

**THE LAW SOCIETY OF UPPER CANADA
16th ANNUAL ESTATES AND TRUSTS SUMMIT**

Toronto – November 12, 2013

ESSENTIAL CHARITY LAW UPDATE

Current as of November 1, 2013

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Table of Contents

A.	Introduction.....	1
B.	2013 Federal Budget Highlights	2
	1. Introduction of Temporary Donation Tax Credit for “First-Time Donors”	3
	2. Early Collection of Amounts Owing from Donation Tax Shelters	4
	3. Extension of Reassessment Period for Donors to Registered Tax Shelters.....	4
	4. New Rules Concerning Collection of GST/HST on Paid Parking Affecting Charities	5
	5. Amalgamation of the Department of Foreign Affairs and International Trade with CIDA.....	6
C.	Other Recent Federal Initiatives	6
	1. Bill C-48, Technical Tax Amendments Act 2012	6
	2. Bill S-7, Combating Terrorism Act	9
	3. Bill S-14, Fighting Foreign Corruption Act.....	10
D.	Highlights of Recent CRA Publications	11
	1. CRA Guidance on How to Draft Purposes for Charitable Registration	11
	2. New CRA Guidance on Purposes and Activities Benefiting Youth.....	13
	3. CRA Guidance on the Promotion of Health and Charitable Registration	15
	4. CRA Guidance on Foreign Activities Changes Rules on Capital Property in a Foreign Country	17
	5. New CRA Resources for Charities Concerning Political Activities.....	18
	6. Modifications Made to CRA Policy Statement on Political Activities.....	20
	7. Public Foundations May Not Acquire Control Through 100% Share Donations	21
	8. Registration Requirements for Qualified Donees	22
	9. Clergy Residence Deduction – Ministry Must Be Integral Part of Employment Responsibilities	23
	10. Individual Clergy Residence Deductions Possible for Spouses	23
E.	CRA Technical Interpretations and Rulings on Non-profit Organizations	24

1.	Private School Not Qualifying as an NPO.....	24
2.	NPOs Accepting Donations to Capital Funds.....	25
3.	Sale of Real Property by an NPO under s. 149(5)	26
F.	Corporate Update	27
1.	<i>Canada Not-for-profit Corporations Act (CNCA)</i> Update.....	27
2.	Ontario Not-for-Profit Corporations Act (ONCA) Update.....	28
3.	Ontario Social Enterprise Strategy Announced	32
4.	B.C. Approves Regulation for Community Contribution Companies	33
5.	Nova Scotia Passes Community Interest Companies Act.....	34
G.	Other Provincial Initiatives	34
1.	Proposed Employer Health Tax Act Amendments May Impact Charities	34
2.	Proposed Payday Lending Amendments in Ontario May Affect Microlending... 36	
H.	Recent Case Law (in chronological order)	37
1.	Court Upholds Termination for Misapplying Charitable Funds.....	37
2.	Court Intervenes in Membership Dispute to Remove Directors.....	38
3.	Court Intervenes in Church Dispute to Ensure Fairness in Membership Admission	38
4.	Federal Court Of Appeal Decision in Prescient.....	40
5.	Federal Court of Appeal Disallows Delayed Assessment	41
6.	Appeal in <i>Guindon v. The Queen</i>	42
7.	Misrepresentation and Gross Negligence in Donations Results in Penalties	43
8.	Donation Through Tax Shelter Disallowed	44
9.	Ontario Human Rights Tribunal Rules that Atheism is a Creed/Religion.....	45
10.	Applications to Delay Revocation of Charitable Registration.....	46
I.	Other & International.....	50
1.	Uniform Law Conference of Canada Adopts New Uniform Trustee Act	50
2.	FATF Issues New Risk Assessment Guidelines	50
3.	US Treasury Expands Terrorist Financing Related Definitions	51
4.	Charities Commission Issues Alert and Offers Tips In Preventing Fraud.....	52
J.	Conclusion	53

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A. INTRODUCTION

Over the last 12 months, Canada’s charitable sector has experienced a number of important legislative and common law developments at the federal and provincial level that will significantly impact how charities operate in Canada and abroad. The purpose of this paper is to provide a brief overview of some of the more important developments in the last year, including changes introduced through the 2013 Federal Budget, changes to the *Income Tax Act*¹ (“ITA”), new publications from the Charities Directorate of the Canada Revenue Agency (“CRA”), corporate updates under the *Canada Not-for-Profit Corporations Act*² (“CNCA”) and the *Ontario Not-for-Profit Corporations Act*³ (“ONCA”), other federal and provincial initiatives, as well as recent court decisions affecting the charitable sector.

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¹ RSC, 1985, c 1 (5th Supp).

² RSC 1970, c C-32.

³ SO 2010, c 15.

B. 2013 FEDERAL BUDGET HIGHLIGHTS⁴

On March 21, 2013, the federal government introduced the 2013 Federal Budget (“Budget 2013”).⁵ While Budget 2013 includes a so-called “First-Time Donor’s Super Credit” (“New Donor Tax Credit”) that is intended to encourage new donors, the budget document includes little else from the various recommendations that were contained in the House of Commons Standing Committee on Finance Report (“SCOF Report”) entitled *Tax Incentives for Charitable Giving in Canada*⁶ that was released on February 11, 2013, presumably so that it could be taken into consideration when drafting Budget 2013. While the charitable sector was undoubtedly expecting more in the way of charitable donation incentives from Budget 2013 arising from the SCOF Report, in the present economic circumstances it is remarkable that there were any new charitable donation tax incentives included in Budget 2013 at all. Hopefully, some of the other recommendations from the SCOF Report will eventually make their way into future federal budgets.

In addition to the New Donor Tax Credit, Budget 2013 included changes with regard to the application of HST/GST to paid parking operated by charities, extending the normal reassessment period with regard to tax shelters and reportable transactions, providing for the early collection of 50% of disputed tax, interest and penalties arising from charitable tax shelters, as well as repeating a call for increased transparency and accountability in the charitable sector, and support for the need for social finance, amongst other initiatives. A portion of the Budget 2013 provisions, including the New Donor Tax Credit, were passed into law on June 26, 2013 through Bill C-60, *Economic Action Plan 2013 Act, No. 1* (“Bill C-60”).⁷ However, other provisions are yet to be passed, including amendments to the *ITA* targeting tax shelters, which

⁴ For more information, see Terrance S. Carter, Karen J. Cooper and Ryan M. Prendergast “2013 Federal Budget: New Donor Tax Credit, Gst/Hst And Anti-Tax Shelter Provisions Affecting Charities” in *Charity Law Bulletin* No. 306 (March 22, 2013) online: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb306.htm>> from which the above summary has, in part, been extracted.

⁵ Canada, Minister of Finance Hon. James M. Flaherty, *Jobs, Growth and Long-term Prosperity: Economic Act Plan 2013*, (Ottawa: House of Commons, 2013), online <<http://www.budget.gc.ca/2013/home-accueil-eng.html>> (“Budget 2013”).

⁶ Report of the Standing Committee on Finance. James Rajotte, MP, Chair. 41st Parliament, 1st Session. Available online at: <<http://www.parl.gc.ca/content/hoc/Committee/411/FINA/Reports/RP5972482/finarp15/finarp15-e.pdf>>.

⁷ Bill C-60, *Economic Action Plan 2013 Act, No. 1*, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6249902>>.

have been introduced in Bill C-4, *Economic Action Plan 2013 Act, No. 2* (“Bill C-4”),⁸ that received second reading and was referred to committee on October 29, 2013.

Below is a brief summary of the provisions from Budget 2013 that affect charities.

1. Introduction of Temporary Donation Tax Credit for “First-Time Donors”⁹

As indicated above, Budget 2013 introduced a New Donor Tax Credit in s. 118.1(3.1) of the *ITA*, which “is designed to encourage new donors to give to charity.” This was implemented through Bill C-60. Donors claiming the New Donor Tax Credit will now receive an additional 25% tax credit for “first-time” donations on up to \$1,000 of a gift, provided that the gift is made in cash.

The New Donor Tax Credit is only available where neither a donor nor his or her spouse has claimed a charitable donation tax credit since 2007. In this regard, while the New Donor Tax Credit is ostensibly targeted at young first-time donors, it will also apply to those who have not claimed a donation tax credit since 2007. It can be claimed only once. As well, it is available only on a temporary basis between the 2013 and 2017 taxation years.

As a result of the New Donor Tax Credit, new donors or those individuals who have not donated since 2007 will receive an enhanced federal tax credit of 40% for donations of \$200 or less and a 54% federal tax credit for the portion of their donation in excess of \$200, up to a maximum of \$1,000. Those donors who are married or in a common-law partnership will also be permitted to share the New Donor Tax Credit in any given taxation year, provided that the New Donor Tax Credit claimed does not exceed the amount that either spouse would be entitled to on an individual basis. Interestingly, if the couple cannot agree concerning what portion of the New Donor Tax Credit each can deduct from their income, proposed amendments to the *ITA* in Budget 2013 will allow the Minister to “fix the portions”.

⁸ Bill C-4, *Economic Action Plan 2013 Act, No. 2*, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6263082&File=4>>.

⁹ For more information, see Terrance S. Carter, Karen J. Cooper & Ryan M. Prendergast, “2013 Federal Budget: New Donor Tax Credit, GST/HST and Anti-Tax Shelter Provisions Affecting Charities” in April *Charity Law Bulletin* 306, online at: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb306.pdf>> from which the above summary has, in part, been extracted.

The New Donor Tax Credit can be applied to eligible donations after March 21, 2013 but may be claimed only once prior to 2018.

2. Early Collection of Amounts Owing from Donation Tax Shelters¹⁰

Budget 2013 states that it hopes to “discourage participation in questionable charitable donation tax shelters”. Bill C-60, amends s. 225.1(7) of the *ITA* to now permit CRA to proceed with collection actions on 50% of the disputed tax, interest or penalties that result from the disallowance of a donation claimed with respect to a tax shelter, even before the ultimate liability of the donor has been determined through the objection and appeal process.

While there are many donors who have turned a blind eye and, to their detriment, become involved in donation tax shelter schemes that were obviously too good to be true, there is an arguable unfairness whereby CRA is permitted to collect taxes, fines, and penalties with regard to disputed donation tax credits or deductions before all routes of appeal have been exhausted. There are no similar provisions under the *ITA* for other potentially disputed taxes by CRA. Budget 2013 states that these measures apply to amounts assessed for the 2013 taxation year and all subsequent taxation years.

3. Extension of Reassessment Period for Donors to Registered Tax Shelters¹¹

Budget 2013, by amendments to s. 152(4)(c) of the *ITA* introduced under Bill C-4, proposes to extend the reassessment period for reportable tax avoidance transactions and tax shelters where information returns that are required to be filed under the *ITA* relating to the tax shelter have not been filed on time.

While CRA is permitted to reassess a taxpayer’s return outside of the normal reassessment period of three years in cases of misrepresentation attributable to neglect, carelessness, wilful default or fraud, the *ITA*, prior to Budget 2013, did not provide a similar extension in cases where an information return by a tax shelter had not been filed or had been filed late. As a result, CRA’s ability to audit the tax shelter had been prejudiced by the application of the shorter reassessment period.

¹⁰ *Ibid.*

¹¹ *Ibid.*

In response, Budget 2013, through Bill C-4, proposes to extend the normal reassessment period with respect to participants in a tax shelter or “reportable transactions” where the information return required to be filed by the tax shelter or reportable transaction is not filed on time, or at all, by a period of a further 3 years after the date that the information return has been filed (for a total of 6 years). This extended reassessment period applies to all future taxation years that end after March 21, 2013.

4. New Rules Concerning Collection of GST/HST on Paid Parking Affecting Charities¹²

Budget 2013 stated that it is unclear whether public sector bodies, i.e., municipalities, universities, public colleges, school authorities, hospital authorities, charities, non-profit organizations or government entities (“PSB”), are exempt from GST/HST in relation to the provision of paid parking. In this regard, Budget 2013 states that, “[i]t was never intended that this provision would exempt a commercial activity, such as paid parking provided on a regular basis by a PSB that may compete with others providing paid parking services.” The enabling legislation from this part of Budget 2013 was introduced through Bill C-4, which, once passed, will amend s. 10 of Part VI of Schedule V of the *Excise Tax Act* (“*ETA*”).¹³

Specifically, Budget 2013, through Bill C-4, amends the *ETA* to clarify that PSBs are not exempt from collecting and remitting HST/GST on supplies of paid parking made by way of lease, license or similar arrangement in the course of a business carried on by the PSB. Budget 2013 specifically identifies parking facilities operated by municipalities or hospitals in this regard. In an effort to be consistent, Budget 2013 also specifically states that supplies of paid parking made by other charities are also not exempt. As a practical result, many charities, including hospitals and universities, will now need to ensure that they are registered for GST/HST purposes and are collecting and remitting all taxes owed with respect to any parking facilities that they operate in the course of a business. This change imposes an additional administrative burden upon many charities and smaller PSBs which have not been registered and which will now need to take steps to determine if their paid parking services will require that they register for GST/HST purposes. It should be noted, however, that Budget 2013 states that amendments to the *ETA* only apply where the supply is made “in the course of a business”, and whether the provision of paid

¹² *Ibid.*

¹³ RSC, 1985, c E-15.

parking is made in the course of a business is a question of fact which would need to be determined on a case by case basis.

These provisions will apply to all supplies of paid parking made after March 21, 2013.

5. Amalgamation of the Department of Foreign Affairs and International Trade with CIDA¹⁴

As a result of Budget 2013, the Department of Foreign Affairs and International Trade and the Canadian International Development Agency (“CIDA”) have been amalgamated into the new Department of Foreign Affairs, Trade, and Development (“DFATD”). There continue to be two ministerial positions for the trade and development functions, whose responsibilities and roles are prescribed in the *Department of Foreign Affairs, Trade and Development Act*.¹⁵

Some charities undertake projects, either on their own or through intermediaries, that receive funding from CIDA (now DFATD). Not all of the DFATD-funded activities are considered to be charitable at common law by the CRA.¹⁶ The charity involved with DFATD funding must, therefore, ensure that the project is consistent with its own charitable purposes as opposed to simply complying with the terms of the DFATD funding agreement. In this regard, the CRA recommends contacting the Charities Directorate in situations of uncertainty regarding the DFATD-funded projects.

C. OTHER RECENT FEDERAL INITIATIVES

1. Bill C-48, Technical Tax Amendments Act 2012¹⁷

On October 24, 2012, the Department of Finance released draft legislative proposals to implement a number of outstanding income tax technical measures. These amendments were intended to clear the backlog of outstanding amendments to the *ITA* and related legislation that had administratively been in effect since they were first introduced, going back as early as December 2002. These amendments included changes that substantially impact the operations of registered charities in Canada, including changes to the definition of “gift,” split-receipting,

¹⁴ *Supra* note 4.

¹⁵ SC 2013, c 33, s 174.

¹⁶ Budget 2013, *supra* note 5 at para 9.

¹⁷ For more information, see Terrance S. Carter, Maria Elena Hoffstein & Adam Parachin, *2014 Charities Legislation & Commentary* (Markham: LexisNexis, 2013) at 11.

designation of charitable organizations and public foundations, revocation of charitable registrations, etc. These proposed changes were first introduced by Finance on December 20, 2002, which then underwent various incarnations over the years. As a follow-up to the draft legislative proposals, Bill C-48, *Technical Tax Amendments Act 2012*,¹⁸ was introduced in the House of Commons and received first reading on November 21, 2012, with Royal Assent being given on June 26, 2013. The amendments introduced by Bill C-48 that impact charities are summarized below

First, through amendments to ss. 110.1 and 118.1 of the *ITA*, as well as newly introduced ss. 248(30) to (41), the split receipting rules broadened the circumstances in which a donor is entitled to a charitable gift receipt. Under the amendments, a donor is entitled to a charitable gift receipt even if an “advantage” is received as a result of making a gift to charity. The amount of the gift is the “eligible amount”. The “eligible amount” of the gift is the fair market value of the property donated less the value of the “advantage”. Donors must demonstrate donative intent, which is assumed if the advantage amounts to less than 80% of the fair market value of the gift. The definition of “advantage” in s. 248(32) of the *ITA* is very broad and includes “the total value of any property, service, compensation, use or any other benefit that [one is] entitled to as partial consideration for, or in gratitude for, the gift.”¹⁹

Second, the definitions of “charitable organization” and “public foundation” in s. 149(1) of the *ITA* were amended. Under the amendments, entities may still qualify as “charitable organizations” or “public foundations” even if they receive large capital contributions from persons dealing with one another at non-arm’s length, provided that they do not directly or indirectly control the charity.

Third, the amendments created an additional basis for revocation of charitable registration under ss. 149.1(2) to (4). In this regard, where a registered charity makes a “gift” to a non-qualified

¹⁸ Bill C-48, *Technical Tax Amendments Act 2012*, online: Parliament of Canada <<http://www.parl.gc.ca/legisinfo/BillDetails.aspx?Language=E&Mode=1&billId=5839600>>.

¹⁹ Canada Revenue Agency, “Gifts and Income Tax 2012”, P113E Rev 12, available online at: <http://www.cra-arc.gc.ca/E/pub/tg/p113/p113-e.html#P77_2387>.

donee,²⁰ unless the gift was made in the course of the charity carrying on charitable activities, its charitable status can be revoked.

Fourth, as a result of amendments to “gifting arrangements” considered to be “tax shelters” under s. 237.1(1) charitable receipts issued for donations to registered charities via such charitable gifting arrangements can be significantly reduced.

Fifth, the amendments, by addition of s. 248(35), altered the fair market value of gifted property, with the exception of inventory, real property or immovables situated in Canada, certified cultural property, publicly traded shares, ecological gifts, and property from a transferor on a tax-deferred rollover basis. The amendments provide under s. 248(35) that the fair market value of such a gift is deemed to be the lesser of the fair market value of the property and the cost (or adjusted cost base in the case of capital property) of the property to the donor immediately before the gift is made where such property was acquired by the donor within the last three years, or within the last ten years if it can be reasonably concluded that one main reason for initially acquiring the property was to gift it to a qualified donee.

Sixth, the amendments have added s. 6(1)(a)(vi) to the *ITA*. This provision provides a new exclusion from the calculation of a taxpayer’s employment income of any benefit under a program offered by an employer to assist in furthering education, provided that three requirements are met: (1) The benefit must be received or enjoyed by an individual other than the taxpayer; (2) the employee taxpayer must deal with the employer at arm’s length; and (3) it must be reasonable to conclude that the benefit is not a substitute for salary, wages, or other remuneration of the taxpayer.

²⁰Section 149.1(1) of the *ITA* defines a “qualified donee” as any one of the following: (1) A person that is registered by the Minister as a (a) housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i), that has applied for registration; (b) municipality in Canada; (c) municipal or public body performing a function of government in Canada that has applied for registration; (d) university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada; or (e) foreign organization for a 24-month period that includes the time at which Her Majesty in right of Canada has made a gift to the foreign organization, if (i) the foreign organization is a charitable organization that is not resident in Canada; and (ii) the Minister is satisfied that the foreign organization is carrying on relief activities in response to a disaster, providing urgent humanitarian aid, or carrying on activities in the national interest of Canada; (2) A registered charity (including a national arts service organization); (3) A registered Canadian amateur athletic association; or (4) Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations.

2. Bill S-7, Combating Terrorism Act²¹

Bill S-7, *Combating Terrorism Act*²² received Royal Assent on May 24, 2013. Although the Act does not target charities and not-for-profits specifically, it does have the potential to impact those organizations that work in conflict areas abroad.

For a five-year period, the *Combating Terrorism Act* reinstates preventive detentions and investigative hearings. As well, the new terrorism provisions involve, among others: targeting foreign travel (an individual may be guilty of an offence for attempting to leave the country with an intent to commit an act of terrorism); acts committed in foreign countries (an individual may now be prosecuted in Canada for high-jacking an aircraft or endangering the safety of a plane or airport in a foreign country); and facilitating terrorism in foreign countries (an individual could be prosecuted for providing material support to a terrorist group in a foreign country, e.g. providing medical assistance or basic necessities to an individual who later is revealed to be involved with a terrorist group).

Since 2007, the government has repeatedly attempted to revive the previously sunsetted provisions. The new provisions highlight the government's renewed focus on the foreign activities of Canadian individuals and corporations (including charities and not-for-profits). The global network of anti-terrorism legislation, international treaties, and intergovernmental information sharing is robust, burgeoning, and well established. In light of this network and the far-reaching new provisions of the *Combating Terrorism Act*, charities and other not-for-profit corporations that have international partners and foreign operations must establish effective due diligence procedures to take into account the applicable foreign and domestic legislation.

²¹ For more information, see Sean S. Carter, "Foreign Activities Focus of New Terrorism Law Allowing Preventative Detention" in May 2013 Charity Law Update online: <http://www.carters.ca/pub/update/charity/13/may13.pdf> from which the above summary has, in part, been extracted.

²² Bill S-7, *Combating Terrorism Act*, online: Parliament of Canada <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5385776>.

3. Bill S-14, Fighting Foreign Corruption Act²³

Bill S-14, *Fighting Foreign Corruption Act*,²⁴ amending the *Corruption of Foreign Public Officials Act*, received Royal Assent on June 19, 2013 without amendments, notwithstanding submissions objecting to such legislation by interested stakeholders, including the Canadian Bar Association. While combating foreign corruption is essential, some of the changes may seriously hinder charities and not-for-profits that deliver humanitarian aid in foreign countries. In this regard, Bill S-14 contains two particular amendments that may be of concern to charities that operate outside of Canada. First, it amends the definition of “business” in s. 2 by removing the words “for profit” so that “business” is now defined as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere”. This amended definition means that the prohibition on bribery now applies to any business undertaking in a foreign country, regardless of whether or not that undertaking was actually conducted for profit, and could impact charities carrying on activities outside of Canada where their programs in a foreign jurisdiction include a “related business” activity permitted under the *ITA*, or a charitable program that involves an inherently commercial element like microfinance, or simply constructing a hospital or a school.

A second important amendment repeals the “facilitation payment” exemption provision of the *Corruption of Foreign Public Officials Act* on a date to be fixed by order of the Governor in Council. Currently, s. 3(4) of the *Corruption of Foreign Public Officials Act* permits “facilitation payments” to be undertaken to “expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions...” by excluding these situations from the prohibition on bribery. However, the amendments introduced by Bill S-14 will repeal this exemption on a date to be fixed by an order of the Governor in Council, which means that in the future, charities could be exposed to possible criminal liability for activities which, up to now, would have been permitted under the “facilitation payment” exemption. This could leave charities operating in foreign jurisdictions where “facilitation

²³ For more information, see Terrance S. Carter, “Proposed Amendments to Curb Corruption of Foreign Public Officials Could Hinder Humanitarian Efforts” in February 2013 Charity Law Update online: <<http://www.carters.ca/pub/update/charity/13/feb13.pdf>> from which the above summary has, in part, been extracted.

²⁴ Bill S-14, *Fighting Foreign Corruption Act*, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=S14&Parl=41&Ses=1>>.

payments” might be considered necessary under certain limited conditions that, if ignored, could impede humanitarian aid and leave charities in an untenable situation.

D. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

1. CRA Guidance on How to Draft Purposes for Charitable Registration²⁵

On July 25, 2013, Canada Revenue Agency (CRA) released its guidance on *How to Draft Purposes for Charitable Registration* (“the Guidance”).²⁶ It outlines CRA’s recommended approach to drafting charitable purposes and will benefit organizations applying for registration as charities, as well as registered charities wishing to change their existing charitable purposes.

The Guidance confirms CRA’s “two-part test” to assess an applicant’s eligibility for charitable status: 1) are its purposes exclusively charitable and do they define the scope of its activities; and 2) subject to limited exceptions, does it devote its resources to charitable activities that further these purposes? The Guidance also reiterates that stated purposes must: 1) be exclusively charitable, falling within the four categories of charitable purposes established by common law; and 2) “define the scope” of the organization’s activities. It offers specific recommendations on how charitable purposes should be drafted to meet these general requirements.

The Guidance identifies three key elements that should be included in a charitable purpose:

1. The charitable purpose category
2. The means of providing the charitable benefit
3. The eligible beneficiary group

If the purpose pertains to the first three categories of charity (relief of poverty, advancement of religion and advancement of religion), this element can be met by using the wording of the particular category, e.g. “advancing education”. For the fourth category (other purposes beneficial to the community in a way the law regards as charitable), it is insufficient to simply use only that wording in the purpose. One must specify the particular purpose within that broad category, e.g. promotion of health.

²⁵ For more information, see Jennifer M. Leddy & Terrance S. Carter, “CRA Guidance on How to Draft Purposes for Charitable Registration” in *Charity Law Bulletin* No. 318, online: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb318.htm>> from which the above summary has, in part, been extracted.

²⁶ Canada Revenue Agency, Guidance CG-094, *How to Draft Purposes for Charitable Registration*, online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/drftprpss-eng.html>>.

The Guidance provides helpful and succinct definitions of the first three categories of charitable purposes which synthesize a complicated body of case law in each category. As well, this appears to be the first time that a CRA Guidance has done this with respect to the charitable category of advancing religion and is a welcome development. The Guidance defines the first three categories as follows.

- a) Relieving poverty – providing relief to the poor, including anyone lacking essential amenities available to the general public
- b) Advancing education – formally training the mind, advancing the recipient’s knowledge or abilities, or improving a useful branch of human knowledge
- c) Advancing religion – manifesting, promoting, sustaining, or increasing belief in a religion’s three key attributes (i.e. faith in a higher unseen power; worship or reverence; and a particular and comprehensive system of doctrines and observances)

Organizations must also set out the means to achieve the charitable purpose, which in turn defines the scope of the charitable activities that can be undertaken to further the charitable purpose. They are limited to pursuing these activities with the exception of a few incidental activities (e.g. political activities, administration, fundraising). For example, the *charitable category* may be promoting health by *means* of operating a hospital, which would include *activities*, such as maintaining a facility and training medical personnel. The means of furthering a purpose in one category can be similar to that of furthering a purpose in another category. However, the beneficiaries may differ from one category to the other.

The Guidance emphasizes that a “charitable benefit” must be socially useful and recognizable, either because it can be objectively proven or demonstrated to be approved by individuals informed about the particular subject. The benefit must be connected to the organization’s purposes and reasonably achievable as a result of its activities. Indirect benefits are acceptable provided that they are not too remote.

Properly defining the eligible beneficiary group ensures that the purpose benefits the public or a sufficient section of the public. This definition can differ from one charitable category to another. For example, the beneficiaries of a purpose for the relief of poverty must be restricted to those who are poor.

The Guidance notes that an element of a purpose may be inferred from the context and gives the example of a stated purpose “to operate a soup kitchen for the poor.” While the charitable category of “relieving poverty” is not stated, it can be inferred from the context. However, the Guidance encourages applicants to be precise in drafting purposes to avoid uncertainty.

The Guidance states that a charitable purpose should be clear and not too broad or vague so that CRA can assess whether it is exclusively charitable and not open to interpretation. In determining eligibility for registration or for maintaining registration, CRA examines both the stated purposes and their related, unstated activities, which may be charitable or not. Organizations are ineligible for charitable registration or maintaining charitable registration if they have unstated non-charitable purposes.

The Guidance sets out three occasions when CRA may review an organization’s proposed purposes and activities. CRA offers reviews of:

- a) Proposed purposes in draft governing documents when submitted with a complete application for registration and a detailed statement of activities;
- b) Proposed amendments to a registered charity’s governing documents and statement of activities for charities wishing to adopt new purposes;
- c) A detailed description of new activities that were not described in the application for registration to ensure that the activities further the charitable purpose.

2. New CRA Guidance on Purposes and Activities Benefiting Youth²⁷

On June 24, 2013, CRA released a new guidance dealing with organizations that benefit youth. The guidance, referenced as CG-020, is entitled *Charitable Purposes and Activities that Benefit Youth* (“Guidance”),²⁸ and replaces the earlier CPS-015 *Registration of Organizations Directed at Youth*. The Guidance describes how CRA interprets the common law and *ITA* in determining whether an organization that benefits youth is eligible to become a registered charity under the *ITA* or presumably can continue as a charity if subject to an audit by CRA.

²⁷ For more information, see Terrance S. Carter & Jacqueline M. Demczur, “New CRA Guidance on Purposes and Activities Benefiting Youth” in *Charity Law Bulletin* No. 319, online: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb319.htm>> from which the above summary has, in part, been extracted.

²⁸ Canada Revenue Agency, Guidance CG-020, *Charitable Purposes and Activities that Benefit Youth*, online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/yth-eng.html>>.

Whereas the previous guidance defined youth with respect to age, the new Guidance broadens the definition of “Youth” by defining it as “young people, without restriction to a specific age range, which will now depend on the nature of the charitable purposes and activities in question.” Additionally, it speaks of “at-risk youth” as “youth who are in danger of not making a successful transition to healthy and productive adulthood as a consequence of a range of possible issues, including, but not restricted to, learning difficulties, socio-economic environment, social relationships, and family/school situations.”

In meeting the requirements of drafting acceptable purposes for charitable registration, purposes must include the three key elements described in the aforementioned CRA Guidance on *How to Draft Purposes for Charitable Registration*. As such, to be eligible for charitable registration, a purpose must: (1) fall within one of four categories of charity; (2) describe the means of providing the charitable benefit; and (3) identify the eligible beneficiary group.

To fulfil the first key element, purposes that benefit youth may fall under any of the four enumerated categories of charity. To fulfil the third key element, eligible beneficiaries, purposes may either allow all youth or particular youth to benefit. In this regard, purposes that generally benefit youth should be open to all youth while purposes that prevent youth problems may restrict which youth can qualify.

The Guidance also describes various specific charitable purposes and activities that relate to youth, outlining particular requirements of each purpose to be eligible. Purposes with a “teaching or learning component” must be structured and educational rather than focused on advancing a particular point of view. They must also have a teaching or learning component, including training, plans of self-study and formal or informal instruction, but cannot simply provide youth with materials for them to teach themselves. Social or recreational activities can be charitable only if they further a charitable purpose, for example, a supervised dance that is part of a structured and focused plan to address the troubles of at-risk youth. Sports activities must also be structured and focused to specifically address youth problems. The charity must provide evidence that there is a causal link between the sport activity and the charitable benefit. Drop-In Centres are acceptable charitable activities, so long as their activities are structured, focused and designed to address or prevent youth problems.

One aspect of the Guidance that is notable is CRA's frequent usage of the terms "structured" and "focused" in relation to evidencing that a specific activity is actually achieving a charitable purpose that benefits youth. This concept will be of great assistance to any organization that is uncertain as to what CRA will be looking for in evaluating an application for charitable status or amendments to its governing documents in order to change its charitable purposes.

3. CRA Guidance on the Promotion of Health and Charitable Registration

On August 27, 2013, CRA released a new guidance dealing with the promotion of health and charitable registration. The guidance, referenced as CG-021, is entitled *Promotion of Health and Charitable Registration* ("Guidance")²⁹ and replaces a number of previous health-related guidances. The new Guidance describes how CRA interprets the common law and *ITA* when determining whether an organization created for the purpose of promoting health is eligible to become a registered charity under the *ITA*.

The Guidance defines promotion of health as "directly preventing or relieving physical or mental health conditions by providing health care services or products to eligible beneficiaries". With regard to the charitable purpose category, promotion of health falls under the fourth category of charity, that being "other purposes beneficial to the community in a way the law regards as charitable". A purpose that promotes health may be eligible for charitable registration provided that three requirements are met. First, the purpose and activities must prevent or relieve a health condition by providing health care services or products. Second, the health care services must meet the standards for effectiveness, quality and safety. If the health care services and products are recognized under the *Canada Health Act*³⁰ or provincial/territorial medical insurance plans, then the standard for effectiveness is already met. Third, it must be provided to the whole public or a sufficient segment of the public if a restriction is necessary to accomplish the charitable purpose, and it must only provide incidental private benefits.

Charitable purposes that promote health are divided into four groups. The first group is "core health care", which is provided to eligible people. Such services may include diagnosing and treating health conditions, assisting with rehabilitation, and protecting and maintaining public

²⁹ Canada Revenue Agency, Guidance CG-021, *Promotion of Health and Charitable Registration*, online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hlth-eng.html>>.

³⁰ RSC 1985, c C-6.

health. The second is supportive health care, which provides “health-related support to individuals with health conditions” or “extended support for families or caregivers of individuals with health conditions”. The third is protective health care that demonstrates a protection and preservation of people’s health. This can be done by offering health-related emergency services or by regulating those people who provide health care services. The fourth is supplying health products to people who medically require the health products to treat a mental health or physical health condition. However, the products must meet the effectiveness, quality and safety standards.

The Guidance contains a section that discusses special topics in the promotion of health. These special topics include particular guidelines for specific activities that further a charitable purpose of promotion of health. Topics discussed include complimentary or alternative healthcare, physical fitness and wellness, providing information as a charitable activity, providing medical clinics, providing health care services in underserved areas or areas of social and economic deprivation, and charging fees.

Additionally, the Guidance states that there are health-related activities that can further the other charitable purposes, which include the relief of poverty, advancement of education and advancement of religion. Particularly, with regard to the advancement of religion, it states that in order to be charitable, the activity must be clearly and materially connected to the religion’s attributes. The Guidance recognizes that health care may further the advancement of religion purpose, which is a welcomed development for the religious community. Health-related activities can further the advancement of religion purpose in two ways. First, when the provided health care is an activity that promotes the teachings or doctrines of the religion; or second, when the health care provided serves religious staff members in support of their religious contributions or service.

4. CRA Guidance on Foreign Activities Changes Rules on Capital Property in a Foreign Country³¹

CRA Guidance – CG-002 *Canadian Registered Charities Carrying Activities Outside of Canada* (“Guidance”)³² has been amended by replacing Appendix B entitled “What if a charity helps build capital property in a foreign country?”, with a new Appendix B now entitled “What if a charity wants to transfer capital property to a non-qualified donee in a foreign country?” The Guidance was originally released on July 8, 2010. The exact date that Appendix B was replaced by CRA is not known, but it would appear that the amendment may have occurred on June 14, 2012, being the “date modified” indicated in the online version of the Guidance accessed on June 27, 2013.

What is obvious from comparing the old and new versions of Appendix B of the Guidance is that CRA has now made it much more challenging for a charity operating in a foreign jurisdiction to transfer ownership of real property to a non-qualified donee. Appendix B now contains more onerous requirements relating to the ownership of capital property by a non-qualified donee in a foreign jurisdiction than is either necessary or justifiable with regard to evidence of “direction and control” when working through a third party intermediary.

Specifically, Appendix B now states that transfers of capital property to non-qualified donees are *not permitted* except in three circumstances: (1) where the country in which the charity is operating does not permit foreign ownership of capital property; (2) the capital property is transferred only as part of a development project to relieve poverty by helping a community to become self-sufficient; or (3) the charity can show that it has made every reasonable effort to gift the capital property to another qualified donee, and has made every reasonable effort to sell the capital property for its fair market value, but has not been successful. Another change is a statement that charities should ensure that organizations to which they are transferring capital property have “mandates” consistent with ensuring the continued charitable use of the property.

³¹ For more information, see: Terrance S. Carter & Jacqueline M. Demczur, “CRA Guidance on Foreign Activities Changes Rules on Capital Property in a Foreign Country” in Charity Law Bulletin No. 316, online: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb316.htm>> from which the above summary has, in part, been extracted.

³² Canada Revenue Agency, Guidance CG-002, *Canadian Registered Charities Carrying Activities Outside of Canada*, online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>>.

What is clear is that these changes in the new Appendix B to the Guidance represent a much more significant set of threshold requirements for charities contemplating transferring capital property to non-qualified donees in a foreign country. As a result, charities will clearly want and need to consult with legal counsel before embarking on any capital property acquisitions in this context. As well, in relation to those charities that have acquired capital property in the past through non-qualified donees but may not meet the more onerous threshold requirements set out in the new Appendix B of the Guidance, it is hoped that CRA will exercise its administrative discretion and not retroactively apply the new requirements in the revised Appendix B of the Guidance to those charities.

5. New CRA Resources for Charities Concerning Political Activities³³

The CRA released a new T3010(13) form for charities (i.e. annual return) with fiscal periods ending on or after January 1, 2013. Revision of the T3010 was necessary following legislative changes in Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* (“Budget 2012”), which were made in response to questions regarding foreign funding of charities in Canada and concerns that such funding was improperly influencing public policy discussion in Canada. Two of Budget 2012’s changes are evident in the new T3010(13). The first of these changes is the amendment to the definition of “political activity” under s. 149.1(1) of the Income Tax Act (“ITA”), which was changed to include “the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee”. The second change was the requirement that charities disclose more information concerning their political activities.

In addition to the new T3010(13), CRA also released the new guide T4033(13) “Completing the Registered Charity Information Return” and the following accompanying forms.³⁴

³³ For more information, see Terrance S. Carter, “CRA News” in March 2013 Charity Law Update online: <<http://www.carters.ca/pub/update/charity/13/mar13.pdf>>; Terrance S. Carter, “CRA Releases New T3010(13)” in Charity Law Bulletin 305, online: <http://www.carters.ca/pub/bulletin/charity/2013/chylb305.pdf>; and Terrance S. Carter & Karen J. Cooper, “Playing by the Rules: Political Activities Fair Game for Charities” in Charity Law Bulletin No. 286, online at: <<http://www.carters.ca/pub/bulletin/charity/2012/chylb286.htm>> from which the above summary has, in part, been extracted.

³⁴ The new forms and guides can be found online at: <http://www.cra-arc.gc.ca/E/pbg/tf/t3010/>.

- a) *Form T1235(13), Directors/Trustees and Like Official Worksheet*
- b) *Form T1236(13), Qualified Donees Worksheet/Amounts Provided to Other Organizations*

The new T3010(13) fulfils the Budget 2012 mandate that charities are to disclose more information concerning their political activities. However, other than the questions in Schedule 7 requiring charities to describe their political activities and how those activities relate to the charitable purpose of the charity, it is not clear how this additional information addresses the only question that really matters under ss. 149.1(6.1) and (6.2) of the ITA; that being, whether the charity has exceeded 10% (subject to certain remedial provisions under CRA's *Policy Statement CPS-022, Political Activities*) of the total resources of the charity for the fiscal year in pursuing political activities.

To help charities understand and comply with the requirements relating to political activities, CRA has also developed a number of web pages explaining key aspects of its *Policy Statement CPS-022, Political Activities*. Below is a list of the topics of the web pages that have been posted to date, as well as a brief description of what each of these topics entails.³⁵

Political activities basic requirements – General rules regarding charities engaging in political activities, including what types of political activities a charity may conduct and when CRA will presume that an activity is political.

Distinguishing between charitable and political activities – Characteristics of a charitable activity as compared to a political activity, as well as an example of an acceptable political activity.

Accountability for the use of resources for political activities – The requirements for keeping books and records related to political activities as stipulated in the ITA, as well as CRA commentary on its expectations.

³⁵ To access the web pages, go to: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-ctvts/menu-eng.html>.

Changes to compliance and reporting requirements – Changes from the 2012 federal budget that affect charities conducting political activities, including the new requirements regarding gifts to support a qualified donee’s political activities, sanctions and reporting obligations.

Partisan political activities – CRA’s definition of a partisan political activity and examples thereof.

Representatives of a charity involved in political activities on their own time – Rules regarding representatives of a charity, such as employees, directors, members and volunteers, engaging in political activities and how to distinguish and separate those activities from the activities of the charity.

Representations to government as a charitable activity – Criteria for representations to be considered charitable and rules relating to releasing the text of a representation to government.

Questions and answers about political activities – Questions and answers that will help charities understand and comply with the requirements regarding political activities. CRA advises that the public is invited to submit questions and will add frequently asked questions to the online list.

The content of these web pages is not intended to represent new law and therefore needs to be read in conjunction with CRA *Policy Statement CPS-022, Political Activities*, as well as the new annual return Form T3010(13).

6. Modifications Made to CRA Policy Statement on Political Activities³⁶

It is important to also note that CRA has made a number of technical modifications to its *Policy Statement on Political Activities, CPS-022*³⁷ originally issued on Sept 2, 2003 (the “Policy Statement”) as a result of the changes introduced by Budget 2012 and its implementing

³⁶ For more information, see Terrance S. Carter & Ryan M. Prendergast, “Modifications Made to CRA Policy Statement on Political Activities” in October 2013 Charity Law Bulletin, online at: <http://www.carters.ca/pub/update/charity/13/oct13.pdf> from which the above summary has, in part, been extracted.

³⁷ Canada Revenue Agency, Guidance CG-022, *Policy Statement on Political Activities*, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pley/cps/cps-022-eng.html> .

legislation concerning political activities. For ease of reference, these technical modifications, which were posted on December 11, 2012, are summarised below as follows:

- a) An explanation in paragraphs 6.2 and 10 that the legislative changes made by Budget 2012 mean that political activities now include the making of gifts to qualified donees that are intended for political activities;
- b) An explanation in paragraph 12 that the “substantially all” (i.e. 90% or more) allocation rule for charitable activities does not apply to gifts made to qualified donees that are intended for political activities, but instead, the part of the gift intended for political activities can now “be treated as a separate transaction where the intent of the donor is clear”;
- c) An update in Appendix I of references to the disbursement quota by deleting reference to the 80% disbursement quota that had been repealed by the 2010 Budget, as well as updating the definition of qualified donee; and
- d) A number of updated legislative provisions in Appendix II.

The balance of the Policy Statement on Political Activities remains as it was before Budget 2012.

7. Public Foundations May Not Acquire Control Through 100% Share Donations³⁸

On August 28, 2013, CRA released an advanced ruling addressing the question of public foundations acquiring control of taxable Canadian corporations after all of the corporation’s voting common shares are transferred to the public foundation (Document 2012-0443321R3).³⁹

S. 149.1(3)(c) of the *ITA* allows for the Minister of National Revenue to revoke a public foundation’s registration where the foundation is found to have acquired control of a corporation since June 1, 1950. The advanced ruling additionally addressed the application of the General Anti-Avoidance Rule (“GAAR”) to such transfers.

³⁸ For more information, see Jacqueline M. Demczur, “Public Foundations May Not Acquire Control Through 100% Share Donations” in September 2013 Charity Law Update, online at: <http://www.carters.ca/pub/update/charity/13/sep13.pdf> from which the above summary has, in part, been extracted.

³⁹ Technical interpretations are only available by subscription or written request to CRA.

The advanced ruling was issued by CRA in response to a proposed transfer of common shares from a charitable organization to a public foundation. Specifically, a charitable organization owned the common shares of a taxable Canadian corporation that it had established for the purpose of transferring certain intellectual property and technology for commercialisation. The charitable organization sought to transfer these shares pursuant to a deed of gift to a public foundation that had provided initial financing to the corporation. The purpose of this transfer was to “optimize economic benefit to [the charity] of the successful commercialization of the Technology”. CRA ruled that the proposed transfer would not result in the public foundation recipient acquiring control of the corporation under s. 149.1(3)(c), and that GAAR would not apply.

8. Registration Requirements for Qualified Donees

Federal Budget 2011 extended to specific qualified donees certain regulatory requirements under the *ITA* that already applied to registered charities. “Qualified donees” is a term defined in s. 149(1) of the *ITA* to include various types of entities, the largest group of which are registered charities.⁴⁰ The qualified donees affected included low-cost housing corporations for the aged (“Low-cost Housing Corporations”) and municipal and public bodies performing a function of government in Canada (“Public Bodies”), which now must be identified in a publicly available list maintained by the Charities Directorate. As a result of these amendments to the *ITA* that came into force on January 1, 2012, qualified donees must apply to CRA for registration in order to maintain their status as qualified donees. Effective as of that date, CRA is also required to maintain a list of Low-cost Housing Corporations and create a registration process for them as qualified donees.

As of January 1, 2014, Low-cost Housing Corporations and Public Bodies that have not applied for registration will no longer have the ability to issue official donation receipts or receive gifts from registered charities. Applicants for registration must send a letter, signed by at least one director, stating that it is applying for registration and include an explanation of how it meets the registration criteria. Those applicants that show that they met the registration requirements as of January 1, 2012 will be granted retroactive status back to that date.

⁴⁰ *Supra* note 20.

9. Clergy Residence Deduction – Ministry Must Be Integral Part of Employment Responsibilities⁴¹

On February 5, 2013, CRA released a technical interpretation (document no. 2012 0447881E5) on the application of paragraph 14 of its Interpretation Bulletin, IT-141R, “Clergy Residence Deduction”,⁴² which paragraph provides that individuals who meet the status test and minister on a part-time or assistant basis also meet the function test provided that “ministering to congregations is an integral part of their employment responsibilities and expectations.” In order to qualify for the clergy residence deduction, an individual must satisfy both a status and function test. As a matter of background, status test requires the individual to be one of (i) a member of the clergy; (ii) a member of a religious order; or (iii) a regular minister of a religious denomination. The function test requires the individual to: (i) be in charge of or ministering to a diocese, parish or congregation, or (ii) be engaged exclusively in full-time administrative service by appointment of a religious order or religious denomination.

The question put to CRA in this technical interpretation was whether occasional liturgical services performed by the priest at parishes in another country that were in addition to his other employment responsibilities in Canada would satisfy the function test. CRA replied that the phrase in paragraph 14 of its Interpretation Bulletin of “minister on a part-time or assistant basis” referred to whether the individual’s employment is part-time in nature, not to the amount of ministering. To qualify under the function test, the ministry must be integral to the individual’s employment responsibilities whether the employment is full or part-time. In this case, the priest could not qualify for the deduction because the occasional liturgies were incidental, not integral to his employment responsibilities.

10. Individual Clergy Residence Deductions Possible for Spouses⁴³

On June 4, 2013, CRA released another interpretation dealing with the clergy residence deduction by addressing whether spouses who are both members of the clergy and who reside in

⁴¹ For more information, see Jennifer M. Leddy, “Clergy Residence Deduction – Ministry Must Be Integral Part of Employment Responsibilities” in April 2013 Charity Law Update, online at: <http://www.carters.ca/pub/update/charity/13/apr13.pdf> from which the above summary has, in part, been extracted.

⁴² Canada Revenue Agency, Interpretation Bulletin, IT-141R, *Clergy Residence Deductions* (document 2012 0447881E5), online at: <http://www.cra-arc.gc.ca/E/pub/tp/it141r-consolid/it141r-consolid-e.pdf>.

⁴³ For more information, see Jacqueline M. Demczur, “Individual Clergy Residence Deductions Possible for Spouses” in February 2013 Charity Law Update, online at: <http://www.carters.ca/pub/update/charity/13/apr13.pdf> from which the above summary has, in part, been extracted.

different residences may individually claim separate clergy residence deductions. S. 8(1)(c)(iv) of the *ITA* provides that a member of the clergy who has met the status and function tests may claim a tax deduction only if the property is owned by the individual or his or her spouse or common-law partner.

CRA expressed the view that a principal place of residence under s. 8(1)(c)(iv) ought not to be confused with a principal residence as defined in s. 54. While any one property belonging to an individual could be designated as a principal residence, the individual's principal place of residence remains a question of fact. This is determined based on factors such as where the individual generally sleeps and eats, where they store their belongings, where they receive their mail, and where their immediate family (i.e. spouse, common-law partner, and/or children) reside. As a result, where it can be demonstrated that each spouse ordinarily resided in a separate residence, spouses who are both clergy and living separately can have separate principal places of residence. Consequently, each may therefore claim the full clergy residence deduction individually for their respective principal places of residence.

E. CRA TECHNICAL INTERPRETATIONS AND RULINGS ON NON-PROFIT ORGANIZATIONS

1. Private School Not Qualifying as an NPO⁴⁴

On November 20, 2012, CRA released a technical interpretation (Document #2012-045849117) concerning whether a private school qualified as a non-profit organization (“NPO”) under paragraph 149(1)(l) of the *ITA*. In order for the private school in question (“Academy”) to qualify as an NPO, it had to show that it operated exclusively for a purpose other than profit. The Academy was affiliated with a for-profit independent private high school.

CRA reviewed four characteristics that might indicate that an activity is a trade or business and therefore could not qualify for NPO status: 1) It is a trade or business in the ordinary meaning, that is, it is operated in a normal commercial manner; 2) Its goods or services are not restricted to its members and their guests; 3) It is operated on a profit basis rather than a cost-recovery basis; and 4) It is operated in competition with taxable entities carrying on the same trade or business.

⁴⁴ For more information, see Theresa L.M. Man, “Private School Not Qualifying as an NPO” in July/August 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/julaug13.pdf>> from which the above summary has, in part, been extracted.

After reviewing the Academy's operations, CRA determined that the Academy met all of the characteristics of a trade or business and therefore did not qualify as an NPO because 1) it operated in a normal commercial manner because it habitually engaged in an activity that was capable of producing a profit; 2) the Academy did not restrict the supply of education services to members and their guests, rather any student could be admitted to the Academy if they were accepted for admission to the high school and met the eligibility requirements; 3) the Academy operated on a for-profit rather than cost-recovery basis with its tuition fee structure being identical to its affiliated for-profit high school; and 4) the Academy was run in exactly the same manner as the affiliated for-profit high school which operated in competition with other private high schools. CRA also determined that the Academy had accumulated profits in its bank accounts and had no specific plans for their use. Furthermore, the Academy's articles of incorporation and day-to-day activities had no connection with any other non-profit or exempt purposes.

2. NPOs Accepting Donations to Capital Funds⁴⁵

On July 2, 2013, the CRA released a technical interpretation on whether a sports club's tax-exempt status as an NPO under s. 149(1)(l) of the *ITA* would be affected if it (a) received donations from its members and businesses affiliated with its members to fund a capital project and (b) recognized the contributions on a "wall of honor" or through naming rights of capital assets.

The CRA stated that an NPO can fund capital projects through member contributions, gifts, grants and incidental profits. Therefore, the CRA was of the view that the sports club could receive contributions from its members and businesses affiliated with its members. Further, generally, it is acceptable for NPOs to develop a "wall of honour" or give naming rights over parts of a capital project to recognize gifts from members or businesses, provided that such rights or "honour" have only a nominal value.

However, it is a question of fact whether the amount received may be a donation or other income. For example, the amount received by an organization in exchange for naming rights

⁴⁵ For more information, see Theresa L.M. Man, "Non-Profit Organizations Accepting Donations to Capital Funds" in September 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/sep13.pdf>> from which the above summary has, in part, been extracted.

may, depending on the facts, be recognized as advertising or other income. In such a scenario, if income received by the organization is not incidental, its NPO status may be jeopardized. This is because the organization may be considered to have a profit purpose and have made income available for the personal benefit of its members, particularly when the amounts are received from non-members.

CRA also pointed out that an NPO's accounting records should clearly identify the capital funds accumulated for the capital project and all transactions related to the project. It further reminds the sports club of the application of s. 149(5), which provides that an NPO whose main purpose is provide sporting and recreational facilities to its members is liable to pay tax on property income earned from the investment of the funds that are accumulated for the capital project.

3. Sale of Real Property by an NPO under s. 149(5)⁴⁶

On July 31, 2013, CRA released a technical interpretation (Document #22012-0460901E5), addressing whether the capital gains from the sale of real property by an NPO was exempt from tax under s. 149(5)(e)(ii) of the ITA. CRA was asked to address a specific transaction involving a club that reported revenue from bar sales and hall rentals to non-members from a clubhouse. CRA's interpretation reviewed the statutory scheme for NPOs having a main purpose of providing dining, recreational, or sporting facilities to its members. The interpretation noted that the *ITA* deems an *inter vivos* trust to exist and the NPO's property is deemed to be property of the trust.

CRA noted that the *ITA* does not define "main purpose", but that CRA will generally consider the main purpose of an NPO to be providing dining, recreational, or sporting facilities to its members where more than 50% of the NPO's assets, time, revenue, attention and efforts are dedicated to providing such facilities to its members. CRA will also review the instruments used in creating the NPO, including the articles of incorporation, bylaws, and the organization's constitution.

⁴⁶ For more information, see Ryan M. Prendergast, "Capital Gains from Sale of Property by NPO Tax Exemption" in July/August 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/julaug13.pdf>> from which the above summary has, in part, been extracted.

The CRA interpretation states that s. 149(5)(e)(ii) provides an exemption for capital gains that result from the disposition of property which was “used exclusively for and directly in the course of providing dining, recreation and sporting facilities” to the NPO’s members. The only exemptions under this section are therefore capital gains resulting from disposition of assets that are required and used to ensure that the NPO’s objects are met. While the interpretation confirms that occasional rental of property to non-members is not sufficient to void the exemption, active pursuit of rental income from non-members may disqualify the NPO from being exempt from tax under s. 149(1)(l) of the *ITA*. In this regard, NPOs providing recreational facilities to their members should review whether or not they are devoting more than 50% of their resources to providing such facilities, and that they limit the pursuit of rental income from non-members in order to maintain their tax-exempt status.

F. CORPORATE UPDATE

1. Canada Not-for-profit Corporations Act (CNCA) Update⁴⁷

As is generally known, the *Canada Not-for-Profit Corporations Act* (“CNCA”) was proclaimed into force on October 17, 2011, succeeding the *Canada Corporations Act* (“CCA”) as the legislation governing Canadian not-for-profit corporations that are federally incorporated. Existing CCA corporations have until October 17, 2014 to continue under the CNCA or face the prospect of dissolution. As part of the continuance process under the CNCA, existing CCA corporations will also need to bring their bylaws up to date to meet the requirements of the CNCA. As well, charities should obtain CRA’s approval if they are planning to make any changes to their existing charitable objects.

Based upon communication with Industry Canada, as of August 31, 2013, only 1,700 not-for-profit corporations incorporated under the CCA had applied for continuance under the CNCA. Industry Canada estimates that there are approximately 17,000 corporations in total that will need to continue under the CNCA by October 17, 2014, although approximately only 13,000

⁴⁷ For more information, see Terrance S. Carter & Jane Burke-Robertson, “Timely Reminder to Apply for Continuance Under the CNCA” in January 2013 Charity Law Update, online at: <http://www.carters.ca/pub/update/charity/13/jan13.pdf> from which the above summary has, in part, been extracted.

regularly file annual summaries each year with Industry Canada. This leaves more than 15,000 CCA corporations with approximately 12 months to continue before the deadline.

For those corporations that have a large membership base, obtaining the necessary membership approval to continue under the CNCA will normally be done at their annual general meeting (“AGM”). Although membership approval could also be obtained at a special membership meeting, most not-for-profit corporations with a large membership base will prefer not to put its membership to the trouble of having to participate in a special membership meeting when approval could be obtained at a regularly scheduled AGM. In order to avoid having to seek membership approval at an AGM or special members meeting at the last minute prior to the looming deadline date of October 17, 2014, federal corporations under the CCA should be commencing the continuance process as soon as possible by preparing the necessary CNCA continuance documents for membership approval.

Corporations with multiple membership classes, including non-voting members, may want to consider whether they want to continue with a multi-class structure. This is because, under the CNCA, members of all classes, including non-voting members, will have a right of veto concerning certain fundamental changes, including continuance. Corporations may therefore wish to change their membership structure in advance of continuing under the CNCA so that there is only one class of members. In this regard, one option is to restructure secondary membership classes into “supporters”, “associates”, “fellows” or other similar terminology in order to avoid classifying them as members. However, a change in membership structure would need to be done at a members meeting held in advance of a subsequent members meeting to proceed with continuance under the CNCA.

2. Ontario Not-for-Profit Corporations Act (ONCA) Update

a) *General Update*

As is also generally known, the *Ontario Not-for-Profit Corporations Act* (“ONCA”) received Royal Assent on October 25, 2010. Amendments to the ONCA (described below) were introduced in the Provincial Legislature on June 5, 2013 through Bill 85.⁴⁸ The Ministry’s June

⁴⁸ Bill 85, *An Act to amend various companies statutes and to amend other statutes consequential to the Not-for-Profit Corporations Act, 2010*, online: <http://www.ontla.on.ca/bills/bills-files/40_Parliament/Session2/b085.pdf>.

5, 2013 email announcing the release of Bill 85 stated that proclamation of the ONCA cannot proceed without these legislative amendments. On September 4, 2013, the Ministry announced that Bill 85 is anticipated to be debated in the Legislature in the fall 2013.⁴⁹ If the amendments are passed by the Provincial Legislature, the ONCA is anticipated to be proclaimed in force no earlier than six months after passage of Bill 85. In this regard, the anticipated proclamation date is expected to occur sometime in mid-2014.

Once the ONCA is in fact proclaimed into force, it will automatically apply to all non-share capital corporations incorporated under Part III of the *Ontario Corporations Act*⁵⁰ (“OCA”). As such, existing Part III OCA corporations will not need to take any specific action in order to come under the ONCA. However, if there are any provisions in a corporation’s letters patent, supplementary letters patent, by-laws or special resolution that are inconsistent with the provisions in the ONCA, these documents will be deemed, at the end of three years after proclamation, to be amended to comply with the ONCA.⁵¹ The problem that this will cause is that it will become difficult to determine what provisions are deemed to be amended and in what way.

In order to avoid such uncertainty from arising, the ONCA permits Part III OCA corporations to “transition” into the ONCA during the three-year period by amending, by articles of amendment, any provision in its letters patent, supplementary letters patent, by-laws or special resolution that are not consistent with the requirements of the ONCA.⁵²

b) *Summary of Bill 85*⁵³

Bill 85 proposes technical amendments to a number of corporate law statutes, including the ONCA and the OCA, *Business Corporations Act*, the *Business Names Act*, the *Corporations Information Act*, the *Extra-Provincial Corporations Act*, the *Limited Partnerships Act*, as well as

⁴⁹ Ontario Ministry of Consumer Services, “Not-for-Profit Corporations Act”, online at: <http://www.sse.gov.on.ca/mcs/en/Pages/not_for_profit.aspx>.

⁵⁰ R.S.O. 1990, c. C.38.

⁵¹ *Supra* note 3 at s. 207(2).

⁵² *Ibid.*, s. 207(1).

⁵³ For more information, see Theresa L.M. Man, “Bill 85 to Amend Ontario Not-For-Profit Corporations Act, 2010” in *Charity Law Bulletin No. 315*, online at: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb315.pdf>> from which the above summary has, in part, been extracted.

79 other Acts consequential to the ONCA. The majority of the amendments are of an administrative nature or are to ensure consistent wording across the various statutes.

The following is an overview of some of the key proposed amendments introduced by Bill 85 affecting the ONCA:

i) Threshold to be Public Benefit Corporations

Currently, the ONCA provides that non-charitable corporations that receive more than \$10,000 in a financial year from specific public sources will become public benefit corporations. The ONCA is proposed to be amended so that the threshold amount may also be prescribed by regulation allowing the threshold amount to be adjusted from time to time without the need to amend the ONCA.

ii) Consents to be a Director must be in Writing

The ONCA now requires that an individual who is elected or appointed to be a director must consent to hold office within 10 days after the election or appointment; and if consent is provided after 10 days, it must be in writing. The ONCA is proposed to be amended to require all consent to be in writing. Further, the ONCA is proposed to be amended to require every corporation to keep directors' consents in the 'approved form'.

iii) Amendments of Governing Documents during Transition Period

As noted above, Part III OCA corporations are not required to take any action in order to come under the ONCA. The ONCA will apply automatically to all Part III OCA corporations upon proclamation. Inconsistent provisions will be deemed at the end of three years from proclamation to be amended to comply with the ONCA. Part III OCA corporations, though, may transition into the ONCA during the three-year period by filing articles of amendment and adopting new by-laws to amend any provision in their letters patent, supplementary letters patent, by-laws or special resolutions that are not consistent with the requirements of the ONCA in order to bring those provisions into conformity with it prior to the expiry of the three year transition period.

Amendments proposed by Bill 85 will, in effect, now make this process which was optional into a mandatory requirement. Bill 85 now proposes to include a new requirement that any provision or portion of a provision in a by-law or special resolution that is required by the ONCA to be

contained in the corporation's articles must be added to the articles during the transition period, failing which such provision will become invalid when the transition period ends.

As well, Bill 85 also proposes to include a new requirement that if a corporation was to file articles of amendment to amend its letters patent during the transition period, it may do so only if it also makes all amendments that may be necessary to bring it into conformity with the ONCA. Similarly, if a corporation was to amend its by-law or special resolution during the transition period, it may do so only if it also makes all amendments that may be necessary to bring the by-law or resolution into conformity with the ONCA, including the removal of any provision required by the ONCA to be contained in the articles and not in the by-laws or special resolution.

iv) Membership Class Votes

The ONCA now provides extensive rights to members of corporations. In addition to the rights to elect and remove directors, members may make proposals, requisition meetings of members, as well as vote on certain amendments to the articles and fundamental changes. The ONCA is now proposed to be amended so that provisions giving non-voting classes of members the right to vote will not come into effect until at least three years after the rest of the ONCA comes into effect. The right of voting members, however, to class votes has not been delayed. The practical effect of this proposed amendment in Bill 85 would mean that non-voting members will not have the right to vote during at least the three year transition period for Part III OCA corporations. If these corporations want to adopt articles of amendment or new by-laws during the transition period (to collapse their membership classes, for example), they would not be required to seek class approval of their non-voting members.

c) *Draft Organizational By-Law Released*⁵⁴

On April 22, 2013, the Ministry of Consumer Services released a draft organizational by-law, which Ontario's not-for-profit corporations may adopt or use as a guide when drafting a by-law that is compliant with the ONCA.⁵⁵ Newly incorporated corporations under the ONCA that do not adopt an organizational by-law within 60 days of incorporation will be deemed to have

⁵⁴ For more information, see Theresa L.M. Man & Terrance S. Carter, "Ontario's Not-for-Profit Corporations Act Update" in April 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/apr13.pdf>> from which the above summary has, in part, been extracted.

⁵⁵ The draft by-law is available at: <http://www.sse.gov.on.ca/mcs/en/Pages/onca6.aspx>.

adopted this organizational by-law by default. These corporations may amend or repeal and replace the default by-law at a later date if they wish.

Existing not-for-profit corporations may refer to the default by-law for language and content when reviewing and amending their own by-laws. However, it is important to recognize that the default by-law is intended to apply to the most common corporate events. It is not intended to be a complete codification of the ONCA and therefore the corporation would need to make frequent reference to the ONCA and other applicable laws to ensure it remains compliant.

3. Ontario Social Enterprise Strategy Announced

On September 26, 2013, the Ontario Ministry of Economic Development, Trade and Employment announced “Impact - A Social Enterprise Strategy for Ontario” (the “Strategy”),⁵⁶ designed to develop, grow and support new social enterprises in Ontario. The Strategy identifies social enterprise as “an organization that uses business strategies to maximize its social and environmental impact”. The Strategy states that it will “increase the number of social enterprise start-ups; leverage private sector impact investments to help social enterprises scale up; and launch new initiatives to support the creation of an estimated 1,600 new jobs in the social enterprise sector.” The Strategy aims to support social enterprises and establish Ontario as a global social enterprise leader through four pillars: (1) “Connecting, co-ordinating and communicating” information to, and about, social entrepreneurs; (2) “Building the social enterprise brand” by increasing public awareness; (3) “Creating a vibrant social finance marketplace”; and (4) “Delivering service, support and solutions” for existing social enterprises.

Although exploring the idea of introducing legislation to create “hybrid” corporations is a goal identified under the strategy, it is currently not known when enabling legislation will be introduced concerning social enterprises in Ontario.

⁵⁶ The Strategy is available online at: <<https://dr6j45jk9xcmk.cloudfront.net/documents/697/impact-socialenterprise.pdf>>.

4. B.C. Approves Regulation for Community Contribution Companies⁵⁷

As background, on May 14, 2012, British Columbia's Bill 23, *Finance Statutes Amendment Act, 2012*⁵⁸ received Royal Assent. The Act amends, among other things, the B.C. *Business Corporations Act*⁵⁹ to provide for a new type of company called a "community contribution company" ("CCC"). According to a government announcement, CCCs are a hybrid vehicle intended to promote social enterprise by allowing the for-profit sector to tap into the emerging demand for socially focused investment options. CCCs combine socially beneficial purposes with a restricted ability to distribute profits to shareholders. CCCs permit an alternative business model that is not available through for-profit companies.

With regard to the creation and operation of these companies, CCCs are incorporated with the same flexibility and certainty accorded to for-profit companies, but the governing legislation ensures that they primarily benefit the community. Measures in this regard include restrictions on corporate reorganizations to avoid the circumvention of payout restrictions and an "asset lock" that caps dividends on company shares to ensure that profits are retained by the company or directed to the community benefit. These companies are subject to a higher degree of accountability than an ordinary company and are required to publish an annual report detailing their social spending.

On February 28, 2013, the B.C. government deposited *B.C. Regulation 63/2013: Community Contribution Company Regulation*⁶⁰ to create the new corporate structure, which regulation came into force on July 29, 2013, implementing the amendments that were made to B.C.'s *Business Corporations Act* allowing for the use of the community contribution company model.

⁵⁷ For more information, see Esther S.J. Oh, "B.C. Approves Regulations Creating Community Contribution Companies" in March 2013 Charity Law Update, online at: <http://www.carters.ca/pub/update/charity/13/mar13.pdf> from which the above summary has, in part, been extracted.

⁵⁸ Bill 23-2012, *Finance Statutes Amendment Act*, online: Legislative Assembly of British Columbia <http://www.leg.bc.ca/39th4th/3rd_read/gov23-3.htm>.

⁵⁹ [SBC 2002] Chapter 57.

⁶⁰ Community Contribution Company Regulation, BC Reg 63/2013, online: <<http://canlii.ca/t/5234k>>

5. Nova Scotia Passes Community Interest Companies Act⁶¹

On December 6, 2012, Nova Scotia's *Community Interest Companies Act*, Bill No. 153⁶² received Royal Assent, allowing businesses to seek designation as a "community interest company" ("CIC"). This legislation is aimed at supporting social entrepreneurship initiatives. According to John MacDonell, Minister of Service Nova Scotia and Municipal Relations, CICs will "benefit the economy and create employment, while contributing to a social good".⁶³

To qualify for the CIC designation, a company must have a "community purpose," which the Act defines as "a purpose beneficial to society at large, or a segment of society that is broader than the group of persons who are related to the community interest company". A CIC must have at least three directors, all of whom must act in accordance with the company's community purpose when exercising their powers and performing their functions. CICs are restricted in their ability to pay dividends and distribute assets on dissolution or otherwise and they must file a community interest report each year. The legislation obviously does not amend the *ITA*, so CICs must either comply with the rules for non-profit organizations or pay tax as a for-profit corporation.

The *Community Interest Companies Act* is not yet in force, and will come into force on such day as the Governor in Council orders and declares by proclamation. The expected date of proclamation is not known at this time.

G. OTHER PROVINCIAL INITIATIVES

1. Proposed Employer Health Tax Act Amendments May Impact Charities⁶⁴

On May 3, 2013, the Ministry of Finance (Ontario) announced its intentions to introduce legislation to implement proposed changes to the *Employer Health Tax Act* (Ontario) ("EHTA") that would be effective January 1, 2014, subject to the approval of the Legislature. Under the

⁶¹ For more information, see Terrance S. Carter, "Nova Scotia Passes Community Interest Companies Act" in January 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/jan13.pdf>> from which the above summary has, in part, been extracted.

⁶² Bill 153, *Community Interest Companies Act*, Online: The Nova Scotia Legislature <http://nslegislature.ca/legc/bills/61st_4th/1st_read/b153.htm>.

⁶³ Service Nova Scotia and Municipal Relations press release (28 November 2012), online: <<http://novascotia.ca/news/release/?id=20121128010>>.

⁶⁴ For more information, see Esther S.J. Oh, "Proposed Employer Health Tax Act Amendments May Impact Charities" in September 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/sep13.pdf>> from which the above summary has, in part, been extracted.

proposed changes, eligible employers under the EHTA that are registered charities, and having multiple locations, will be able to treat each location as a separate employer for EHTA purposes. Each location will be able to claim the exemption from tax under the EHTA on the first \$400,000 of annual payroll remuneration paid by the employer. The exemption amount will be prorated where the particular location is new or otherwise exists for less than 365 days of any given year.

To be considered a separate location, charities will be required to prove, through formal evidence, that the location is separate from the organization's main body, by providing information concerning any one of the following:

- a) *supporting evidence that the location belongs to the charity (e.g. copies of leases, deeds or purchase agreements, property tax bill, or other third party documentation to show continued exclusive occupancy during the period) and the location is publically advertised (on the charity's letterhead, on business cards, in telephone directories, or through other information readily accessible by the public such as pamphlets or internet sites);*
- b) *proof of the location's own charitable registration number; or*
- c) *proof that the location files its own Registered Charity Information Returns with Canada Revenue Agency.*

Shared space facilities (such as before or after school programs) will not be treated as separate locations, although different programs operating under the same roof or on the same property may be treated as separate locations under the EHTA if they are carried out by separate registered charities. Two or more buildings on a single property will be counted as one location.

For separate location claims, charities will also be required to provide (1) a complete listing of addresses of all of their locations; (2) the period of time for which each location exists; and (3) copies of by-laws or other proof that the charity is not controlled by any level of government. A registered charity with more than one location will be able to apply for a refund if it has filed as a single employer and claimed only one tax exemption for all of its locations.

2. Proposed Payday Lending Amendments in Ontario May Affect Microlending⁶⁵

The Ontario Ministry of Consumer Services released its *Proposed Regulatory Amendments to the General Regulation (O. Reg. 98/09) of the Payday Loans Act, 2008* (“Proposed Regulations”) on August 16, 2013. The Proposed Regulations state that “[t]his Regulation comes into force on the later of October 31, 2013 and the day it is filed” with the Registrar of Regulations. As of the date of this paper, the Proposed Regulations have not been filed. However, if adopted in their current form, the Proposed Regulations under the *Payday Loans Act* would negatively impact Ontario charities and not-for-profits that are involved in microlending, whether in Ontario or elsewhere. In this regard, the Proposed Regulations would expand the scope of payday loans to catch a broader range of organizations as designated payday lenders under the Act. To fall within this the definition of a payday lender under the Proposed Regulation, a lender must “extend credit” to borrowers, the transaction must not be secured against real property, and the transaction must fall under one of the four listed criteria. The first criteria (and the one that is most relevant to charities and non-profit organizations involved in microlending) would prescribe businesses that lend aggregate amounts of \$5,000 or less as designated payday lenders. Consequently, Ontario charities and not-for-profits that engage in microlending could become designated payday lenders under the Act and be subject to the requirements and restrictions imposed upon payday lenders, such as licensing and disclosure requirements.

Non-licensees who loan money in contravention of the Act may only recover the advance paid to the borrower, but not the cost of borrowing. Further, payday lenders are prohibited from receiving or demanding payment or partial payment for the cost of borrowing until the end of the term agreement. The Act also places restrictions on default charges. This is an obvious example of overreaching by government regulations and therefore the Proposed Regulations should include an exemption for charities and non-profit organizations that carry on microlending or provide loan guarantees as part of their programs.

⁶⁵ For more information, see Terrance S. Carter, “Proposed Payday Lending Amendments in Ontario May Affect Microlending” in September 2013 Charity Law Update, online at: <http://www.carters.ca/pub/update/charity/13/sep13.pdf> from which the above summary has, in part, been extracted.

H. RECENT CASE LAW (in chronological order)

1. Court Upholds Termination for Misapplying Charitable Funds⁶⁶

On January 17, 2013, the Ontario Superior Court of Justice released its decision in *English v. Travel Centres Canada*.⁶⁷ The decision regarded a wrongful dismissal suit between an employee of a for-profit multi-service centre (the “Centre”). Justice Grace had to decide whether the employee, in fundraising proceeds for the business, rather than charitable purposes, constituted misconduct sufficient to warrant her dismissal. The Centre raised approximately \$1,500 in funds for a Foundation. It later assisted another business with a fundraising event for the same Foundation by providing food for sale. Unfortunately, a large amount of unsold food meant that the Centre did not break even in its sales. The employee decided to use the \$1,500 raised for the Foundation to pay down the food supplier’s invoice.

Justice Grace noted that in each fundraising activity, “representations were made to staff and members of the public that monies were being raised for the charity”. The court found that the employee “knew that donations of time, effort, money, and property were made by [the Centre’s] staff and members of the public on the basis that their contribution would go to [the Foundation]...not a single penny found its way there.” The court concluded that the employees conduct was dishonest and constituted misconduct that was adequate grounds for dismissal.

It is important to note that even though the amount in dispute was modest, i.e., \$1,500, Justice Grace stated that, “the seriousness of the transgression is not appropriately measured by the amount of money involved”. Employees employed by a business raising funds on behalf of a charity, or even employees of a charity responsible for raising funds, should be aware that misapplying charitable funds can constitute dismissal for cause, in addition to breach of trust allegations, although not raised in this particular case.

⁶⁶ For more information, see Ryan M. Prendergast, “Court Upholds Termination for Misapplying Charitable Funds” in February 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/feb13.pdf>> from which the above summary has, in part, been extracted.

⁶⁷ *English v Travel Centres Canada*, 2013 ONSC 417, online at: <http://canlii.ca/t/fvqmk>.

2. Court Intervenes in Membership Dispute to Remove Directors⁶⁸

On March 3, 2013, the Ontario Superior Court of Justice released its decision in *Pal et al. v. Chatterjee et al.*⁶⁹ The decision involved Toronto Kalibari, a religious organization incorporated under the *Canada Corporations Act*. The corporation was governed by a board of nine directors referred to in its by-laws as “trustees.”

As a result of an October 10, 2012 petition, six trustees attempted to orchestrate a show cause hearing to remove three “dissident” trustees as members of the corporation for having signed or agreed with the petition. The court examined the corporation’s by-laws and determined that they contained no method for the removal of trustees, save and except where the trustee misses 50% of the meetings held in a year. It concluded that the proceedings had not been commenced in good faith and that they did not conform to the requirements of natural justice. In this regard, the six trustees had the ability to appoint five of the seven committee members of the show cause hearing which created a reasonable apprehension of bias against the three dissident trustees.

The court found that the termination of the applicants as trustees warranted intervention in the corporation and that the show cause hearing was being initiated for the improper and oblique purpose of their removal. The court noted that the corporation could properly amend its by-laws if methods of removal, other than failure to attend meetings, were warranted. The decision is an important reminder that corporate proceedings to discipline or terminate a member cannot be commenced for an improper or ulterior purpose. In addition, corporations must comply with their by-laws in seeking the removal of a director or trustee.

3. Court Intervenes in Church Dispute to Ensure Fairness in Membership Admission⁷⁰

On March 7, 2013, the Ontario Superior Court of Justice released its decision in *Diaferia et al. v. Elliott et al.*,⁷¹ an application for an interlocutory injunction preventing a membership meeting.

⁶⁸ For more information, see Ryan M. Prendergast, “Court Intervenes in Membership Dispute to Remove Directors” in *March 2013 Charity Law Update*, available online at: <<http://www.carters.ca/pub/update/charity/13/mar13.pdf>> from which the above summary has, in part, been extracted.

⁶⁹ *Pal et al v Chatterjee et al*, 2013 ONSC 417, online at: <<http://canlii.ca/t/fvqmk>>.

⁷⁰ For more information, see Ryan M. Prendergast, “Court Intervenes in Church Dispute to Ensure Fairness in Membership Admission” in *April 2013 Charity Law Update*, online at: <<http://www.carters.ca/pub/update/charity/13/apr13.pdf>> from which the above summary has, in part, been extracted.

⁷¹ *Diaferia et al v Elliott et al*, 2013 ONSC 1363, online at: <<http://canlii.ca/t/fwg6k>>.

The decision involved the Nashville Road Community Church (the “Church”) in Kleinburg, Ontario, a registered charity operating as an unincorporated association. The voting membership consisted of 60 people admitted into membership in accordance with the Church’s written constitution. In this regard, the constitution required potential members to complete a three-step process, including confirmation by a vote of the Church membership.

A dispute arose when the elders of the Church announced on February 10, 2013, that a meeting of members would be held on March 3, 2013 to discuss the potential dismissal of the pastor. The pastor then announced that a meeting would be held on February 24, 2013, at which he would ask the elders to consider admitting into membership those who supported him. The elders, however, decided that only those who had met the qualification requirements for membership as of February 10, 2013 would be recommended for admission into membership. At the meeting held by the pastor on February 24, 2013, the elders refused to admit 14 individuals who had not met the qualification requirements for membership as of February 10, 2013 but who supported the pastor.

As such, three members of the Church brought an application seeking an injunction to prevent the meeting called for March 3, 2013 to consider the pastor’s employment. The court granted the injunction, and also permitted a group of 12 individuals, who had applied for membership after a lunch meeting with the pastor on February 3, 2013, to have their names considered for membership. The court primarily sought to ensure that ultimately there was a level playing field for both sides of the dispute concerning the employment of the pastor. The court ruled the elders’ arbitrary cut-off point unfair. The decision is a reminder for both incorporated and unincorporated religious, as well as non-religious, organizations that if a procedure for admitting members is in the governing documents of the organization, this procedure should not only be followed, but should also be well known to those who want to become members. If there is not procedure for admitting members, a fair process must be used. Otherwise, there is a risk that the court could intervene.

4. Federal Court Of Appeal Decision in Prescient⁷²

On May 1, 2013, the Federal Court of Appeal released its decision in *Prescient Foundation v. Minister of National Revenue*,⁷³ an appeal by Prescient Foundation of the revocation of its charitable registration. Pursuant to a CRA audit, CRA had issued a notice of intention to revoke Prescient Foundation's charitable registration based on three key issues. First, Prescient donated \$500,000 to the DATA Foundation, a foreign non-qualified donee. Second, Prescient was involved in the sale of a farm, where sale proceeds were routed on a tax-free basis "for the private benefit of certain taxpayers". Third, Prescient had "failed to maintain adequate books and records" by only providing CRA with several documents and not allowing CRA to verify information in the Foundation's financial statements and registered charity information returns.

The Federal Court of Appeal ("FCA") held that the revocation of Prescient's registration for the gifts to DATA was unfounded, since there was no legislative basis at that time to enforce such position, despite CRA's administrative position and proposed amendments that were not then yet in force.⁷⁴ Regarding books and records, the FCA stated that the CRA's representative must "(a) clearly identify the information which the registered charity has failed to keep, and (b) explain why this breach justifies the revocation of the charity's registration", calling into question CRA's determination of what constitutes adequate books and records. While the poor books and records regarding the farm sale alone were insufficient on their own to revoke the charity's status, this coupled with the lack of documentation and disclosure regarding DATA was found to be sufficient grounds for revocation on the ground of failure to maintain adequate books and records.

The implications of this decision need to be carefully considered by registered charities at various stages of the audit, objections and appeals process because it questions current CRA positions regarding gifts to foreign charities and the adequacy of books and records maintained

⁷² For more information, see Karen J. Cooper, "Federal Court of Appeal Decision in Prescient" in Charity Law Bulletin No. 313, online: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb313.pdf>> from which the above summary has, in part, been extracted.

⁷³ *Prescient Foundation v Minister of National Revenue*, 2013 FCA 120 at para 47, online at: <<http://canlii.ca/t/fxc4n>>.

⁷⁴ Bill C-48 was given Royal Assent on June 26, 2013, giving effect to ss. 149.1(2) to (4) of the *ITA* to allow the Minister to revoke an organization's charitable registration if the organization has made a gift to a foreign non-qualified donee, although Bill C-48 does not impact the Prescient decision, as it came into force subsequent to the decision.

by registered charities. It correctly addresses the long-standing inconsistencies between CRA policy and applicable legislation on the issue of gifts to foreign charities, highlighting the continued difficulties organizations and their advisors face in reconciling CRA policy on many issues, including split-receipting, gifts to non-qualified donees and even the threshold definitions of the various types of charities, and the uncertain state of proposed legislative amendments – difficulties that the charitable sector has had to negotiate for more than 10 years until the passing of Bill C-48 on June 26, 2013.⁷⁵ The decision also calls into question CRA’s determination of what constitutes adequate books and records in the face of a vague paragraph 230(2)(a) of the *ITA* and suggests that CRA should be more forthcoming about what it considers to be reasonable.

On July 31, 2013, the Prescient Foundation filed an application for leave to appeal to the Supreme Court of Canada (“SCC”) on the basis that the Foundation’s status should not be revoked for maintaining inadequate books and records.

5. Federal Court of Appeal Disallows Delayed Assessment⁷⁶

The Federal Court of Appeal released its decision in *Ficek v Canada (Attorney General)*⁷⁷ on May 14, 2013, regarding s. 152(1) of the *ITA*, which requires the Minister to examine a taxpayer’s income tax return with “all due dispatch” and which the Court stated means within a reasonable time. Although standard CRA policy is to assess a charitable donation tax credit for a tax shelter donation before the tax shelter is audited, the Winnipeg Tax Centre (“Winnipeg”) created a new policy in March 2011 to delay the initial assessment until after the audit and before a refund was issued.

In 2010, the applicant made a donation through the Global Learning Gifting Initiative (“GLGI”), a registered tax shelter whose activities were viewed as a “sham” by CRA, and was advised that due to Winnipeg’s policy, her assessment would be delayed until the 2010 GLGI audit was completed. The Court examined whether Winnipeg’s new policy and the delayed assessments violated the requirement of the *ITA* to assess “with all due dispatch”. It determined that although the Minister of National Revenue had discretion regarding the timing of the assessments, a delay

⁷⁵ See earlier comments concerning Bill C-48.

⁷⁶ For more information, see Karen J. Cooper, “Federal Court of Appeal Disallows Delayed Assessment” in *July/August 2013 Charity Law Update*, online: <<http://www.carters.ca/pub/update/charity/13/julaug13.pdf>> from which the above summary has been extracted.

⁷⁷ *Ficek v Canada (Attorney General)*, 2013 FC 502, online at: <<http://canlii.ca/t/fxj63>>

must be reasonable and for a “proper purpose” related to the tax liability of the particular taxpayer. Winnipeg’s actual purpose was to deter taxpayers from participating in the GLGI tax shelter by delaying assessments and withholding refunds. As this was not an acceptable purpose and was not truly related to the applicant’s tax return, the Court declared that the Minister of National Revenue had not complied with the statutory duty to assess with “all due dispatch”.

While this decision limits the capacity of CRA to delay initial assessments in tax shelter situations, recent changes to the *ITA* resulting from the last Budget and the packages of technical amendments in Bill C-48, referenced above, demonstrate that the Department of Finance is serious about using legislative means to continue to discourage participation in tax shelters and CRA will likely continue to aggressively audit and reassess taxpayers involved with donation tax shelters.

6. Appeal in *Guindon v. The Queen*⁷⁸

On October 2, 2012, the Tax Court of Canada (“TCC”) released its decision in *Guindon v. The Queen*.⁷⁹ The case dealt with whether the third party penalties provided under s. 163.2 of the *ITA* could be assessed against the appellant. The basic purpose of s. 163.2 is to provide for monetary penalties assessable against third parties who knowingly, or in circumstances amounting to gross negligence, participate in, promote, or assist conduct that results in another taxpayer making a false statement or omission in a tax return.

As a result of an investigation, CRA assessed a penalty of \$564,747 against Ms. Guindon under s. 163.2 of the Act after she provided a legal opinion on the “The Global Trust Charitable Donation Program” charitable donation scheme and in respect of which she issued 134 charitable donation receipts. The TCC held that s. 163.2 created an “offence” such that Ms. Guindon had the rights set out in s. 11 of the *Charter*, concluding that the provision creates a criminal sanction that can only be prosecuted in provincial court in accordance with criminal procedure and *Charter* protections.

⁷⁸ For more information, see Karen J. Cooper, “Federal Court of Appeal Overturns Decision in *Guindon*” in *June 2013 Charity Law Update*, online:<<http://www.carters.ca/pub/update/charity/13/jun13.pdf>> from which the above summary has, in part, been extracted.

⁷⁹ *Guindon v The Queen*, 2012 TCC 287, online at: <<http://canlii.ca/t/ft2fk>>.

On June 12, 2013, the Federal Court of Appeal (“FCA”) released its judgment in *Guindon v The Queen*,⁸⁰ overturning the decision of the TCC to set aside a penalty assessed against Ms. Guindon by CRA under s. 163.2. Given the constitutional nature of the argument, the FCA held that Ms. Guindon should have been obligated to serve a notice of constitutional question when she sought a finding that a section of the Act was invalid, inoperative or inapplicable. Since she failed to do so, the FCA held that the TCC had no jurisdiction in this instance to consider whether s. 163.2 of the Act created a criminal offence and her penalty should not have been overturned. In the alternative, the FCA reviewed the TCC’s assessment of the criminal nature of the penalty under s. 163.2. The FCA compared the penalty and offence provisions in the Act in order to determine whether a penalty in the Act could be a criminal offense. Despite approximately sixty penalty provisions in the Act, the FCA determined that these provisions provided no evaluation of the “moral blameworthiness or turpitude on the conduct.” In comparison, the FCA established that offence provisions were punishable by fines, imprisonment or both, and none were fixed or calculated by a rigid formula. According to the FCA, proceedings under s. 163.2 are in place to maintain discipline, compliance or order “within a discrete regulatory and administrative field of endeavour” and are, therefore, not criminal in nature.

On September 11, 2013, Ms. Guindon filed an application for leave to appeal to the Supreme Court of Canada.

7. Misrepresentation and Gross Negligence in Donations Results in Penalties⁸¹

On June 18, 2013, the Tax Court of Canada released its judgment in *Clarke v. The Queen*.⁸² This case concerned an appeal by a taxpayer of the Minister of National Revenue’s reassessment of charitable donation tax credits and penalties assessed pursuant to s. 163(2) of the ITA. Although the reassessment of Ms. Clarke’s donations was completed after the normal reassessment period, the Minister argued that under s. 152(4) of the Act, the Minister had the right to reassess due to the fact that Ms. Clarke made misrepresentations that were “attributable to neglect, carelessness or wilful default” or committed fraud.

⁸⁰ *Guindon v The Queen*, 2013 FCA 153, online at: <<http://canlii.ca/t/fz581>>..

⁸¹ For more information, see Tanya L. Carlton, “Misrepresentation and Gross Negligence in Donations Results in Penalties” in *July/August 2013 Charity Law Update*, online: <<http://www.carters.ca/pub/update/charity/13/jun13.pdf>> from which the above summary has been extracted.

⁸² *Clarke v The Queen*, 2013 TCC 191, online at: <<http://canlii.ca/t/fzdm3>>.

Ms. Clarke acknowledged that she did not make the charitable donations claimed, did not provide charitable donation receipts and that “she or her tax preparer misrepresented the facts in relation to the charitable donation claims.” In addition, the Court heard evidence that the individuals that prepared Ms. Clarke’s tax returns had sold charitable donation receipts for tax purposes. The charitable donations claimed by Ms. Clarke were an indication that she had paid the tax preparer for the fraudulent tax refund.

The Court held that since Ms. Clarke had not made the claimed donations and had not verified her tax return to determine why her refund was higher than expected, there was clear misrepresentation by her and the Minister was entitled to reassess Ms. Clarke beyond the normal reassessment period. Further, given “the magnitude of understatement of tax, as well as the carelessness demonstrated by the appellant in signing her tax returns”, the Court held that Ms. Clarke knowingly claimed the tax credits and met the burden for proving gross negligence, the prerequisite for assessing a penalty under s. 163(2) of the ITA.

8. Donation Through Tax Shelter Disallowed⁸³

The Tax Court of Canada released its decision in *Bandi v. The Queen*⁸⁴ on July 25, 2013. This decision was with regard to an appeal of a reassessment by the Minister of National Revenue which disallowed a claim by Mr. Bandi for a charitable donation tax credit for an alleged gift made to the Aurora Foundation (“Foundation”) under their Charitable Technology Trust Gifting Program (“Program”). The appellant participated in the Program and made an alleged gift which consisted of a cash payment and a “purported” gift of four software licenses to the Foundation.

According to the tax deduction claim, following Mr. Bandi’s cash gift to the Foundation, the Trust set up to supply the software licenses to investors was to have provided the four software licences to Mr. Bandi, who was to have then gifted them to the Foundation. Mr. Bandi stated however, that he did not receive the software licences and he had no knowledge of whether they even existed. As a result, the Court held that the Program was not properly implemented and the reassessment by the Minister was valid.

⁸³ For more information, see Tanya L. Carlton, “Donation Through Tax Shelter Disallowed” in *July/August 2013 Charity Law Update*, online: <<http://www.carters.ca/pub/update/charity/13/jun13.pdf>> from which the above summary has, in part, been extracted.

⁸⁴ *Bandi v The Queen*, 2013 TCC 230, online at: <<http://canlii.ca/t/fzvr9>>.

The Court also assessed Mr. Bandi's claim that even if the reassessment was valid, he was still entitled to a tax credit for his alleged cash gift made to the Foundation. A gift has been defined in previous court cases as "a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor." The Court concluded that the cash and non-cash elements of the transactions formed an integral part of the tax shelter arrangement, and that Mr. Bandi would not have paid any cash to the Foundation without having received the software licences. The expectation of an enhanced tax benefit thereby nullified Mr. Bandi's donative intent and the cash gift could not be considered separate from the overall plan.

9. Ontario Human Rights Tribunal Rules that Atheism is a Creed/Religion⁸⁵

On August 13, 2013, the Human Rights Tribunal of Ontario (the "Tribunal") released an important decision in *RC v District School Board of Niagara*⁸⁶ about a complaint brought by self-described atheists concerning the distribution of religious publications in a public school to students who expressed interest in receiving those materials and who had a signed parent permission slip. The District School Board of Niagara ("Board") had established a policy and procedure that required requests for distribution of religious publications and presentations in schools to be approved by the Director of the Board and the school's principal. The parent applicant contacted the principal and requested to be allowed to distribute materials that promoted atheism at a presentation at school. He was subsequently refused permission by the Board to allow distribution of the book on several grounds, including that atheism is not a religion and that the book was not an authoritative source of any religion or belief.

The decision primarily dealt with the question of whether atheism can be encompassed within the protected ground of "creed" under the *Ontario Human Rights Code* ("Code"). The Tribunal concluded that it was not necessary to decide whether atheism is a creed or a religion because it is well established that creed includes religion and the Code protects individuals from discrimination on account of their beliefs about religion, including their non-belief. The decision is very careful not to conflate atheism and religion and uses the *Charter* freedom of religion cases to drive home the point that persons cannot be discriminated against on the basis of

⁸⁵ For more information, see Sean S. Carter, Terrance S. Carter & Jennifer M. Leddy, "Ontario Human Rights Tribunal Rules that Atheism is Protected as a 'Creed'" in *Church Law Bulletin No. 45*, available online at: <<http://www.carters.ca/pub/bulletin/church/2013/chchlb45.htm>> from which the above summary has, in part, been extracted.

⁸⁶ *RC v District School Board of Niagara*, 2013 HRTO 1382, online at: <<http://canlii.ca/t/g034z>>.

religion whether it is because of a sincerely held religious belief or sincerely held non-belief. Atheists are protected from discrimination on the basis of creed under the Code, not because a decision has been made that atheism is a religion, but because the discrimination is based on religion or a creed and engages the purpose of the Code to ensure that “people are treated equally regardless of their views and practices on religious matters.”

The decision is certainly notable for what it changed and expanded, but also for the principles and rights it upheld. The Decision confirms that the “Code ensures equality because of creed, but does not ban creed from all public spaces.” It is ultimately up to the Board or similar public institutions to decide whether or not to have programs like the presentations in question. So long as no particular religion or creed is promoted and none are specifically excluded in these after-school voluntary programs, the Code is not breached.

The Tribunal’s impact (if any) outside of Ontario and the human rights arena is yet to be determined. Much will depend on its interpretation and how it is referred to by other Canadian courts under different legislation or case law that deals with the charitable purpose of advancing religion. While different areas of law can spill over into others, it is clear that: 1) the reference to protecting atheism as a creed is limited to the protection afforded by the Code and not to anything else, and 2) that school boards and other public institutions are not precluded from distributing religious materials by various religious groups, provided that the same opportunity is offered on a fair and equitable basis to all religious groups or creeds.

10. Applications to Delay Revocation of Charitable Registration

The following three cases cover recent applications made by charities to delay the revocation of charitable status when faced with a CRA notice of intention to revoke charitable status. The decisions in *Trinity Global Support Foundation v. Minister of National Revenue* and *Gateway City Church v. Canada (National Revenue)* were released before the judgment of the Federal Court of Appeal in *Cheder Chabad v The Queen*. The decision reached in *Cheder Chabad* is the opposite of those released in *Trinity* and *Gateway*.

a) *Trinity Global Support Foundation v. Minister of National Revenue Decision*⁸⁷

On April 23, 2013, the Federal Court of Appeal, in *Trinity Global Support Foundation v. Minister of National Revenue*,⁸⁸ denied an application by Trinity Global Support Foundation (“Trinity”) for an order to delay the publication of CRA’s notice of intention to revoke Trinity’s charitable registration. Although the Minister conceded that Trinity had an arguable case against the revocation, the Court held that Trinity did not satisfy the balance of the three-part test for granting stays and injunctions.

Trinity argued that the revocation would cause it irreparable harm as it would lose revenue from loss of donations. It also argued that its clients would be seriously impacted if Trinity was unable to continue to fund their charitable activities. The Court found the evidence submitted in respect of these arguments did not constitute “compelling evidence of irreparable harm”. Also, it noted from the evidence that “the reputation of the Foundation has already been subject to intense public scrutiny for reasons distinct from the notice of intention to revoke” and that there was “no basis upon which to conclude that any possible further harm to the Foundation’s reputation will be such as to amount to irreparable harm.” The Court did not consider the balance of convenience element of the test. However, it did note that serious allegations had been raised in CRA’s proposed revocation. It found that Trinity’s own evidence showed that they had been “engaged in fundraising activities using tax shelter arrangements” and it determined that the public interest in the Minister protecting the integrity of the charitable sector outweighed Trinity’s interest in staying revocation. As a result, Trinity Global Support Foundation had its charitable status revoked by CRA, effective May 4, 2013.⁸⁹

⁸⁷ For more information, see Karen J. Cooper, “Federal Court of Appeal Refuses to Delay Revocation of Charity ” in *May 2013 Charity Law Update*, online: <<http://www.carters.ca/pub/update/charity/13/may13.pdf>> from which the above summary has been extracted.

⁸⁸ *Trinity Global Support Foundation v Minister of National Revenue*, 2013 FCA 109 online at: <<http://canlii.ca/t/fx5lz>>.

⁸⁹ For more information on the revocation, see online: <<http://www.cra-arc.gc.ca/nwsrm/rlss/2013/m05/nr130503b-eng.html>>.

b) *Gateway City Church v. Canada (National Revenue) Decision*⁹⁰

On May 7, 2013, the FCA, in *Gateway City Church v. Canada (National Revenue)*,⁹¹ denied an application by Gateway City Church (“Gateway”) for an order to delay the publication of CRA’s notice of intention to revoke Gateway’s charitable registration. Although the Minister conceded that Gateway had an arguable case against the revocation, the Court held that Gateway did not satisfy the balance of the three-part test for granting stays and injunctions.

Gateway argued that revocation of its charitable status would cause the church irreparable harm as Gateway would not be able to issue receipts for donations and future donations would decrease, and that this would then prevent them “from doing essential work for its congregation and the wider community.” The Court held however, that “such a general assertion” was not sufficient to establish “irreparable harm”. It further held that irreparable harm must be demonstrated, not just asserted. Gateway’s evidence that unavoidable irreparable harm would result was found by the Court to be lacking. Gateway failed to produce evidence that members would no longer donate, failed to provide evidence that lower donations would affect Gateway’s overall budget and failed to produce evidence that without donations, programs offered by them would need to be cut. Given that Gateway was unable to demonstrate irreparable harm, the Court did not consider the balance of convenience element of the test, and denied a delay to the publication of CRA’s notice to revoke.

c) *Chabad v. Minister of National Revenue Decision*⁹²

On August 23, 2013, the Federal Court of Appeal released its decision in *Chabad v. Minister of National Revenue*.⁹³ Cheder Chabad is a registered charity operating a religious school in the Toronto area, teaching secular and religious studies. The charity was audited by CRA for the fiscal periods of July 2007 to June 2009. As a result of the audit, CRA issued a notice of intention to revoke the charitable status of Cheder Chabad on July 5, 2013. In this regard, the

⁹⁰ For more information, see Tanya L. Carlton, “Court Denies Application to Delay Revocation of Church’s Charitable Status” in September 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/sep13.pdf>> from which the above summary has been extracted.

⁹¹ *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126, online at: <<http://canlii.ca/t/fxc4k>>.

⁹² For more information, see Ryan M. Prendergast, “Religious School Wins Rare Delay of Recovation” in *Charity Law Bulletin 321*, online at: <<http://www.carters.ca/pub/bulletin/charity/2013/chylb321.pdf>> from which the above summary has been extracted.

⁹³ *Chabad v Minister of National Revenue*, 2013 FCA 196, online at: <<http://www.drache.ca/upload/files/1/docs/Cheder.Chabad.Reasons.pdf>>

charity sought an order prohibiting CRA from publishing a copy of the notice of intention to revoke in the Canada Gazette, which would make the revocation of charitable status effective.

Cheder Chabad argued that the revocation would result in the cancellation of the school year for all of the students and the dismissal of the teaching staff. In addition, since 80% of the students receive subsidized tuition, loss of charitable status would also mean the costs of tuition would prevent some students from attending the school since the charity would no longer be able to provide tax receipts for that portion of the tuition fees that qualifies for a charitable receipt. The court concluded that Cheder Chabad had demonstrated the revocation of its status would cause it to suffer irreparable harm, since the revocation would prevent the school from carrying on the next school year given the short-fall in funds the school would face without being able to liquidate assets, and since the impact that revocation would have on the parents who would not be able to send their children to the school but for the subsidies provided to students through tax-receiptable gifts. The court also concluded that the balance of convenience weighed in favour of the interests of the 180 students, since their parents would not likely be able to place them in another school within such a short timeframe, and the specific nature of religious instruction available at the school which would not generally be available elsewhere in the area.

As indicated above, other charities had been unsuccessful at the Federal Court of Appeal in obtaining a stay or delay of revocation of their charitable status. This is because charities have thus far been unable to convince the court that they would suffer “irreparable harm” as a result of the revocation. In this decision, however, Cheder Chabad was able to obtain a delay in the publication of the notice of intention to revoke due to the Federal Court of Appeal’s consideration of the impact that the revocation would have on a third party. Where a revocation will have a material impact upon other parties, particularly vulnerable beneficiaries like children, there appears to now be a precedent for a delay in revocation, albeit of a short duration in this case. As such, the decision may impact CRA’s decisions in the future to proceed with giving notice of intention to revoke in the Canada Gazette before the charity has exhausted all avenues of appeal where the decision to proceed with revocation may impact third parties, particularly vulnerable beneficiaries.

I. OTHER & INTERNATIONAL

1. Uniform Law Conference of Canada Adopts New Uniform Trustee Act⁹⁴

At its 2012 annual meeting, held from August 12-16, 2012, the Uniform Law Conference of Canada (ULCC) adopted its new *Uniform Trustee Act*⁹⁵ with commentary and recommended that the model legislation be enacted by provincial and territorial governments. The *Uniform Trustee Act* is a modernized model statute that addresses the administration of trusts in general, as well as charitable and non-charitable purpose trusts in particular. The *Uniform Trustee Act* is not intended to be a code of trust law, but rather is proposed as enabling and supplementary legislation to the general and largely non-statutory law of trusts, and its provisions would only apply when trust instruments did not make other provisions or were silent.

In addition to including provisions that would have general application to all trusts, including charitable trusts (such as establishing a prudent investor standard), the *Uniform Trustee Act* includes a number of remedial provisions that would directly assist charities. Such remedial provisions would include a power of the court to vary charitable gifts (s. 70), authority and direction concerning the application of a surplus fund from a public appeal (s.71), the power of the court to order the sale of charitable trust property if it can no longer be advantageously used for its charitable purpose (s.72), and protection of charitable trust property from seizure (s.76). As such, the *Uniform Trustee Act* represents an important initiative to assist in the administration of charitable property. It is hoped that provincial and territorial governments will take notice of the model legislation and consider its future enactment within their respective jurisdictions.

2. FATF Issues New Risk Assessment Guidelines⁹⁶

The Financial Action Task Force (FATF), an intergovernmental policy making body that sets anti-terrorist financing and anti-money laundering standards, published a new guidance titled the “National Money Laundering and Terrorist Financing Risk Assessment”. The focus of the

⁹⁴ For more information, see Terrance S. Carter, “Uniform Law Conference of Canada Adopts New Uniform Trustee Act” in June 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/jun13.pdf>> from which the above summary has, in part, been extracted.

⁹⁵ The Uniform Trustee Act and Final Report of the Working Group is available online at: <<http://www.ulcc.ca/en/uniform-acts-en-gb-1/619-uniform-trustee-act-2012/1254-uniform-trustee-act-final-report-of-the-working-group>>.

⁹⁶ For more information, see Terrance S. Carter & Nancy E. Claridge, “FATF Issues New Risk Assessment Guidelines” in April 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/apr13.pdf>> from which the above summary has, in part, been extracted.

updated assessment criteria in the guidance is on “areas of higher risk” – places where illicit arms trafficking, bribery and corruption have been found to be present. The new guidance will help countries calculate these risks by assessing both terrorist and criminal threats in their system and aid them in determining the impact or consequences of any of these vulnerabilities.

The guidance places a focus on charities and not-for-profits and listed the “presence of NPOs active in overseas conflict zones” as a factor that should be flagged by evaluators as a risk. Also, the guidance states that charities and not-for-profits that “disburse large sums for unspecified projects” should be flagged, but it does not make clear on how much money is considered to be “large.” There are some concerns in the charitable sector with regard to how this new guidance will affect charities and not-for-profits, due to the possibility of governments using these comments to disproportionately target the legitimate activities of charities and not-for-profits that send money overseas for aid and development operations.⁹⁷

3. US Treasury Expands Terrorist Financing Related Definitions⁹⁸

The US Department of Treasury on July 5, 2013 published “Technical Amendments to Counter-Terrorism Sanctions Regulations” (“Technical Amendments”). The Technical Amendments expanded the definitions of “prohibited transactions” and “charitable contributions” under the American Global Terrorism Sanctions Regulations (31 CFR 594) and Terrorism Sanctions Regulations (31 CFR 595).

As a result of the Technical Amendments, the new definitions have been brought into accord with those found in February 2005’s Executive Order 13372. This does not change the pre-existing ban on charitable donations to and for the benefit of terrorists, but creates an additional prohibition on all charitable donations received from terrorists. The regulations will continue to afford protection to charities that unknowingly provide funds, goods, services or technology to terrorists, as long as the terrorists are not listed as organizations that threaten the Middle East

⁹⁷ For the new FATF documents see online at: http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf.
<http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf>.

⁹⁸ For more information, see Nancy E. Claridge, “US Treasury Expands Terrorist Financing Related Definitions” in July/August 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/julaug13.pdf>> from which the above summary has, in part, been extracted.

peace process, but is silent with respect to protection for charities receiving such funds goods, services or technology.

The Technical Amendments place an additional burden on charities operating in the United States, which now must ensure not only that their donations are not contributing toward terrorism, but also that all donations received are not of terrorist origins.⁹⁹

4. Charities Commission Issues Alert and Offers Tips In Preventing Fraud¹⁰⁰

Following the release in June 2013 of the UK National Fraud Authority Annual Fraud Indicator , the Charity Commission of England and Wales (“Charity Commission”) released an Alert to warn charities of increasing level of fraud. The Annual Fraud Indicator states that charities across England, Scotland and Wales lose approximately £147.3 million annually as a result of fraud, with the most common forms of fraud being banking, accounting, and identity fraud.

The Charity Commission’s Alert advises charities to have financial controls and policies in place to prevent fraud and to deal with fraud should it arise. It also provides a brief list of “Top Tips” for charities regarding fraud prevention tactics.¹⁰¹ Some of these tips include ascertaining the identity and legitimacy of organizations with whom the charity works, increasing online protection through firewalls and anti-virus programs, maintaining proper vigilance and reporting suspicions, and developing a financial records system for receipt and use of all funds. These practice tips will be of benefit to any charity as opposed to only those based in England and Wales.

⁹⁹ The Technical Amendments is available online at: <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/fr78_38574.pdf>.

¹⁰⁰ For more information, see Terrance S. Carter, “Charities Commission Issues Alert and Offers Tips In Preventing Fraud” in July/August 2013 Charity Law Update, online at: <<http://www.carters.ca/pub/update/charity/13/julaug13.pdf>> from which the above summary has, in part, been extracted.

¹⁰¹ The Charity Commission’s alert is available online at: http://www.charitycommission.gov.uk/media/522590/ccnews_issue43.pdf. For a detailed look at the 2013 Annual Fraud Indicator, see online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206552/nfa-annual-fraud-indicator-2013.pdf.

J. CONCLUSION

The broad extent and number of changes that have occurred during the last 12 months underscore how complicated the law pertaining to charities has become in Canada. As such, it is important for practitioners who are interested in working with the charitable sector to keep abreast of developments in the law with regard to charities as they occur. Hopefully this paper will be of help in this regard.