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**CONTROL: WHO, HOW, WHAT, WHEN
AND WHY?**

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CONTROL: WHO, HOW, WHAT, WHEN AND WHY?

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INTRODUCTION

This paper presents an introduction to some of the provisions of the *Income Tax Act* (Canada)¹ (the “Act”), Canada Revenue Agency (“CRA”) technical interpretations, and related jurisprudence dealing with the meaning of control in order to review their potential application in the charitable context. It is intended to provide a quick summary of the basic rules as a resource tool – a “primer” on control. Further, while the focus of this paper is on the meaning of control, the discussion would be incomplete without also considering the meaning of “related” and the non-arm’s length (“NAL”) concept and the relationship between these notions in the Act. This is because the tests for “control” and “NAL” are sometimes intertwined and often confused since both require a broader examination of the facts surrounding the transactions in question at some point (see discussion below about factual control and factual non-arm’s length). There have been some very good articles² on the meaning of control for the purposes of the Act in the corporate context, as well as much jurisprudence. However, it remains unclear how these concepts will be applied to the charitable sector.

A. WHY?

Over the past year, there have been a number of important changes to the tax rules affecting many aspects of operations of charities in Canada. Firstly, sweeping amendments to the Act were enacted by Bill C-33, *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 23, 2004* (“Bill C-33”), which came into force on May 13, 2005. These changes include a reduced disbursement quota rate and calculation formula, the ability to encroach on realized capital gains of enduring property, complicated rules regarding inter-charity transfers, and new intermediate sanctions and penalties for minor non-compliance of requirements on charities under the Act, among others. Secondly, on July 18, 2005, the Department of Finance again released legislative proposals (the “July 2005 Amendments”) to amend the Act. The July 2005 Amendments consolidate and further amend previously proposed amendments introduced in 2002, 2003 and 2004. These changes include split-receipting, designation of charitable organizations and public foundations, and revocation of charitable registrations, to name a few.

¹ R.S.C. 1985, c. 1(5th Supp.) (the “Act”). All statutory references are to the Act and proposed amendments to the Act unless otherwise noted.

² Robert Couzin, “Some Reflections on Corporation Controls” (2005) 53(2) *Canadian Tax Journal* 305-32 [Couzin],

The most important change, from the perspective of the application of the control provisions, are the July 2005 Amendments proposing to amend the definitions of charitable organizations and public foundations in subsection 149.1(1) of the Act in order to ensure that in certain circumstances large donations are not prohibited. The July 2005 Amendments will replace the former “contribution test” with a “control test,” whereby it would be permissible for 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. As a result of the introduction of a “control” test, the general rules in relation to “control” in sections 251 and 256 of the Act are now applicable. However, these rules have previously been relevant in the charitable context and their application remains unclear, since these rules are premised upon their application to commercial arrangements in a business context.

These recent changes have increased the complexity of the regime within which registered charities and their donors operate. Many of the changes stem from the Department of Finance’s intention to curtail abusive tax shelter schemes involving charitable donations. As a result, “stealth” anti-avoidance concepts from the commercial context have been imported into the charity context which may be problematic.³

Finally, in the 2006 Federal Budget released on May 2, 2006,⁴ the Conservative government proposed to remove the capital gains tax on listed securities donated to charities and extended this measure to gifts of ecologically sensitive land, effective immediately. While these measures do not apply at present to private foundations,⁵ the government indicated in the Budget that it will consult with the sector to develop some self-dealing rules to safeguard against potential conflicts of interest. Any new “self-dealing” rules related to donations of publicly-traded shares will also likely include references to the concepts of “control” and NAL.

B. WHAT?

An understanding of the concepts of control and “related” is fundamental to the application of the Act in so far as these concepts define the majority of fiscal relationships relevant for determining many tax

³ John Loukidelis, “Comments on Certain Proposed Tax Rules Applicable to Charities: Gifts to Foreign Entities, Large Gifts and ‘Split Receipts’” (2004) 18(4), *The Philanthropist* 261-302, p. 261; Couzin, *Ibid* p. 307.

⁴ See <http://www.fin.gc.ca/budget06/bp/bpc3ce.htm#donations> for the relevant section of the Budget 2006 documents.

⁵ See section 51 of *Notice of Ways and Means Motion to Implement Certain Provisions of the Budget Tabled in Parliament on May 2, 2006* (May 8, 2006) amending paragraph 38(a.1).

consequences. The Act defines many other different types and degrees of connections between persons, including the notions of affiliation and connected, but these concepts are less relevant in the charitable context. The relationships which are most relevant here are the meaning of “arm’s length” and “control” under the Act.

1. Arm’s Length

a) Statutory Definition of Arm’s Length

The definition of “arm’s length” is contained in subsection 251(1) of the Act and reads as follows:

For the purposes of this Act,

(a) related persons shall be deemed not to deal with each other at arm's length;

(b) a taxpayer and a personal trust (other than a trust described in any of paragraphs (a) to (e.1) of the definition "trust" in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)(b)(iii)(A)(II) to (IV); and

(c) where paragraph (b) does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.

Paragraph (a) deems individuals who are related to each other to not deal at arm’s length with each other. Subsection 251(2) of the Act provides that related persons includes persons related by blood, marriage, common law relationship, or adoption,⁶ and that a corporation is related to the person or group of persons that control the corporation, a member of a related group of persons that control the corporation or any person related thereto.⁷ Paragraph 251(2)(c) details complex rules which will determine whether two corporations are related and which focuses on common control of both corporations. Since paragraphs 251(2)(b) and (c) refer only to “control” and not the broader expression “controlled, directly or indirectly in any manner whatsoever,” “control” for the purposes of these provisions is *de jure* or legal control, which is discussed in greater detail below and which generally means the right of control that rests in ownership of such number of shares as to control the election of the board of directors of the corporation.

⁶ Paragraph (a). These terms are further defined in subsection 251(6)

⁷ Paragraph 251(2)(b).

b) Factual Non-Arm's Length

With respect to unrelated persons, paragraph 251(1)(c) provides that it is a question of fact whether they deal at arm's length. CRA has detailed what it means with respect to this test for determining whether individuals are dealing with each other at arm's length in paragraph 24 of *IT-419R2: Meaning of Arm's Length*, as follows:

The courts have held that when one person (or a group of persons) is, in fact, the bargaining agent, or the mind by which the bargaining is directed, on behalf of both (or all) parties to a transaction, then the parties cannot be dealing at arm's length. The courts have expanded this principle to include the concept of "acting in concert" with respect to an element of common interest. Therefore, even when there are two distinct parties (or minds) to a transaction, but these parties act in a highly interdependent manner (in respect of a transaction of mutual interest), then it can be assumed that the parties are acting in concert and therefore are not dealing with each other at arm's length. When a common purpose exists, a transaction is not necessarily a non-arm's-length one when different interests (or independent parties) are also present. In this context, different interests are considered to exist when each party has an independent interest from the other parties to a transaction, notwithstanding the fact that each party may have the same purpose, such as economic gain.

CRA generally refers to the following criteria for determining whether unrelated persons are dealing with each other at arm's length: (i) was there a common mind which directs the bargaining for both parties; (ii) were the parties acting in concert without separate interests; and (iii) was there *de facto* control.⁸

2. Control (legal or *de jure* control)

The expression "control" is not defined in the Act, but jurisprudence has established, in general terms, that for the purposes of the Act control means *de jure* control, which has been held to mean in the commercial context the ownership of a sufficient number shares to elect a majority of the board of directors.⁹ The usual definition for control is set out in the Exchequer Court's decision in *Buckerfield's Ltd. v. M.N.R.*:¹⁰

the word controlled contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in an election of the Board of Directors.

⁸ *IT-419R2: Meaning of Arm's Length*.

⁹ *Buckerfield's Ltd. et al v. M.N.R.*, 64 D.T.C. 5301 (Ex. Ct.) most recently approved by the Supreme Court of Canada in *Duha Printers (Western) Ltd. v. The Queen*, 98 D.T.C. 6334 [*Buckerfield's*].

¹⁰ *Ibid.*

The concept has been refined since the 1964 *Buckerfield's* decision in order to take into consideration other significant rights contained in corporate statutes and constating documents, including, among others, unanimous shareholder agreements, and powers on wind-up or dissolution. The concept of *de jure* control also includes indirect control, meaning that a person who controls one corporation will also control any corporation controlled by it.¹¹ Thus, when looking at *de jure* control it is appropriate to look beyond a corporation which may control the subject corporation through ownership of a majority of the shares of the corporation to who controls the voting rights with respect to those shares, e.g. another corporation or individual.

It is unclear how this will apply to non-share capital corporations. While little of the caselaw has dealt with a non-share capital corporation, a reasonable analogy could be made to the members of a non-share capital corporation.¹² One of the few examples of the application of the control test in a non-share capital corporation context is *HSC Research Development Corp. v. Canada*.¹³

HSC Research Development Corp. was an Ontario non-share capital corporation which was engaged in and earned a profit from medical research. Its members were its twelve directors and at no time were the majority of the directors appointed by or connected to the Hospital for Sick Children and/or its Foundation. However, profits and assets on dissolution were to be distributed to the Hospital and/or Foundation and start-up funding was provided by the Hospital and/or Foundation in the form of a \$3,000,000 loan. At issue in this case was whether HSC was controlled directly or indirectly by the Hospital or its Foundation for the purpose of eligibility for refundable investment tax credits. At the time, subsection 256(5.1) of the Act had not been enacted (discussed below) and “controlled directly or indirectly” meant *de jure* control.

In its decision, the Tax Court of Canada could find “no valid reason not to apply the concepts of control developed in the decided cases for share corporations to a corporation without shares. The persons who control the non-share corporation are the members who in turn appoint the directors.” The Court held that on the facts of this case that no *de jure* control existed because it could not be said that either the

¹¹ *Vineland Quarries and Crushed Stone v. M.N.R.* [1966] D.T.C. 5092 (Ex. Ct.).

¹² Note also that subsection 256(8.1) of the Act provides that for the purposes of the acquisition of control rules a non-share capital corporation is deemed to have a single class of shares owned by the members in a proportion that the Minister deems reasonable. While this provision does not always apply as a matter of strict interpretation, it is likely that a Court would consider the provision when determining the intent of the Act with respect to the application of control rules in a non-share capital corporation context.

¹³ (1994), [1995] D.T.C. 225 (T.C.C.).

Hospital for Sick Children or its Foundation controlled who was appointed to the Board of Directors. However, the Court considered that it was possible, without deciding, that factual control existed in the circumstances

3. Factual Control (*de facto* control)

Subsection 256(5.1) provides that when the expression “controlled directly or indirectly in any manner whatever” is used in the Act, “a corporation will be considered to be controlled by another corporation, person or group of persons (in this subsection referred to as the “controller”) at any time where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation.” In *IT-64R4: Corporations: Association and Control*, CRA describes what it considers to be relevant factors to consider in determining whether *de facto* control exists, as follows:

¶ 21. De facto control goes beyond de jure control and includes the ability to control “in fact” by any direct or indirect influence. De facto control may exist even without the ownership of any shares. It can take many forms, e.g., the ability of a person to change the board of directors or reverse its decisions, to make alternative decisions concerning the actions of the corporation in the short, medium or long term, to directly or indirectly terminate the corporation or its business, or to appropriate its profits and property. The existence of any such influence, even if it is not actually exercised, would be sufficient to result in de facto control.

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¶ 23. Whether a person or group of persons can be said to have de facto control of a corporation, notwithstanding that they do not legally control more than 50 per cent of its voting shares, will depend on each factual situation. The following are some general factors that may be used in determining whether de facto control exists:

- (a) the percentage of ownership of voting shares (when such ownership is not more than 50 per cent) in relation to the holdings of other shareholders;
- (b) ownership of a large debt of a corporation which may become payable on demand (unless exempted by subsection 256(3) or (6)) or a substantial investment in retractable preferred shares;
- (c) shareholder agreements including the holding of a casting vote
- (d) commercial or contractual relationships of the corporation, e.g., economic dependence on a single supplier or customer;
- (e) possession of a unique expertise that is required to operate the business; and

(f) the influence that a family member, who is a shareholder, creditor, supplier, etc., of a corporation, may have over another family member who is a shareholder of the corporation.

In addition to the general factors described above, the composition of the board of directors and the control of day-to-day management and operation of the business would be considered.¹⁴

The Federal Court of Appeal, in *Silicon Graphics Ltd. v. H.M.Q.*,¹⁵ found that in order for the controller to have *de facto* control it must have the clear right and ability to effect a significant change in the board of directors or their powers or to directly influence the shareholders who would otherwise have the ability to elect the board. Other court cases have found that *de facto* control will exist where there is sufficient evidence to demonstrate that the decision-making powers of the corporation rests with persons other than those with *de jure* control,¹⁶ particularly where there is strong economic dependence on the putative controller.

C. WHERE?

The concepts of control and “arm’s length appear in many sections of the Act related to charities:

1. New Definitions of Charitable Organizations and Public Foundations

As noted above, the definitions of charitable organizations and public foundations have been amended by replacing the “contribution” test with a “control” test. The rationale for amending the definitions is to permit charitable organizations and public foundations to receive large gifts from donors without concern that they may be deemed to be a private foundation. The changes were first introduced by the December 2002 Amendments and were included in the February 2004 Amendments with minor changes. The proposed amendments are further revised in the July 2005 Amendments. Once enacted, these amendments will generally become retroactive to January 1, 2000.

The previous “contribution” test meant that where more than 50% of the capital of a charity was contributed from one donor or donor group then the charity would be deemed to be a private foundation subject to more stringent activity and disbursement obligations. The new “control” test means that while a donor may donate more than 50% of the capital of a charity, the donor or donor group cannot exercise

¹⁴ *IT-64R4: Corporations: Association and Control.*

¹⁵ [2002] 3 C.T.C. 527 (F.C.A.).

control *directly or indirectly in any manner* over the charity or be in a *non-arm's length* relationship with 50% or more of the directors or trustees of the charity. As a result of the introduction of a "control" test, the convoluted business rules in relation to "control" will become applicable and as a result of the use of the phrase "controlled directly or indirectly in any manner whatever" the concept which will be applied will be the broader factual control test.

2. New definition of "enduring property"

Bill C-33 introduced a new concept of "enduring property" in subsection 149.1(1) of the Act for purposes of calculating the disbursement quota for charities. Subsection 149.1(1) defines "enduring property" to include the following:

- (b) a gift received by a charitable organization from another registered charity, where the majority of directors and trustees of the donor charity deal at arm's length with the recipient charitable organization, provided that the gift is subject to a trust or direction requiring that the gift be utilized over a period not exceeding five years in the course of a program of charitable activities or for the purpose of acquiring a capital property to be used directly in the charitable activities;

The new definition includes five-year gifts received by a charitable organization from another registered charity, 50% of the board of which *deal at arm's length* with each member of the board of the recipient organization. As a result, charitable organizations seeking to make five-year gifts of enduring property will need to review this section carefully to ensure that it complies with the arm's length requirement.

3. Revocation for Public and Private Foundations

Paragraphs 149.1(3)(c) and (4)(c) provide that the registration of a charitable foundation may be revoked if it acquires *control* of any corporation. However, subsection 149.1(12) provides a special rule for determining whether *control* has been acquired. Under paragraph 149.1(12)(a) a charitable foundation is deemed not to have acquired control of a corporation where "it has not purchased or otherwise acquired for consideration more than 5% of the issued shares of any class of the capital stock of that corporation."

¹⁶ 9044-2807 *Québec Inc v. The Queen*, [2004] D.T.C. 6141 (F.C.A.); aff'g *Transport M.L.Couture Inc. et al v. The Queen*, [2003] D.T.C. 817 (T.C.C.).

4. Undue Benefit – Subsection 188.1(5)

Bill C-33 introduced a new concept of “undue benefit.” Generally speaking, if a charitable organization confers a benefit outside the ordinary course of its charitable activities, the charity may be subject to a penalty equal to 105% of the amount of the undue benefit (subsection 118.1(4)). The penalty is increased to 110% of the amount for a repeat infraction.

An undue benefit includes the amount of any “rights, income, property or resources” paid, payable, assigned or otherwise made available to a member or trustee of the charity, or a person who contributed more than 50% of the capital of the charity, or a person *who does not deal at arm’s length* with such a person or the charity. A gift to a qualified donee is not included in this definition. Again, a clear understanding of the NAL concept is required when determining whether or not this new provision has or has not been infringed.

5. Eligible Donee – Subsection 188(1.3)

Subsection 188(1.3) provides new interim sanctions and penalties to charitable organizations. However, sanctioned charities can transfer the amount of tax or penalty to CRA or to another arm’s length charity (eligible donee). More than 50% of directors of the recipient charity must *deal at arm’s length* with all directors of the sanctioned charity.

6. Amount of Advantage – Subsection 248(32)

A very broad definition of “advantage” is set out in subsection 248(32) of the Act. It was first introduced by the December 2002 Amendments and was substantially amended by both the December 2003 and February 2004 Amendments. This definition was again revised in the July 2005 Amendments. The proposed definition of advantage includes two parts in paragraphs 248(32)(a) and (b) as follows: paragraph 248(32)(a) of the Act provides that the amount of advantage in respect of a gift includes the value, at the time the gift is made, of “any property, service, compensation, use or other benefit”¹⁷ that the donor, or a person or partnership who *does not deal at arm’s length* with the donor¹⁸ has “received, obtained or enjoyed, or is entitled, either immediately or in the future and either absolutely or

¹⁷ The reference to “use” is introduced by the July 2005 Amendments.

¹⁸ The reference to “another person or partnership who does not deal at arm’s length with and holds, directly or indirectly, an interest in the taxpayer” that was introduced by the February 2004 Amendments has not been included in the July 2005 Amendments.

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.¹⁹

The Explanatory Notes indicate that subsection 248(32) is intended “to apply in respect of any transaction or series of transactions having either the purpose or the effect of reducing the economic impact to a donor of a gift or contribution.” This language clearly indicates the Department of Finance’s view that the breadth of the definition is intended as an anti-avoidance mechanism and we should not, therefore, be surprised to see the inclusion of the NAL concept. This reference to persons who are NAL with the donor imposes such a high burden on recipient charities when receipting gifts very onerous and now, more than ever before, charities will need to know their donors and their relationships.

7. Donation Tax Shelter Rules

The July 2005 Amendments also include new rules arising from donation tax shelter schemes prescribing “deemed fair market value” of certain gifts to be their cost. The new provisions also require a “look-back” to see if the property had been acquired within the 3 or 10 year hold period by a *non arm’s length person* and if so then the “deemed fair market value” applies to the person (subsection 248(36)). The new rules do not apply if a shareholder has transferred property to a *controlled corporation* in exchange for shares and the shares are donated, or a rollover transaction to a corporation for the same purpose of donating shares.

8. Definition of Non-Qualifying Security

Subsections 118.1(13) to (19) set out detailed rules regarding gifts of shares or debt obligations of a corporation that the donor does *not deal with at arm’s length*.

9. Definition of Non-Qualified Investment

Subsection 149.1(1) defines a non-qualified investment as a share, right to acquire a share or debt owing to a private foundation by a person who *does not deal at arm’s length* with the foundation or a corporation *controlled* by the foundation.

¹⁹ The reference to “in any other way related to” the gift in subparagraph 248(31)(a)(iii) was introduced by the December 2003 Amendments.

10. Acting in Concert/Associated

Paragraph 149.1(4.1)(b) and subsection 188(4) were included to deal with charities which “act in concert” in order to avoid disbursing funds. This language reflects one of the criteria for determining whether parties are factually NAL or, according to some interpretations, whether one party to a transaction has factual control over another. However, by choosing this language, it would seem that the Department of Finance has placed emphasis on particular transactions, as opposed to the broader relationship between the charities.

Subsection 149.1(7) provides that the Minister may designate charities to be associated, but this does not necessarily mean “associated” within the meaning of subsection 256(1).

D. HOW?

How are the control and arm’s length rules used in provisions related to charities? The following example will illustrate the application of definitions of charitable organizations and public foundations:

A public share capital corporation provides start-up funding (\$20 million) for a foundation in year 1 (“Contributor”). The members are the directors (five directors). Beyond appointing the initial directors, the corporation has no further authority to appoint the directors. The letters patent provide that no profit is payable to the members and that the assets remaining on dissolution are to be distributed to registered charities with similar objects.

The definition of “public foundation” in subsection 149.1(1) includes the following:

1. Arm’s length:

c) more than 50% of the directors, trustees, officers or like officials of which deal at arm's length with each other and with

(i) each of the other directors, trustees, officers and like officials of the organization,

(ii) each person described by subparagraph (d)(i) or (ii), and

(iii) each member of a group of persons (other than Her Majesty in right of Canada or of a province, a municipality, another registered charity that is not a private foundation, and any club, society or association described in paragraph 149(1)(l)) who

do not deal with each other at arm's length, if the group would, if it were a person, be a person described by subparagraph (d)(i), ...

The relationship at issue in this paragraph is an arm's length relationship (the "what") and the relevant parties (the "who") are the directors, trustees, officers or like officials of the foundation and their relationship with:

- (i) each other and other directors, trustees, officers or like officials,
- (ii) the Contributor or persons who are NAL with the Contributor, and
- (iii) the group of persons making contribution (for the purposes of this example, this does not apply).

Board: Are three of the directors unrelated to each other and factually at arm's length with each other? These three directors must also be unrelated to and factually at arm's length with the remaining two directors. What about officers and like officials? Does this include the executive director?

The Contributor: Are three of the directors unrelated to and factually at arm's length with the Contributor and persons at arm's length with the Contributor?

Since the Contributor is a corporation, the rules in paragraph 251(2)(b) apply, but note reference in (d) to "if the organization were a corporation." Essentially, the directors of the foundation will be unrelated to the Contributor corporation if they do not control (*de jure*) the corporation, or are unrelated to any person or group of persons that controls the corporation.

Since the Corporation is a public corporation, its shares are likely widely held and we can assume, for the purposes of the example, that no person or group of persons controls the corporation and that the directors are unrelated to the Contributor. But, are they factually at arm's length with the Contributor? Are there economic ties? Are they "acting in concert"?

2. Control:

(d) that is not, at the particular time, and would not at the particular time be, if the organization were a corporation, *controlled directly or indirectly in any manner whatever*

- (i) by a person (other than Her Majesty in right of Canada or of a province, a municipality, another registered charity that is not a private foundation, and any club, society or association described in paragraph 149(1)(l)),

(A) who immediately after the particular time, has contributed to the organization amounts that are, in total, greater than 50% of the capital of the organization immediately after the particular time, and

(B) who immediately after the person's last contribution at or before the particular time, had contributed to the organization amounts that were, in total, greater than 50% of the capital of the organization immediately after the making of that last contribution, or

(ii) by a person, or by a group of persons that do not deal at arm's length with each other, if the person or any member of the group does not deal at arm's length with a person described in subparagraph (i);

The relationship (the “what”) at issue in this paragraph is control (*de jure* and/or factual) and the relevant parties (the “who”) are the foundation and the Contributor. For the purposes of paragraph (d) of the definition, the foundation cannot be controlled by:

- (i) The Contributor,
- (ii) Persons or group of persons not at arm’s length with the Contributor,

Legal control: Does the Contributor have sufficient votes to control the majority of the Board? Not likely since the directors are the members and appoint themselves.

Factual control: Does the Contributor have any direct or indirect influence that, if exercised, would result in control in fact of the corporation? Can it be said that the foundation and the public corporation are economically interdependent? If all of its initial and future funding comes from the public corporation, arguably they are. Who is in the “driver’s seat? Does the public corporation have operational control because maybe it provides all of the administrative support and facilities to the foundation, including the CEO?

E. WHEN?

Each provision will have its own relevant time for determining the issue of arm’s length or control. For example, with respect to the new definitions detailed above, the determination is a continuous one with respect to the arm’s length issue regarding the composition of the Board, e.g. at no time can more than 50% of the Board of a charitable organization or public foundation be NAL. However, with respect to control of

such organizations by a large donor, the determination with respect to this issue is made at the particular time of the large donation.

F. CONCLUSION

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 registered charities. Donors, directors and officers of registered charities and their advisors will need to carefully review these rules when establishing charitable organizations and public foundations involving a major donor, or when receiving a donation from a major donor who contributes more than 50% of the charity’s capital. This should be done in order to ensure that the charity in question will not inadvertently be caught by these rules. The current relationships between entities in multiple corporate structures should also be reviewed in order to assess whether the application of the control and arm’s length tests may have an undesirable effect, particularly where the boards of directors of various related organizations are composed of substantially the same individuals.

RESOURCE MATERIAL

For more information see *Charity Law Bulletins* #73, #76 and #77 at www.charitylaw.ca

IT-419R2: Meaning of Arm's Length

IT-64R: Corporations: Association and Control

Robert Couzin, "Some Reflections on Corporation Controls" (2005) 53(2) *Canadian Tax Journal* 305-32

John Loukidelis, "Comments on Certain Proposed Tax Rules Applicable to Charities: Gifts to Foreign Entities, Large Gifts and 'Split Receipts'" (2004) 18(4) *The Philanthropist* 261-302.