and morality set out in this proposed CRA policy statement. In this regard, while it is always possible for an organization whose application for charitable status has not been granted to have its application reviewed by the courts, it is important to be aware that, practically speaking, few organizations are in a position to undertake such a review. This reality underscores why it is important for CRA to clarify these issues in its policy statements, as they will be used as the primary basis by which CRA will review future applications for charitable status.

Accordingly, the potentially unclear nature of the rebuttable presumption that is referenced in the draft policy statement may give a greater amount of discretion to CRA in deciding whether particular types of activities by religious organizations satisfy the public benefit test and will therefore be able to qualify for charitable status. As a result, the attaining of charitable status by religious organizations that are engaged in activities other than pure religious worship and teaching doctrine may become more challenging in the future.

4. New Online Publication on “Charities in the International Context”

As a result of the increased focus on international activities of charities since September 11, 2001, and the introduction of Canadian Anti-terrorism Legislation,⁵⁴ CRA has released a new publication entitled: “Charities in the International Context,”⁵⁵ which provides operational guidance to Canadian registered charities operating particularly abroad, in relation to Canada’s Anti-terrorism Legislation. This online publication affirms that Canadian registered charities operating outside of Canada continue to fall under the jurisdiction of Canadian statutory and regulatory authorities. It also identifies many sources of

⁵⁴ For information regarding this legislation, see “Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law” (October 2004) by Terrance S. Carter, available at: www.charitylaw.ca and www.antiterrorismlaw.ca.

⁵⁵ Charities in the International Context, supra, note 50.

information that discusses the statutory and regulatory boundaries within which charitable activities should be carried out. Some of these sources of information mentioned in the publication include ITA rules, CRA guidelines, Anti-terrorism Legislation and international standards of best practices. These sources will guide charities on how to ensure their resources are being used for legitimate charitable purposes.

The stated rationale behind this approach to regulating activities of charities is to maintain public confidence in the charitable sector, ensure the integrity of the registration granting process and “ensure that the tax benefits reserved for Canadian charities are not used to provide support to terrorism in the guise of charity.”

The main point of this publication by CRA is that regardless of a charity’s place of operation, it must operate:

- ♦ either by engaging in its own charitable activities or;
- ♦ by transferring its resources to qualified donees; and by,
- ♦ following international standards of best practice in order to reduce the likelihood of terrorist financing flowing through the organization

On the issue of countering terrorism, charities and prospective charities should take note of the considerable powers that CRA has and the consequences that can flow from non-compliance. In this regard, CRA can rely upon any relevant information concerning an organization’s ties to terrorist groups in deciding whether it should be registered as a charity for the purposes of the Income Tax Act. In addition, as explained earlier, if the CRA issues a certificate under the *Charities Registration (Security Information) Act* to revoke a charity’s status as a registered charity on the basis that it has availed its resources to a terrorist organization, this decision is final and not subject to appeal.⁵⁶ These initiatives mean that Canadian registered charities that operate abroad will be subject to increased scrutiny, not only internationally but also domestically as well. Therefore, charities should become familiar with the international due diligence practices by referring to the recommendations and policies in other countries,

⁵⁶ S.C. 2001, c. 41, subsection 8(2) & ITA ss. 168(3), 172(4.1).

including the Financial Action Task Force on Money Laundering (FATF),⁵⁷ and the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines,⁵⁸ both of which will become the benchmark that charities in Canada will be expected to comply with in relation to Anti-terrorism Legislation.⁵⁹

E. CHARITY LAW DEVELOPMENTS IN OTHER JURISDICTIONS

1. Introduction

In order to provide a comparative look at international developments in charity law over the past year, this paper briefly reviews developments in England and Wales, as well as Australia, both of which jurisdictions have initiated regulatory reform to their charitable sector by considering a statutory definition of charity. The public consultation that was a part of these initiatives highlighted the challenges of accuracy, clarity and certainty involved in a review of this kind.

2. Statutory Definition of Charity in England and Wales

In May 2004, the Government of the U.K. released draft charities legislation (Charities Bill). The Charities Bill is currently subject to legislative scrutiny by a Joint Committee of both Houses. The Government is considering the Report of the Joint Committee's recommendations released on September 30, 2004. If adopted, this Bill will create a new statutory definition of charity. The draft Bill proposes an expansive list of twelve descriptions as heads of charity. These are enumerated in paragraph 2(2) (a-k) of the Bill and in addition to the three traditional heads of charity, includes advancement of citizenship or community development, advancement of the arts, heritage or science, advancement of amateur sport, advancement of human rights conflict resolution or reconciliation, advancement of environmental protection or improvement, the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage, advancement of animal welfare, and any "other purpose". In

⁵⁷ Available at: http://www.fatf-gafi.org/SRecsTF_en.htm.

⁵⁸ Available at: <http://www.ustreas.gov/press/releases/po3607.htm>.

⁵⁹ For a detailed discussion of anti-terrorism issues, see *supra* note 53; as well as "Emerging International Information Collection and Sharing Regimes: the Consequences for Canadian Charities," *Anti-Terrorism and Charity Law Alert* No 4 by Terrance S. Carter and Sean S. Carter dated September 28, 2004, and "Worldwide Implications of America's Emerging Policies Concerning NGOs, Non-Profits and Charities," *Anti-Terrorism and Charity Law Alert* No 5 by Terrance S. Carter and Sean S. Carter dated November 30, 2004, available at: www.antiterrorism.ca; "In the Shadow of the Law" A Report by the International Civil Liberties Monitoring Group (ICLMG) in response to Justice Canada's 1st annual report on the application of the *Anti-Terrorism Act* (Bill C-36) May 14, 2003, available at www.charitylaw.ca.

defining the reference to “any other purpose”, in paragraph 2(2)(l) as one of the proposed heads of charity, the explanatory notes to the Charities Bill states that this paragraph is a more general description which brings in any other purposes which are analogous to the enumerated purposes. In tandem, the Bill introduces the statutory public benefit test in section 3. While the Charities Bill also addresses the registration and regulation of charities, charitable incorporated organizations, as well as governance and fundraising for charitable institutions, this paper only focuses on the elimination of the presumption of the public benefit test, as well as advancement of religion issues raised in the Charities Bill.

a) Elimination of presumption of public benefit

In addressing the public benefit test, subsection 3(2) of the Bill provides as follows:

In determining whether that requirement (public benefit test) is satisfied, in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit. [emphasis added]

...any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales

If passed, this provision would remove the existing common law presumption that purposes for relief of poverty, advancement of education, advancement of religion are for the public benefit. The explanatory notes state that this new requirement represents a leveling of the field for all types of charities. However, this new provision will narrow the current common law position for organizations applying under the traditional three heads of charity by imposing a public benefit threshold requirement that must be met by all charitable organizations in order to be considered charitable.

b) Advancement of religion issues

Various groups and individuals participated in the consultation process concerning the Charities Bill. One of these groups, the Churches Main Committee, raised issues concerning what it means to advance religion, which are similar to the concerns that have been identified earlier in this paper

concerning the position taken in relation to advancement of religion in the recent CRA proposed policy statements on “Applicants Assisting Ethnocultural Communities”⁶⁰ and “Guidelines for Registering a Charity: Meeting the Public Benefit Test.”⁶¹

In this regard, churches in the UK expressed concern regarding the “rather narrow understanding of the types of body currently entitled to charitable status under the head of advancement of religion, the breadth of activities those bodies undertake and the nature of the public benefit which may accrue from those activities.” For example, the churches pointed out that the statements made in the government publication on “Private Action, Public Benefit” imply that “all or most charities concerned with the advancement of religion are involved in providing opportunities for public worship or evangelistic/missionary activity. They go on to state that “in fact, currently accepted religious purposes in the Church of England are much broader and include the promotion of worship, the promotion of the work of religious communities, encouraging spiritual life, nurturing young people in the Christian faith, promoting particular aspects of the Christian Faith, such as the Anglican Society for the Welfare of Animals.”

The Churches also argued that the statements erroneously assume that “the benefit derived from religious belief and practice will be confined to adherents alone.” Their concern is that “if the existing presumption of public benefit is removed, decisions about the public benefit of religious activities will not preserve the current breadth of religious purposes accepted as charitable at common law.”

3. Statutory Definition of Charity in Australia Abandoned

In July 2003, the Australian Government released draft legislation that proposed a statutory definition of charity. As part of this initiative, the Australian Board of Taxation consulted with the charitable sector and submitted a report on the “Workeability of the *Draft Charities Bill 2003*”. The Board found that several provisions in the *Charities Bill 2003* represented a substantial departure from the current common law. Further, as noted by Australia’s Commonwealth Treasurer, the draft legislation was

⁶⁰ Ethnocultural Communities, *supra* note 3.

⁶¹ Public Benefit, *supra*, note 3.

discontinued because it “did not achieve the level of clarity and certainty that was intended to be brought to the charitable sector.” Based on the Board’s report, the proposed statutory definition of charity was abandoned.⁶²

As a result, the Australian Government will continue to rely on the “common law” definition of charity and recently announced the *Extension of Charitable Purpose Bill 2004*.⁶³ This Bill extends the common law definition of charity to include “non-profit organizations providing child care services, self-help bodies with open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention to the public”.⁶⁴ Traditionally, these entities experienced difficulty in satisfying the common law charitable tests.

Specifically, sections 1.19 and 1.24 of the explanatory memorandum to the *Extension of Charitable Purpose Bill 2004*, provide that self help groups and closed and contemplative religious orders “will be taken to satisfy the public benefit test” but “it will be necessary for the institution to satisfy the other general criteria before it will be taken to be a charity”. However, section 1.13 provides that non-profit organizations providing child care services must satisfy the general criteria including the public benefit test before it will be considered a charity. While the *Extension of Charitable Purpose Bill 2004*, will assist in determining charitable status in relation to Australian Commonwealth legislation, it does not apply to state legislation. Already, some commentators are pointing out that there was little justification to abandon the *Charities Bill 2003*, as well as inconsistencies in this new approach the Government has taken. Debate over the modified common law position and how the provisions under this Act will be interpreted in the courts will continue to be of interest.

4. Comment

The UK and Australian positions discussed above are examples of legislative approaches that other jurisdictions have initiated as a part of a regulatory reform to the law of charity. The dominant issues that surfaced during the consultation processes concerning the respective UK and the Australian charity bills

⁶² See media release available at: <http://www.treasurer.gov.au/tsr/content/pressreleases/2004/031.asp>, for further details.

⁶³ This Act may be cited as the *Extension of Charitable Purpose Act 2004*. This Act is taken to have commenced on July 1, 2004.

⁶⁴ Explanatory Memorandum to the *Extension of Charitable Purpose Bill 2004*.

are the lack of certainty and clarity, and the risk of narrowing the common law definition of charity. However, as with the administrative initiatives being undertaken by the CRA in the form of the draft policy statements, these initiatives are a positive development for the law of charity to the extent they evidence that the regulatory authorities are responding to the changing needs in society in order to enable charitable organizations to pursue their objectives. It will be interesting to follow the progression of the U.K. Bill and how the scope of what it means to be a charity will evolve and hopefully be more in keeping with the needs of the volunteer sector in the UK, especially in light of the path that the Australian government has taken in opting for a modified version of the common law definition of charity.

F. OTHER LEGISLATIVE INITIATIVES AFFECTING CHARITIES

1. Introduction

Besides the federal and international legislative reform that directly impacts charities discussed above, there are other federal and provincial legislative initiatives that have occurred in the last twelve months, some of which have already come into force, that establish new procedural and substantive standards of operation that have either a direct or indirect impact on how registered charities operate. Examples of these other legislative changes that are discussed in this paper include, the *Not-For-Profit Corporations Act* (Canada) (“Bill C-21”),⁶⁵ *Personal Information Protection and Electronic Documents Act* (Ontario) (“PIPEDA”),⁶⁶ *Charitable Purposes Preservation Act* (British Columbia) (“Bill 63”),⁶⁷ and *An Act to Amend the Criminal Code (Canada)* (“Bill C-45”).⁶⁸ As well, this paper also highlights the work of the Uniform Law Conference of Canada (“ULCC”) concerning the development of a *Uniform Charitable Fundraising Act* in Canada.

⁶⁵ A full text of Bill C-21 is available at: http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-21/C-21_1/C-21.html. (Bill C-21).

⁶⁶ 2000, c. 5.

⁶⁷ A full text of Bill 63 is available at: http://www.leg.bc.ca/37th5th/3rd_read/gov63-3.htm.

⁶⁸ In force as of March 31, 2004.

2. Canada Not-For-Profit Corporations Act (Bill C-21)

a) Introduction

On November 16, 2004, *An Act Respecting Not-For-Profit Corporations and Other Corporations Without Share Capital (Not-For-Profit Corporations Act)* (“Bill C-21”), received first reading in the House of Commons.⁶⁹ This federal legislation was one of the non-tax commitments made in the March 2004 Budget. The following is an overview of the purpose and scope of Bill C-21, and the transition procedures that will be required of all the entities to which it applies.

b) Scope and purpose of Bill C-21

Generally, the *Not-For-Profit Corporations Act* is based on the *Canada Business Corporations Act* (the “CBCA”). Its purpose, as stated in section 4 of the proposed Bill C-21, is to:

...allow the incorporation or continuance of bodies corporate as corporations without share capital, including certain bodies corporate incorporated under various Acts of Parliament, for the purposes of carrying on legal activities and to impose certain obligations on bodies corporate without share capital incorporated by a special Act of Parliament.

Section 3 of the Bill C-21 states that it applies to:

...every corporation and, to the extent provided for in Part 19, to bodies corporate without share capital incorporated by a special Act of Parliament.

The summary to Bill C-21 states that it:⁷⁰

- establishes a framework for the governance of not-for-profit corporations and other corporations without share capital.

⁶⁹ See news release by the Director of the CBCA available at <http://strategis.ic.gc.ca/epic/internet/incd-dgc.nsf/en/cs02682e.html>.

⁷⁰ See the Summary to the Bill at http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-21/C-21_1/C-21-2E.html.

- replaces Parts II and III of the *Canada Corporations Act* (“CCA”). Currently parts II and III of the CCA cover the requirements for federal not-for-profit corporations and corporations without share capital that were created by Special Acts of Parliament respectively.
- replaces the “letters patent” system of incorporation by an “as of right” system of incorporation. The current requirement for Ministerial review of letters patent and by-laws prior to incorporation is replaced by the granting of incorporation upon the sending of the required information and payment of a fee.
- provides for modern corporate governance standards, including the rights, powers, duties and liabilities of directors and officers, along with related defences, and financial accountability and disclosure requirements.
- sets out the capacity and powers of a corporation as a natural person, including its right to buy and sell property, make investments, borrow funds and issue debt obligations.
- sets out the rights of members, including the right to vote at a meeting of members, call a special meeting of members, advance proposals for consideration at meetings of members and access corporate records.
- provides requirements for financial review by a public accountant and financial disclosure based on whether a corporation has solicited funds and its level of annual revenue.
- gives the Director powers of administration, including the power to make inquiries related to compliance and to access key corporate documents such as financial statements and membership lists.
- includes remedies for members and other interested persons to address the conduct of a corporation that is oppressive or unfairly prejudicial to or unfairly disregards the interests of any creditor, director, officer or member.
- provides procedures for the amalgamation, continuance, liquidation and dissolution of a corporation and other fundamental corporate changes. The continuance provisions govern the continuance of bodies incorporated under other Acts and provide a power for the Governor

in Council to require a federal body corporate without share capital to apply for continuance under the enactment or be dissolved.

- modernizes the legal regime that applies to corporations without share capital created by Special Acts of Parliament by providing that those corporations are natural persons, requiring the holding of an annual meeting and the sending of an annual return, and regulating a change of a corporation's name and its dissolution.
- makes a number of consequential amendments to other federal Acts.

c) Transition requirements

Once Bill C-21 comes into force, every corporation currently covered by Part II of the CCA will have three years to formally make the transition to the new Act. The transition process will involve;⁷¹

- amending the corporation's by-laws; and
- filing new articles with Corporations Canada.

Corporations that fall within the ambit of the Act must be aware that the Director can take steps to dissolve any corporation that fails to comply with the transition requirements.

d) Comment

It is important to note that there is currently an opportunity for the public to comment on Bill C-21. In this regard, a summary of all comments will be posted on the Corporations Canada website as part of the public record unless otherwise requested by participants. This is an excellent opportunity for federally incorporated charities and or their lawyers to peruse the Bill and participate in the consultation process, especially in light of the fact that additional "information on how to make the transition to the new Act will be available when the new Act comes into force."

⁷¹ *supra* note 69.

3. Application of Privacy Legislation to Charitable and Non-profit Organizations

a) Introduction

As of January 1, 2004, the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) applies to every organization that collects, uses or discloses personal information in the course of commercial activities.⁷² On March 31, 2004, the Office of the Privacy Commissioner of Canada (the “Privacy Commissioner”) released a Fact Sheet (the “Fact Sheet”) entitled “The Application of the *Personal Information Protection and Electronic Documents Act* to Charitable and Non-Profit Organizations.”⁷³ In the Fact Sheet, the Privacy Commissioner stated, “*The bottom line is that non-profit status does not automatically exempt an organization from the application of the Act.*”

b) Application of PIPEDA to charitable and non-profit organizations.

All charitable and non-profit organizations should be aware of the Fact Sheet released on March 31, 2004, which clarifies the application of PIPEDA to these organizations. The only exception from PIPEDA is in provinces that enact legislation that is substantially similar to PIPEDA. To date, the only provinces that have enacted privacy legislation are Quebec, Alberta and British Columbia. However, Ontario has also enacted the *Personal Health Information Protection Act*,⁷⁴ which is limited to the collection of personal health information. As such, all organizations in Ontario that collect, use or disclose personal information in the course of commercial activities, other than personal health information, are still subject to PIPEDA. Whether a charitable or non-profit organization will be subject to PIPEDA depends on whether the organization engages in the kind of commercial activities contemplated by the Act.

In the Fact Sheet, the Privacy Commissioner stated the following:

⁷² See *Charity Law Bulletin* No. 28, dated November 29, 2003 by Mark Wong, for a detailed discussion of the impact of PIPEDA on charitable and not-for-profit organizations, available at: <http://www.charitylawbulletin.ca/2003/chylb28.pdf>.

⁷³ See http://www.privcom.gc.ca/fs-fi/02_05_d_19_e.asp, for a copy of the fact sheet.

⁷⁴ S.O. 2004, c. 3, which came into force on November 1, 2004.

The presence of commercial activity is the most important consideration in determining whether or not an organization is subject to the Act. Section 2 of the Act defines “commercial activity” as:

“... any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.”

Whether or not an organization operates on a non-profit basis is not conclusive in determining the application of the Act. The term non-profit or not-for-profit is a technical term that is not found in PIPEDA. The bottom line is that non-profit status does not automatically exempt an organization from the application of the Act.

In addition, the Privacy Commissioner made the following points in the Fact Sheet:

- Most non-profits are not subject to the Act because they do not engage in commercial activities. This is typically the case with most charities, minor hockey associations, clubs, community groups and advocacy organizations.
- Collecting membership fees, organizing club activities, compiling a list of members’ names and addresses, and mailing out newsletters are not considered commercial activities.
- Fundraising is not a commercial activity. However, some clubs, for example many golf clubs and athletic clubs, may be engaged in commercial activities which are subject to the Act.
- Although the Act does not generally apply to charities, associations and other similar organizations, [the Privacy Commissioner] recommend[s] that such organizations provide their members, donors or supporters with an opportunity to decline to receive further communications.

Accordingly, charitable and non-profit organizations should carry out privacy audits to determine what personal information they collect, use and disclose, and whether such personal information is subject to PIPEDA.

c) Comment

Although a charity may not be subject to PIPEDA, it is still important for the charity to adhere to the underlying privacy principles. Donors and members expect charities to recognize that an individual's right to privacy is an essential issue. As such, charities need to demonstrate that they understand the importance of maintaining the anonymity of donors and protecting personal information in their care and control, as their relationship with those that support their activities is founded on trust and they must show a commitment to maintaining this trust.

For these reasons, it is still recommended that charities have a privacy policy to provide all the safeguards as standardized in PIPEDA. The privacy policy confirms a charity's dedication to protecting privacy and maintaining the trust that its donors and members have placed in the charity.

4. Bill 63: Charitable Purposes Preservation Act (British Columbia)

a) Introduction

On October 21, 2004, the *Charitable Purposes Preservation Act (Bill 63)* received Royal Assent⁷⁵ in the British Columbia Legislature. This Act responds to the decision in *Christian Brothers of Ireland In Canada (CBIC)*.⁷⁶ In that case, the courts found that property that a charity holds in special purpose charitable trusts can be seized by a creditor to satisfy debts owed to tort claimants even if those claims arise from circumstances that are unrelated to the special purpose trust. Since leave to appeal the decision to the Supreme Court of Canada was denied,⁷⁷ the decision "increased the legal uncertainty about when charitable donations that are given in trust are, or ought to be preserved from being used to satisfy the debts and other liabilities of the charitable organization."⁷⁸

⁷⁵ See *Official Report of Debates of the Legislative Assembly (Hansard)*, Thursday October 21, 2004, Volume 26, No. 14.

⁷⁶ See also *Christian Brothers of Ireland in Canada (Re)* (1998), 37 O.R. (3d) 367 (Ont. Ct. (Gen. Div)), 21 E.T.R. (2d) 117, rev'd (2000), 47 O.R. (3d) 674 (Ont. C.A.); *Christian Brothers of Ireland in Canada (Re)*, (2000), 47 O.R. (3d) 674 (Ont. C.A.), rev'g (1998), 37 O.R. (3d) 367, application for leave to appeal to the Supreme Court of Canada dismissed, November 16, 2000; *Rowland v. Vancouver College Ltd.* (2000), 78 B.C.L.R. (3d) 87 (S.C.), 34 E.T.R. (2d) 60, aff'd (2001), 94 B.C.L.R. (3d) 249 (C.A.); See 32 *The Philanthropist*, Volume 18, No. 1 *Rowland v. Vancouver College Ltd.* (2001), 94 B.C.L.R. (3d) 249 (C.A.), aff'g 78 B.C.L.R. (3d) 87 (S.C.), application for leave to appeal to the Supreme Court of Canada dismissed, May 23, 2002.

⁷⁷ [2000] S.C.C.A. No. 277

⁷⁸ See *Official Report of Debates of the Legislative Assembly (Hansard)*, Monday October 18, 2004, Volume 26, No.9.

As the British Columbia Law Institute commented on the decision, “the concern is that the holding may be more widely adopted unless steps are taken to address this decision.”⁷⁹

b) The legislation

The *Charitable Purposes Preservation Act* (CPPA) “supplements the law of trusts as it relates to charitable giving by expressly recognizing discrete purpose gifts and setting out the obligations such gifts impose on a recipient charity and the role of the charity and the courts in relation to those gifts.”⁸⁰ Property can be accorded a discrete purpose in either of two ways: by donor intent or by court order. In this regard, “discrete purpose charitable property” is property the donor expressly or implicitly:

- gifts for a specified charitable purpose;⁸¹
- intends to, and is separately administered and used exclusively to advance the specified charitable purpose.⁸²

Generally speaking, this property:

- Must be identifiable with certainty; and
- Cannot be seized or attached to satisfy a debt or liability unrelated to the advancement of the discrete purpose for the property.

If a charity that is holding a discrete purpose charitable property is unable or unwilling to continue, keep, use or administer the property to advance the discrete purpose or if the charity becomes bankrupt or is being wound up, the property does not automatically lose its character as “discrete purpose charitable property.” Instead, a court can make any appropriate arrangements as

⁷⁹ British Columbia Law Institute (Committee on the Modernization of the Trustee Act), *Report on Creditors Access to the Assets of a Purpose Trust*, March 2003.

⁸⁰ See Explanatory note to the *Charitable Purposes Preservation Act*, from the 2004 Legislative Session: 5th session, 37th Parliament: First Reading, available at: http://www.legis.gov.bc.ca/37th5th/1st_read/gov63-1.htm.

⁸¹ subsection 2(1)(b)

⁸² subsection 2(1)(c)(i) & (ii)

necessary, or transfer the discrete property to a new charity in order to either advance the discrete purpose or another charitable purpose the court considers consistent with the discrete purpose.⁸³

The Act places obligations on the transferee charity that is assuming the discrete property by court order to pay from the property “any debts or liabilities arising from the actual or attempted advancement by the former charity of the discrete purpose that applies to the property before the court order.” The Act applies retrospectively to all “discrete purpose charitable property”, even if gifted before it was enacted, except for property that is the subject of the CBIC decision.

c) Implications of the *Charitable Purposes Preservation Act*

The CPPA will likely have a significant and positive impact on the operation of charities in British Columbia. Although the legislation is in its infancy and has not yet been interpreted by the courts, some possible implications of this enactment are that it will:

- Re-instill donor confidence that their intentions will be respected. Donors can be assured that property that complies with the rules within the Act will be protected from seizure or attachment to satisfy unrelated debts;
- Donors will be less reluctant to give large gifts (such as endowment funds) to charities, since they will have the assurance that their donations will be protected from present and future creditors of the charity that are unrelated to the discrete character of their donations; and
- Provide certainty to charities and bolster their ability to raise funds, given they will be able to assure donors of the legislative boundaries within which their donations may be insulated from unrelated tort claims.

It is hoped that a similar legislative initiative will be initiated in Ontario as well.

⁸³ subsection 3(4)

5. Bill C-45, *An Act to Amend the Criminal Code*⁸⁴

a) Introduction

The Federal Government recently introduced amendments to the *Criminal Code of Canada*,⁸⁵ (the "Criminal Code"), which affects when organizations and their representatives will face criminal liability for negligent conduct. Bill C-45, "*An Act to Amend the Criminal Code (Criminal Liability of Organizations)*," came into force on March 31, 2004 and with this imposes a Criminal Code duty on organizations and their representatives to protect their workers and the public by creating a Criminal Code duty similar to the duty already found in the *Occupational Health and Safety Act* (Ontario), which requires that employers take every reasonable precaution to protect their employees.

b) Effect of Bill C-45 on criminal liability

The amendments instituted by Bill C-45 will apply not only to corporations, but to all types of organizations, including non-share capital corporations, profit-making corporations, partnerships, and unincorporated organizations. "Organization" is defined in Bill C-45 to mean:

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons.

The key reforms to the Criminal Code therefore include, but are not limited to:

- (1) Imposing criminal liability on organizations will no longer require that the criminal conduct or act of the organization be committed by a directing mind of the organization. Traditionally, to impose criminal liability on corporations in Canada, the Crown, applying

⁸⁴ This was discussed in *Charity Law Bulletin* No. 35, authored by Mervyn F. White & Bruce W. Long, dated January 30, 2004, available at www.charitylaw.ca.

⁸⁵ R.S.C. 1985 c.C-46

the “identification theory”, had to establish that the directing minds of the organization and the organization itself were effectively one and the same in committing the offence. Establishing this will no longer be necessary to obtain a conviction under Bill C-45.

- (2) The Crown will now be able to “cobble together” the essential elements of a criminal offence, such that the *actus reus* and the *mens rea* can be attributed to separate individuals within the offending organization in order to establish criminal liability.
- (3) The class of representatives of the offending organization who can commit or contribute to the *actus reus* of the offence has been expanded from directors and officers to all representatives who act on behalf of the organization, such as directors, partners, employees, members, agents or contractors of the organization.
- (4) For crimes of criminal negligence, the *mens rea* of the offence will be proven against offending organizations from the collective fault of the senior officers of the organization. In other words, a reckless corporate culture, which is tolerated by senior management, may be sufficient to establish the *mens rea* of the criminal offence.
- (5) Where the criminal offence is based on allegations of criminal intent or recklessness, the Crown will establish the *mens rea* where a senior officer is a party to the criminal offence, or where a senior officer had knowledge of the offence but failed to take all reasonable steps to prevent or stop the offence.
- (6) Finally, a specific and explicit legal duty will be imposed on those who direct the work or task of others, to ensure that such individuals take all reasonable steps to prevent bodily harm at work.

c) Criminal negligence – Section 22.1

To facilitate imposing liability on organizations for criminal negligence, the amendments add section 22.2 to the Criminal Code, which reads as follows:

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
- (i) one of its representatives is a party to the offence, or

- (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

It is immediately evident from a reading of the new Criminal Code provision that criminal liability for negligence will no longer need to derive from the same individual, as the Actus reus can be committed by the organization's representatives while the mens rea can stem from the organization's senior officers. Furthermore, the Actus reus itself need not be derived from one individual, as more than one representative can cause it, and the mens rea also need not be derived from one individual, as it can stem from more than one senior officer. In short, an organization's criminal liability for negligence can now be established through the aggregation of the representatives' and senior officers' acts, omissions and state of mind.

There are a number of identifiable problems with section 22.1 of the Criminal Code:

- (i) Section 22.1 will impose criminal liability for negligence on organizations based on the collective results of the policies, procedures and omissions of the organization, as well as the actions of the organization's representatives. In this manner, an organization may be liable for criminal negligence even though no single individual within the organization has committed a criminal offence.
- (ii) Section 22.1 will impute the individual *mens rea* of a senior officer to the entire organization. This is a marked change from the traditional concept of corporate criminal liability developed at common law, which required that the directing minds of the corporation be found to be the corporation's mind before imposing criminal liability on the corporation for the directors' criminal negligence.
- (iii) A senior officer is defined by Bill C-45 as:

“a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”.

This broad definition has effectively eliminated the common law concept of limiting corporate criminal liability to the conduct of only those senior officers with decision-making powers.

- (iv) Section 22.1 requires that the senior officers depart markedly from the “standard of care”. There is no clear definition of this standard and it would vary depending on the activities of the organization.

It is, however, encouraging to note that there is still one conceptual limit on how criminal liability may be imposed on organizations. That is, the act of criminal negligence must be within the scope of the representative’s authority before it will be imputed to the organization.

In light of the broad range of individuals whose actions and intentions can trigger the criminal liability of the organizations they represent, it is highly recommended that organizations take immediate steps to establish a system of checks-and-balances to monitor the acts and omissions of its representatives and senior officers in fulfilling their duties.

- d) Criminal offences Other than negligence – section 22.2

The passage of Bill C-45 also makes it easier to hold organizations accountable for criminal offences other than negligence (i.e. criminal offences requiring intent or recklessness, which is the majority of offences in the Criminal Code) by adding section 22.2 as follows:

In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

This new provision of the Criminal Code is more limiting than section 22.1, in that criminal liability is restricted to the conduct of the senior officers. Furthermore, the *actus reus* and the *mens rea* will still need to be derived from the same individual (i.e., from one senior officer). However, the definition of a “senior officer” remains broad and, thus, an organization is as equally liable for the criminal conduct of someone with operational management authority as it is for someone with policy-making authority. The obvious problems with section 22.2 are as follows:

- (i) It is difficult to see the difference between subsections (a) and (b). A senior officer who has the mental state required, and directs others to commit the offence, is a party to the offence.
- (ii) It states that an organization will be criminally liable if one of its senior officers has “the mental state required to be a party to the offence” and directs others to commit the offence. This mental state is not defined and will require judicial clarification. As this new provision deals with criminal offences, the mental state must include intention, be it general or specific. Once again, due to the high possibility that an organization may become criminally liable as a result of the criminal conduct of one senior officer, it is highly recommended that organizations take immediate steps to establish a check-and-balance system to monitor the acts and omissions of its senior officers in fulfilling their duties.

- e) A new duty – section 217.1

Bill C-45 has also introduced a form of “criminal negligence” into the Criminal Code to address workplace safety, or the lack thereof, by adding section 217.1 as follows:

Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

This duty to prevent bodily harm applies to both individuals and organizations as the term “everyone” has been defined to include an organization. Furthermore, this duty is not limited to the

senior officers of an organization, but is imposed on anyone who directs, or has the authority to direct, another person. Most importantly, it should be noted that the new provision in the Criminal Code covers not only “work”, but tasks as well. This is broad enough to cover most activities, including those not traditionally considered work, but also those of a volunteer nature. When combined with the definition of “organization”, which includes an “association of persons”, it is reasonable to conclude that the activities of volunteers carried out on behalf of non-profit organizations, such as churches and charities, will be covered by this provision. As such, anyone who undertakes, or has the authority, to direct the activities of volunteers, members, employees or agents of charities, non-profit organizations, churches or philanthropic groups will be under a legal duty to take reasonable steps to prevent bodily harm to those persons under their control and direction.

The problem with section 217.1 is that its location in the Criminal Code suggests that it is a criminal offence, but its wording is insufficient to meet even the standard of advert negligence, which is the lowest level of *mens rea* required in the Criminal Code. In fact, the use of the term “reasonable steps” makes it more akin to a regulatory offence. It will be interesting to see how the courts resolve this ambiguity. In the meantime, many legal commentators are assuming that section 217.1 will be designated as a criminal offence and that, more specifically, it will be further designated as a criminal negligence offence. As such, the legal community is also assuming that the standard of care and the penalties for violating section 217.1 will be the same as those applicable to a criminal negligence offence. However, the ambiguity concerning what is required under section 217.1 paired with its potential for criminal penalties may give rise to challenges under the *Canadian Charter of Rights and Freedoms*.

This could potentially expose those who direct the work or task of others to criminal sanction for conduct that would traditionally be considered as negligence, and more appropriately dealt with through existing regulatory provisions, such as those found in the *Occupational Health and Safety Act* (Ontario). It will also most likely lead to a blurring of the distinction between civil and criminal negligence. All this will have a detrimental effect on insurance coverage, which will be discussed in the next section.

The use of the term “reasonable steps” have led some legal commentators to feel that there is still a defence of due diligence available to an organization charged with a violation of section 217.1 under the Criminal Code. Others have disagreed as the defence of due diligence is only applicable with regulatory offences. At the very least, however, taking reasonable steps would assist in defending against criminal negligence charges. Therefore, it is highly recommended that organizations exercise due diligence by:

- Conducting a legal audit to review the organization’s existing policies and programmes to determine whether or not they are inconsistent with applicable legal requirements;
- Having an ongoing audit programme;
- Establishing a safety system and ensuring that all reasonable steps are taken to ensure that the system is effective;
- Implementing business methods in response to any discovered needs;
- Requiring that the corporate officers report to the Board in a scheduled, timely fashion;
- Ensuring that all corporate officers are aware of the standards of their industry;
- Requiring that corporate officers immediately and personally react when they see that a system has failed;
- Publicizing both contingency and remedial plans for dangers or problems;
- Exercising due diligence in selecting competent persons when any of the officers’ duties are delegated;
- Utilizing reports from outside professionals;
- Recording all steps taken to ensure that due diligence is being exercised;
- Making due diligence an integral part of every employee’s performance review; and
- Directors and senior managers should exhort those whom they manage to reach an accepted standard of practice.

f) Effect of Bill C-45 on insurance coverage

By introducing the possibility of bringing criminal negligence charges against those who direct the work of others, Bill C-45 will seriously affect insurance coverage for directors and officers, where such insurance coverage was previously available. For example, many Directors and Officers liability insurance policies provide for a duty to defend against civil lawsuits founded in negligence, or against allegations laid under regulatory legislations, such as the *Occupational Health and Safety Act* (Ontario). This duty to defend would impose on the insurer a duty to provide and pay

for reasonable legal expenses incurred in defending a claim. Normally, such a duty to defend would not extend to allegations of criminal conduct. This is based, in part at least, on the public policy principle that one cannot buy insurance to cover criminal activities. As such, it is possible that a director or officer could be charged under the new provisions of the Criminal Code for conduct that would have traditionally been considered a regulatory offence (and for which a duty to defend would have been imposed upon the insurer) and not be covered for legal defence costs.

What is striking about this is that activities which previously resulted in civil liability based on negligence may now be adjudged criminal in nature. This, in turn, will detrimentally affect insurance coverage. It must be remembered that insurance policies usually impose two obligations on insurers: the duty to defend (discussed above) and the duty to indemnify (i.e., the duty to pay for the damages sustained). Most insurance policies, either through specific exclusionary clauses, or caselaw based on public policy, generally do not cover conduct that is designed to cause a loss or for which the loss is predictable. Criminal conduct, by its very nature, is predicated in the predictability of the outcome or loss sustained. This is the *mens rea* of the criminal offence. A criminal act requires that a perpetrator turns his or her mind to committing the act, or, in the certain limited cases, wilfully turn his or her mind away from the dangers posed by his or her activities (wilful blindness or recklessness).

As such, the distinction between insurance coverage for non-intentional torts versus intentional torts is very important in light of the amendments introduced through Bill C-45. By its very nature as a criminal charge (which contemplates either a form of criminal intent or a recklessly negligent mind), Bill C-45, and specifically section 217.1, may have the effect of creating a form of “intentional” or “criminal” negligence. While this may seem illogical and contradictory at first glance, it would appear that the intent of the legislation is to create a new level or type of negligence, which is based on the recklessness of an organization, but for which the penalties imposed are more stringent. It would seem appropriate to anyone that, while a “new” form of criminal negligence has been created by the legislation, the underlying negligence – based on the foreseeability of the event – has not changed, and as such insurance coverage should be provided. It should, however, be anticipated that insurers will attempt to limit their obligations to cover losses

arising from such criminal negligence and will argue that it is an excluded risk. Although there are reasonable arguments to be made that insurance should be extended to cover such losses, such arguments may be resisted by the insurers, and will probably require judicial review and determination.

g) Comment

In short, the conduct contemplated by section 217.1 would normally be dealt with through civil concepts of negligence law, or regulatory legislation such as the *Occupational Health and Safety Act* (Ontario). Now that such conduct may be adjudged criminal, insurers will be well-placed to deny either a duty to defend or a duty to indemnify if criminal charges are laid under section 217.1 or if a civil claim for damages is pleaded too broadly or where the conduct in question is described in terms not truly negligent. Until Bill C-45 comes into force and the courts are given an opportunity to interpret the new provisions, however, it is unclear that a violation is a criminal offence or that there will be no insurance coverage for a violation of section 217.1. In the meantime, it is highly recommended that organizations take pro-active steps in exercising due diligence, which may assist in defending against criminal charges.

6. Uniform Law Conference of Canada (Position Paper on Charitable Fundraising)

The Uniform Law Conference of Canada, Civil Law Section, (ULCC) released a position paper on “Charitable Fundraising” in April 2004,⁸⁶ which was accepted by the ULCC in August 2004. The resulting draft legislation that is expected by August 2005, will invariably affect charities across Canada.

The 2004 ULCC paper advocates the introduction of a standard legislative response to instances of fraudulent, inept and unethical fundraising practices by charities and fundraising businesses. Professor Albert Oosterhoof, the author of the ULCC paper, bases his recommendations on a series of reported cases in the media that pointed to instances of unethical fundraising practices. Professor Oosterhoof acknowledges that though these infractions are not rampant in the sector, they stand to undermine the

⁸⁶ Uniform Law Conference of Canada (Civil Law Section), *Charitable Fundraising*, Albert H. Oosterhoff, April 2004.

integrity of the sector if allowed to continue unchecked. The paper highlights some of the significant problems concerning charitable fundraising in the sector as follows:

- ♦ no standard method by which charities account for expenses, for example, the allocation of expenses amongst administrative costs and charitable activity;
- ♦ shortcomings in the existing law, evidenced in the lack of coordination between the provinces and between the federal authorities and the provinces; and
- ♦ the inability, because of confidentiality rules, of regulatory agencies to keep each other informed of allegations of wrongdoing and of investigations into such allegations⁸⁷

In proposing a solution, Professor Oosterhoof refers to the legislative response to the issue of charitable fundraising initiated in Alberta, which in his view, has enabled the province to ban undesirable activity and thereby protect the public and legitimate fundraising activity. The author recommends the adoption of a *Uniform Charitable Fundraising Act* to address these problems highlighted above and details the issues that should be considered in this regard.

Given the findings in the Statistics Canada NSNVO Survey discussed earlier in this paper, and particularly the need for capacity building with regards to smaller charities, it is notable that the ULCC paper suggests that some of the issues that this legislative process should take into account are the differences between charities so that smaller charities with limited resources are not overburdened with reporting requirements and that challenges to administrative decisions are kept affordable in order to ensure smaller charities are not disadvantaged.

G. RECENT CASELAW AFFECTING CHARITIES

1. Introduction

Over the course of the last twelve months, the courts have rendered a number of decisions that are of significance to charities. In two recent decisions, the courts have rendered expansive interpretations that will impact the scope of what it means to be charitable. This development was evident in decisions addressing property tax exemptions under the *Assessment Act (Ontario)*⁸⁸ and the Supreme Court of

⁸⁷ Reference is being made here to s.241 of the ITA as well as provincial privacy legislation.

⁸⁸ R.S.O. 1990, c. A.31

Canada decision addressing the scope of freedom of religion under the Charter. In addition to these developments, this paper also discusses other cases in which the courts endorsed CRA decisions to deny or revoke charitable status, the challenges involved in enforcing donor pledges, the use of the cy-pres doctrine to facilitate achieving a charity's disbursement quota, what constitutes "commercial activity" for the purposes of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), as well as the implications these decisions will have upon registered charities.

2. Advancing Religion Cases

a) The Federal Court of Appeal decision in *Fuaran Foundation*

The 2004 Court of Appeal decision in *Fuaran Foundation v. Canada Customs Revenue Agency*⁸⁹ is the most recent case in which the courts endorsed CRA's decision not to register an organization (the Fuaran Foundation) as a charity under the ITA because it did not fall under the advancement of religion head of charity. In that case, the Fuaran Foundation was a Canadian foundation that supported a Christian Retreat Centre in Great Britain, which was operated on behalf of the Fuaran Foundation, by its agent.

While the Fuaran Foundation's listed objectives in its application for charitable status were focused on the advancement of religion, in addressing the appeal, the courts agreed with CRA's position that the operations did not advance religion for the following reasons: the Foundation's objects were overly broad and could allow it to undertake non-charitable activities as well, attendees at the Retreat Centre had complete discretion concerning whether they wished to participate in religious activities. In dismissing the appeal, Justice Sexton was not convinced that the Foundation's activities were exclusively for the purpose of advancing the Christian religion and ruled that it was not unreasonable for CRA to deny registration on this basis.

⁸⁹ 2004 FCA 181 ("Fuaran Foundation"). See *Charity Law Bulletin* No.51, dated August 23, 2004, available at www.charitylaw.ca, for more information on the *Fuaran Foundation* decision.

In reaching this decision, the court analogized Justice Iacobucci's position in *Vancouver Society of Immigrant Visible Minority Women v. Canada (Minister of National Revenue)*⁹⁰ on the threshold requirement for registering a charity. In that case, Justice Iacobucci stated that:

Simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished, but need not be, is not enough.

In addition, the court referred to the definition of what it means to advance religion from the English decision in *Keren Kaymeth*⁹¹ as:

Promoting spiritual teaching of the religious body concerned and the maintenance of the spirit of doctrines and observances upon which it rests.

In concluding that the Foundation's activities did not fall within the ambit of advancing religion, the court demonstrated deference to tradition and narrowly construed the practices constituting "advancing religion" in the charitable sense. As a result, this decision could be a hurdle to religious organizations that do not have as their aim a focused purpose of either religious proselytizing or worship. However, as will be seen below, the subsequent decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem*⁹² may mean that the *Fuaran* decision will not have a lasting effect.

- b) Supreme Court of Canada freedom of religion cases
 - i) The Supreme Court decisions in *Syndicat Northcrest v. Amselem* and *Congregations Des Temoins*

There have been two recent Supreme Court of Canada decisions that have raised the issue of Charter rights in relation to freedom of religion. The first case is *Syndicat Northcrest v Amselem* (*Amselem*)⁹³ and the second case is *Congregation des Temoins de Jehovah de St-*

⁹⁰ [1999] 1 S.C.R. 10

⁹¹ [1931] 2 K.B. 465

⁹² [2004] S.C.J. No. 46 ("Amselem").

⁹³ *Amselem*, *supra*, note 92.

Jerome-Lafontaine v Lafontaine (Village).⁹⁴ These two cases are generally important, since determining the scope of freedom of religion under the Quebec (and Canadian) Charters will likely provide some boundaries within which the definition of advancement of religion should operate. Even though both cases were decided differently, the principles that the courts endorsed in these cases and the resulting implications that these cases have for expanding what it means to advance religion as a head of charity are important.

ii) *Amsalem* decision

In *Amsalem*, the Supreme Court of Canada rendered a broad interpretation of the Charter right to religious freedom. In this case, the two appellants were Orthodox Jews who co-owned residential units in a condominium complex. A by-law in their declaration of co-ownership restricted them from building structures on their balconies. At issue was the appellants' ability to erect a "succah" (a small enclosed temporary hut or booth made of wood or other material and open to the heavens) on their individual balconies during the nine-day Jewish festival of Succot. When the appellants refused to remove the "succahs", the respondent Syndicate applied for and was granted an injunction on the basis that the by-law did not violate the Quebec Charter.

In the Supreme Court's decision, Justice Iacobucci rejected the "unduly restrictive" view of freedom of religion taken by the Court of Appeal. In finding that the declaration of co-ownership infringed the appellants' religious rights under the Quebec Charter, Justice Iacobucci for the majority, concluded that freedom of religion includes:

Freedom to undertake practices, and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom

⁹⁴ [2004] S.C.J. No. 45 ("Congregations Des Temoins")

of religion. It is the religious or spiritual essence of the action, not any mandatory or perceived-as-mandatory nature of its observance that attracts protection. [emphasis added]

Justice Iacobucci reiterated that: “freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion.” In addition, he stated that “it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.” He also stated that there should be no legal distinction between “obligatory” and “optional” religious practices.

The Supreme Court decision in *Amselem* resonates on two main points. Firstly, it establishes that it is the spiritual essence of an action that is sincerely held, and not the mandatory nature of its observance that attracts protection. Further, it reinforces that it is inappropriate for courts to decipher contentious matters of religious law. Together, these principles expand the scope of protected freedom of religion to practitioners of a faith, and not just to believers of a faith.

This decision is also important to potential applicants for charitable status because it makes clear that the state and judges must not inquire into the validity of an individual’s religious beliefs or practices. Therefore, this may impact on the extent to which CRA will consider what constitutes advancing religion where reviewing applications for charitable status by organizations whose activities are believed by their members as advancing religion but which are not necessarily mandated by the doctrine, teaching or practice of that particular faith. As a result, it is hoped that this Supreme Court decision could provide significant guidance to CRA on how it makes its decisions on charitable registration under advancement of religion.

iii) *Congregation des Temoins* decision

In *Congregation des Temoins*, a Jehovah’s Witness congregation (congregation) appealed a Quebec Court of Appeal decision dismissing their application for mandamus, ie. a writ used to compel performance of a public duty, which in this case was done to compel a lower court to exercise its jurisdiction. In this case, based on a municipal by-law, places of worship could

only be built in regional community use zones. After failing to acquire a lot in this zone, the congregation purchased a lot in the commercial zone and applied twice for a zoning change. On both occasions, the municipality refused their application without giving reasons. At trial, the judge dismissed the application for mandamus on the basis that lots were available in the community use zone. The Quebec Court of Appeal set aside this finding of fact but dismissed the appeal on the basis that a lack of land was beyond the municipality's control and that the municipality was under no positive obligation to preserve freedom of religion.

The issue before the Supreme Court of Canada was whether the municipality lawfully denied the rezoning application to allow the congregation to build a place of worship. Chief Justice McLachlin, in a narrow 5 to 4 majority decision, allowed the appeal and remitted the matter to the municipality for reconsideration. Chief Justice McLachlin decided the case not on Charter grounds but on the basis that in refusing to provide reasons for its decisions, the municipality breached its duty of procedural fairness to the congregation.

It is noteworthy that the dissenting judgment in this case hypothesized that a congregation's religious rights could have been infringed if no land was available on which to build a place of worship. However, even then, the dissenting judgment would have restored the trial judge's finding of fact that there was a lot available that the congregation could purchase. As a result, in restoring the trial judge's finding of fact in this regard, there was justification for dismissing the application of the congregation, since their freedom of religion charter rights could not have been violated when land was available. Since this case was decided by the court on procedural grounds, with no commentary on the definition of religion, the principles articulated in the *Amselem* decision should remain as the judicial standard in defining the scope of religion

3. The Federal Court of Appeal Decision in *College Rabbinique de Montreal Oir Hachaim D' Tash*

In the case of *College Rabbinique de Montreal Oir Hachaim D' Tash v Canada (the College)*⁹⁵, the courts endorsed the CRA's decision to revoke the appellant charitable organization's registration for not

⁹⁵ [2004] F.C.J. No. 424

complying with the rules set out in the ITA. In particular the Federal Court of Appeal determined that CRA was justified in revoking the College's charitable status for:

- (a) Contravening subsection 118.1(1) of the ITA by providing official donation receipts for amounts that were not gifts;
- (b) Not devoting its resources to charitable purposes and activities;
- (c) Failing to maintain proper books and records in accordance with subsection 230(2) of the ITA;
- (d) Making improper loans to non-qualified donees;
- (e) Making loans that were not considered to be at arm's length.

The College sought leave to appeal this ruling to the Supreme Court of Canada but leave was denied on September 30, 2004. As a result, on October 15, 2004, CRA announced that it was revoking the College's charitable status effective October 16, 2004 on the basis of non-compliance⁹⁶.

It is important to note that this was an abbreviated judgment and offered little means to assess what facts contributed to these allegations by CRA. Nevertheless, it is worth noting that the fact that the appellant was not given the opportunity to respond to some of the grounds put forward in the notice of intention to revoke was not sufficient a basis to alter the court's decision in light of the fact that the Minister put forward sufficient grounds to support his decision and because the appellant was given full opportunity to respond to the revocation decision.

4. Property Tax Exemption in *Ottawa Salus*

*Ottawa Salus Corporation v. Municipality Property Assessment Corporation et al*⁹⁷ ("Ottawa Salus") is a recent decision that addresses the relevancy of using land for the relief of poverty in determining whether the charity "occupies" the land and therefore qualifies for exemption from property tax under the *Assessment Act*.⁹⁸ Ottawa Salus Corporation is a charitable corporation that provides housing and support services to mentally ill and unemployed persons in Ottawa. Ottawa Salus appealed a Municipal

⁹⁶ CRA news release available at <http://www.cra-arc.gc.ca/newsroom/releases/2004/oct/1015ottawa-e.html>.

⁹⁷ [2004] O.J. No. 213.

⁹⁸ Assessment Act, *supra* note 88.

Property Assessment Corporation (MPAC) assessment that assessed some of its properties as taxable. The issue before the Court of Appeal was whether the Divisional Court judge erred in purposively interpreting the word “occupy” in the former paragraph 12 of subsection 3(1) of the *Assessment Act*, which provided charitable organizations with a statutory exemption from property tax for land:

...owned, used and occupied by any charitable, non-profit philanthropic corporation organized for the relief of the poor if the corporation is supported in part by public funds. [emphasis added]

The Appellant (“MPAC”) felt that the 1998 amendments to paragraph 12, of subsection 3(1) of the *Assessment Act* narrowed the scope of the exemption and therefore Ottawa Salus’ residential properties must be strictly owner-occupied in order to maintain its tax exempt status.

At the Court of Appeal, MacPherson J. endorsed the Divisional Court finding that “the word “occupy” is not limited in its ordinary meaning to physical occupation.” The courts therefore interpreted the word “occupy” against the backdrop of the organization’s purpose to relieve poverty and held that since the tenants, though third parties, had a connection to the charity and were the recipients of the charity’s work to relieve poverty, “occupation” for the purposes of the exemption does not require actual or exclusive occupation by the charitable institution. If the property is being used directly by the charity to further its objective of relieving poverty, this is sufficient to satisfy the requirements under this category and enable a charitable organization to qualify for property tax exempt status.

Two concepts can be drawn from the Ottawa Salus decision. First actual “occupation” for the purposes of the Act must be interpreted more expansively when viewed in relation to an organization whose purpose is relief of the poor. Secondly, besides reinterpreting the scope of “occupation”, the decision emphasizes that in assessing “occupation”, there must be a nexus between the occupants of the property and the organizations objects in order to qualify for tax exempt status.

5. Enforcing Donor Pledges in *Brantford General Hospital*⁹⁹

The Ontario Court of Appeal recently dismissed an application for leave to appeal from the decision of Justice Milanetti in the case of *Brantford General Hospital Foundation v. Marquis Estate*.¹⁰⁰ In this case, Mrs. Helmi Marquis, a regular donor to the Brantford General Hospital Foundation, signed a pledge to donate \$1- million over a five year period to the Brandford General Hospital Foundation's capital campaign. A month after making the first installment of \$200,000, in April 2004, Mrs. Marquis died. In her Will, Mrs. Marquis left the Foundation a bequest of one-fifth of the residue of her estate, but there was no specific reference to the outstanding pledge amount of \$ 800,000, which her Estate Trustees refused to pay.

The decision in *Brantford General Hospital* does not establish new law, but rather reinforces the common law principle that a pledge is unenforceable for lack of consideration. Further, the doctrines of part performance and estoppel will only allow enforcement of a pledge in cases where there is a pre-existing legal or contractual relationship between the parties. Two implications can be drawn from the decision. First, there should be a correlation between testamentary and *inter vivos* gifts. In drafting a will, it is important that legal counsel ensure the testamentary gift will continue to honour the *inter vivos* gift and allow for the testator's wishes to be fulfilled. Secondly, the case reinforces that a pledge is not a binding contract, so to be enforceable a pledge must be accompanied by consideration.

6. *Cy Pres* Granted to Facilitate Meeting Disbursement Quota in *Toronto Aged Men's and Women's Homes*¹⁰¹

In *Toronto Aged Men's and Women's Homes v. Loyal True Blue and Orange Home*,¹⁰² (the "Toronto Aged Men's and Women's Homes case"), the Ontario Superior Court of Justice exercised its inherent jurisdiction to alter the terms of a charitable trust (the "Trust") to address the Trust's inability to meet its

⁹⁹ For a fuller discussion on donor pledges and the Brandford General Hospital decision, reference should be made to Timothy G.Youdan's paper on "Charitable Donations and Pledges" presented at the 7th Annual Estates and Trusts Law Summit, December 1, 2004.

¹⁰⁰ [2004] O.J. No. 1705 (C.A.), aff'g (2003), 67 O.R. (3d) 432 (Sup. C.J.) ("*Brantford General Hospital Foundation*").

¹⁰¹ For a detailed discussion of this decision reference should be made to *Charity Law Bulletin* No. 53, dated September 28, 2004, available at www.charitylaw.ca.

¹⁰² [2003] O.J. No. 5381

disbursement quota due to the rate of return on its capital assets. Coincidentally, the difficulties of charities meeting their disbursement quota was addressed in the March 2004 Budget.

a) Facts of the case

A Trust created by the Will of Mary Elsworth Stillman (the “Testatrix” or “Stillman”), amounting to \$3,464,075 on death in 1961 and \$19,306,466 on June 30, 2001, contained terms requiring the capital to be retained and kept invested, with the net income paid out to two charitable beneficiaries. The Trust was intended to be a perpetual endowment, with Stillman expressing a preference for investments in equities in order to protect the value of the residue against the effects of inflation. This was achieved to an extent by the investment policy adopted by the trustee in accordance with Stillman’s intentions, with an approximate 10 percent loss of purchasing power by 2001, and a further six percent loss between June 30, 2001 and June 30, 2002 due to the decline in share prices. The combined effect of the investment strategy and the absence of any authority to distribute capital resulted in the Trust’s inability to meet its 4.5 percent disbursement quota for the fiscal years ended June 30, 1997 through June 30, 2002, instead only averaging 3.4 percent to 4.1 percent of the value of its investment property for those years. The court indicated that the disbursement quota was calculated as 4.5 percent of the average fair market value of the investment property in the immediately preceding 24-month period, pursuant to the ITA. The cumulative shortfall was \$738,000, potentially exposing the Trust to having its charitable registration revoked, and liability for a revocation tax. Although the Minister’s discretion under s. 149.1(5) of the ITA to reduce a charity’s disbursement quota is referred to in the decision, no explanation of whether the Trust had applied for such a reduction of the disbursement quota, which would likely have been granted, was provided.

The trustee and charitable beneficiaries applied to the court for approval of a scheme for the administration of the Trust that would permit the trustee to diverge from the directions in the Will and adopt a “total return” investment and distribution policy. Under a total return investment policy, the best returns of income and capital gains are sought without distinguishing between them.

The central issues in the application were whether the court had jurisdiction to give its approval, and whether such jurisdiction should be exercised in the manner requested.

b) Findings of the court

The court found that the terms of a charitable trust may be varied when the conditions for an application of the *cy pres* jurisdiction are satisfied, namely that the purposes of the Trust have become impossible or impracticable to achieve if it is to continue to be administered in accordance with the provisions of the Will.

c) *Cy Pres* jurisdiction exercised

“*Cy pres*” is an equitable doctrine under which a court changes a written instrument, such as a trust, with a gift to charity “as closely as possible to the donor’s intention,” so that the gift does not fail. In this case, such a variation would involve a departure from the intentions of the Testatrix and would override her express directions in the Will. The court held that its jurisdiction would permit the authorization of encroachments on capital to the extent required to satisfy the Trust’s disbursement quota.

Accepting that the combined effect of the investment strategy and the absence of any authority to distribute capital resulted in the Trust’s inability to meet its disbursement quota in successive years, and the potential for serious consequences should this continue, the court concluded that the administration of the trust in accordance with Stillman’s intentions was no longer practicable and that a *cy pres* order was appropriate to rectify the problem. According to the court, the existence of the Minister’s discretion, under s. 149.1(5) of the ITA to reduce the disbursement quota was not sufficient to make the purposes of the trust practicable in these circumstances. Consequently, as the administration of the trust in accordance with the terms of the Will jeopardized the Trust’s status as a charity, it was sufficient to constitute an impracticability that justified the exercise of the court’s *cy pres* jurisdiction.

The total return approach proposed by the applicants was found to provide a degree of flexibility that should enable an increase in the return from investments and thereby protect the Trust's purchasing power or real value, notwithstanding the fact that distributions of capital may be made. This was likely to accommodate the overall intentions of the Testatrix with respect to both investments and distributions to a greater degree than an order authorizing encroachments on capital from time to time. The scheme proposed by the applicants for investments and distributions in accordance with the total return model was approved, with some modifications including fixing the distribution rate at 4.25 percent.

d) Disbursement quota alleviation required

Despite the stated CRA position against revoking charities that failed to meet their disbursement quota as a direct result of the current low interest rates which required affected charities to request an alleviation pursuant to s. 149.1(5) of the ITA, the court did not regard it as sufficient to justify inaction on the part of the court as far as the future administration of the Trust was concerned. However, in order to address the accumulated shortfall, the court directed the trustee to make such a request to the CRA.

e) PGT and Attorney General authority

Addressing submissions made by the PGT, the court refused to extend the authority of the Attorney General, and by extension that of the PGT, to make it necessary to obtain their consent before the court could exercise its jurisdiction to approve a proposed variation of the terms of a charitable trust saying, "the inherent jurisdiction is that of the court and not that of the Attorney General or the Public Guardian and Trustee." Instead, the Attorney General cannot act except with the authority of the court.

In the current investment climate, it is inevitable that many charities will be unable to achieve real rates of return sufficient to satisfy the disbursement quota required under the ITA. The proposed September 2004 Amendments to the disbursement quota, as discussed earlier, will not resolve all

issues. Accordingly, charities, their boards of directors, donors, and their advisers should note several points made by the Toronto Aged Men's and Women's Homes case:

- Charitable trusts should be drafted in such a manner as to enable trustees to generally conform to donor intention, yet still adjust investment policies in accordance with the fluctuating market. This would likely include the power to encroach on the capital to meet the Trust's disbursement quota in the event that relief under section 149.1(5) of the ITA is not available;
- Charities must be proactive in addressing disbursement problems arising from the terms of a charitable trust, seeking relief from the CRA under subsection 149.1(5) of the ITA or the courts where appropriate;
- Courts will be unwilling to alter the terms of a charitable trust solely on the grounds that it would be more efficiently administered without them, or that it is expedient or desirable; and

It is interesting to note that consent from the PGT is not technically necessary in order to obtain a *cy pres* order from the court. However, in practice, it would be prudent to do so if at all possible.

If no other interested party objects, it may be possible to obtain a consent order from the PGT under section 12 of the *Charities Accounting Act* without having to apply for a formal court order.

7. Definition of "Commercial Activity" for Non-Profit Organizations in *Rodgers v Calvert*

Recently, the Ontario Superior Court of Justice rendered a decision in *Rodgers v. Calvert*¹⁰³ which addressed the issue of whether the disclosure of a non-share corporation's membership list constituted "commercial activity" for the purposes of the *Personal Information Protection and Electronic Documents Act*¹⁰⁴ (PIPEDA). In this case, the applicant member brought a motion to compel the Association to release a listing of its members. In doing so, the applicant member relied on section 307 of the *Corporation's Act* (Ontario),¹⁰⁵ under which any person may require that a corporation releases a list of all its members "upon paying a reasonable fee" and filing an affidavit with the corporation or its agent that the list is required "for purposes connected with the corporation". One of the issues decided on this motion was whether producing the listing was tantamount to disclosing personal information "in the

¹⁰³ [2004] O.J. No. 3653

¹⁰³ R.S. 1970, c. C-32.

¹⁰⁴ PIPEDA, supra note 66.

¹⁰⁵ R.S. 1990, c. C.38.

course of commercial activity” contrary to PIPEDA, which overrides the right to disclosure under section 307 of the *Corporation’s Act* (Ontario).

“Commercial activity” is defined under subsection 2(1) of PIPEDA as any transaction, act or conduct ...or regular course of conduct that is of a commercial character including...selling, bartering or leasing of donor, membership or fundraising lists. In deciding whether there was evidence of commercial activity, Mackenzie J, pointed out the shortcomings in a dictionary definition of “commercial” and endorsed instead the interpretation provided at the Privacy Commissioner’s website which states that “collecting membership fees, organizing club activities, compiling a list of members’ names and addresses and mailing out newsletters are not considered commercial activities.” In finding that nothing either in the Association’s activities or from producing the membership list constituted “commercial activity” under PIPEDA, Mackenzie J found that the mere exchange of consideration in contract does not in itself lead to the finding of commercial activity under PIPEDA. Furthermore, it is not feasible to set out a criteria or facts as to what constitutes a “commercial activity” for a non-profit organization.

The effect of this case therefore means that there has been no further judicial clarity concerning whether PIPEDA applies to charitable organizations or what activities will be construed as “commercial activities” that will trigger the disclosure protections under PIPEDA.

H. CONCLUSION

Over the past twelve months, there has been significant legislative changes announced and case law rendered that have impacted the way in which charities operate in Canada. From the survey of these changes outlined in this paper, it is evident that there is a considerable amount of information for charities to be cognizant of, which in turn underscores the need for those who advise charities to be informed of these changes so they will be better able to provide legal counsel as necessary. In this regard, it is hoped that this paper will be of assistance in identifying and explaining some of the more important legal developments impacting charities that have occurred over the last year.

Schedule "A"

[Excerpt from page 115 of the Explanatory Notes to the September 2004 Amendments]

Generally, the results are as follows:

- § As the Minister would not normally assess a charity for the revocation tax before the time that the charity is required, under new subsection 189(6.1) of the Act, to file a return, if a charity has not filed a return at the time of an assessment by the Minister, the winding-up period would generally end at that time. The Minister will compute the liability for revocation tax up to the date of assessment. Under new subsection 189(6.2), the charity may continue to reduce that liability, such as by gifts to eligible donees, up to the time that is one year from the day that the certificate or notice of intention to revoke was issued. For more information, refer to the commentary for subsection 189(6.2).
- § If a charity files a return calculating the amount for which it is liable under subsection 188(1.1), the charity will include in the calculation its income and disbursements in the period up to the date of filing, but not later than one year from the day that the certificate or notice of intention to revoke was issued. This period will apply notwithstanding that the Minister may have previously assessed the charity. The Minister would normally be expected to assess the liability based on the information reported by the charity, unless the Minister disputed the calculation or other information relevant to the assessment became available to the Minister.
- § If, at any time after an assessment of the liability of the charity, the Minister reassesses that liability, the Minister will consider in the calculation the income and disbursements of the charity up to the date of that reassessment. The Minister could initiate such a reassessment, or could reassess in response to a direction from a court resulting from an appeal of the amount of tax by the charity.
- § If a charity files a notice of objection to an amount assessed under subsection 188(1.1), the time at which the Minister may begin to collect the liability is deferred by amended section 225.1, generally until any objection or appeal by the charity has been disposed of. At that time the Minister may be expected to reassess the charity to include in the calculation the income and disbursements of the charity up to the date of that reassessment.

The Minister would not normally be expected to assess a charity for the revocation tax before the time that the charity is required, under new subsection 189(6.1) of the Act, to file a return. However, there may be circumstances where the Minister becomes aware that a charity's assets are being diverted or directed for private benefit. In such a case, the Minister may consider issuing an assessment notice without waiting for the charity to file the required return. Such a charity will, for one year from the notice of intention to revoke its registration, retain the opportunity to satisfy the liability under subsection 189(6.2).