

## COMMENTARY

The purpose of this consolidation is to assist those undertaking research in the area of charity law. Anyone who has undertaken research in this field can attest to the fact that the statutory regime governing charities consists of numerous, complex and, in some cases, unexpected legislative requirements. There is no single statute that sets out all of the legislative requirements applicable to charities. The statutory provisions applicable to charities are instead set out in multiple federal and provincial statutes. To further complicate matters, the statutory rules governing charities have in recent years proven susceptible to ongoing revision. Indeed, since the time of the first edition of this consolidation, the legislative provisions applicable to charities have undergone significant change. The consequence is that an applicable statute or legislative amendment can all too easily be overlooked.

Having regard to this complicated legislative context, this consolidation aims to facilitate charity law research by setting out excerpts from or the entire text of the key Federal and Ontario statutes that apply to charities. A brief description of the statutes included in this consolidation is set out below. Before proceeding, though, we offer the following observations.

Not every statutory provision applicable to charities is included in this consolidation. We have excluded statutes that deal with highly specialized subject matters, those that are only tangentially related to charities or those that are otherwise unlikely to arise with recurrence in charity law research. A brief description of some of the statutes that have been omitted appears below.

At the time of writing, the law of charity, is in some key respects, in a state of transition. Since the time of the first edition of this consolidation, a number of relevant legislative amendments have been proposed and enacted into law. Other amendments have been proposed, but at the time of writing have yet to be enacted into law.<sup>1</sup> Still other amendments, namely, proposed amendments to the Income Tax Act (Canada), have yet to be enacted into law, but nevertheless are being administered by government regulators as though they were enacted into law.<sup>2</sup> This consolidation includes all of these amendments. To avoid confusion, we note in the description below and in the body of the text the status of relevant legislative amendments.

### **Federal Statutes:**

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supplement), as amended.

There are two key tax advantages under the *Income Tax Act (Canada)* for an institution to obtain the status of a “registered charity”. First, registered charities are generally exempt from tax under the *Income Tax Act (Canada)*. Second, registered

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<sup>1</sup> Bill C-21, *Canada Not-For-Profit Corporations Act*.

<sup>2</sup> Legislative Proposals Relating to Income Tax, July 2005. See Technical News No. 26 published by the Canada Revenue Agency.

charities are allowed to issue to donors official donation receipts, which entitle donors to tax relief under the *Income Tax Act (Canada)*. The excerpts from the *Income Tax Act (Canada)* included in this consolidation generally relate to these two issues. In particular, these excerpts set out the various requirements that must be complied with in order for charities to both obtain and maintain registered status and also set out the rules applicable to the tax consequences of charitable donations. The excerpts can be generally categorized as follows:

<u>Select Provisions of the <i>Income Tax Act (Canada)</i></u>	<u>General Description</u>
<b><u>Tax Exemptions for Registered Charities</u></b>	
Paragraph 149(1)(f) Paragraph 181.1(3)(c) Paragraph 210.1(c) <sup>3</sup> Subsection 212(14) Paragraph 219(2)(c)	Paragraph 149(1)(f) exempts registered charities from Part 1 tax. Paragraph 181.1(3)(c) exempts registered charities from Part I.3 tax. Paragraph 210.1(c) exempts registered charities from Part XII.2 tax. Subsection 212(14) allows for the issuance of certificates of exemption to non-resident charities, which exempts from Part XIII tax interest income described in paragraph 212(1)(b)(iv). Paragraph 219(2)(c) exempts registered charities from Part XIV tax. Due to either practical or technical considerations, registered charities are also generally exempt from tax levied under those Parts of the Act that do not contain an express exempting provision.
<b><u>General Requirements for Charitable Registration</u></b>	
Section 149.1 Regulations 3500 – 3502 Regulations 3700 – 3702	Section 149.1 sets out the key rules applicable to charitable registration. These include rules applicable to the: <ul style="list-style-type: none"> <li>• designation of registered charities as charitable organizations, public foundations and private foundations;</li> <li>• disbursement quota requirements of registered charities;</li> </ul>

<sup>3</sup> Proposed amendments to the *Income Tax Act (Canada)* released July, 2005 provide for the repeal of para. 210.1(c) and the re-enactment of this paragraph in proposed new para. 210(2)(c).

<b><u>General Requirements for Charitable Registration</u></b>	
	<ul style="list-style-type: none"> <li>• permissible expenditures of registered charities;</li> <li>• restrictions on activities such as political activities and business activities; and</li> <li>• grounds for revocation of charitable registration.</li> </ul> <p>Regulations 3500-3502 set out rules applicable to proper gift receipting practices of registered charities.</p> <p>Regulations 3700-3702 provide for rules relevant to calculating the disbursement quota obligations of charitable foundations.</p>
<b><u>Loss or Denial of Charitable Registration</u></b>	
<p>Subsections 149.1(2), (3), (4) &amp; (4.1)</p> <p>Section 168</p> <p>Section 172</p>	<p>The grounds for revocation of charitable registration are set out in subsections 149.1(2), (3), (4) and (4.1). Sections 168 and 172 establish the procedural rules in this regard. In particular, section 168 establishes the procedure by which charitable registration may be revoked and section 172 establishes the procedure by which the revocation or denial of registered charity status may be appealed.</p>
<b><u>Special Taxes and Penalties in Respect of Registered Charities</u></b>	
<p>Section 163.2</p> <p>Part V (Sections 187.7, 188, 188.1, 188.2 &amp; 189)<sup>4</sup></p> <p>Part XI.2 (Sections 207.3, 207.31 &amp; 207.4)</p>	<p>These sections establish special taxes and penalties in respect of registered charities. Section 163.2 provides for penalties that could apply in relation to certain charitable fundraising schemes. Subsections 188(1)-(2.1) provide for a revocation tax applicable where a charity's registration is revoked. Subsections 188(3)-(5) provide for a</p>

<sup>4</sup> Sections 188.1 and 188.2 derive from the proposed amendments to the *Income Tax Act (Canada)* released in July, 2005, which, at the time of writing, have yet to be enacted into law.

<b><u>Special Taxes and Penalties in Respect of Registered Charities</u></b>	
	<p>transfer of property tax applicable to certain inter-charity transfers. Subsections 188.1(1)-(2) provide for a penalty for carrying on an impermissible business. Subsection 188.1(3) provides for a penalty where a charitable foundation acquires control of a corporation. Subsections 188.1(4)-(5) provide for a penalty for conferring an “undue benefit”. Subsection 188.1(6) provides for a penalty for failure to file a return as required under paragraph 149.1(14). Paragraphs 188.1(7)-(10) provide for a penalty where a charity issues an improper gift receipt. Subsection 188.1(11) provides for a penalty for participating in a gifting scheme to delay expenditures of amounts on charitable activities. Section 188.2 provides for the suspension of receipting privileges where certain penalties under section 188.1 apply. Subsections 189(1)-(5) provide for a tax regarding non-qualified investments of private foundations. Subsections 189(6.2)-(6.3) indicate how charities are to satisfy, respectively, revocation tax liability / penalties. Sections 207.3 and 207.31 provide for a tax applicable in certain circumstances where a charity disposes of, respectively, a culturally significant object or an ecological gift. Section 207.4 provides for a filing obligation applicable where sections 207.3 or 207.31 apply.</p>
<b><u>Obtaining Information Relating to Registered Charities</u></b>	
<p>Subsections 241(1), (3.2) &amp; (4)(f.1)</p>	<p>These provisions allow government regulators to release certain information relating to registered charities to certain persons.</p>

COMMENTARY

<b><u>Miscellaneous Provisions Applicable to Registered Charities</u></b>	
<p>Paragraph 150(1.1)(a) Regulation 204(3)(c) Subsection 230(2) Subsection 248(1)</p>	<p>Paragraph 150(1.1)(a) exempts charitable corporations from the obligation of corporations to file returns pursuant to paragraph 150(1)(a). Regulation 204(3)(c) exempts charities from the requirement to file returns as provided for in Regulation 204(1). Subsection 230(2) sets out the requirement for registered charities to keep certain records. Subsection 248(1) provides definitions for “private foundation”, “public foundation”, “qualified donee” and “registered charity”.</p>
<b><u>Capital Gains Arising from Charitable Donations</u></b>	
<p>Subsections 38(a),(a.1) &amp; (a.2) Regulation 6210 Subparagraph 39(1)(a)(i.1) Subsection 46(5) Subsection 69(1) Subsection 40(1.01) &amp; Paragraph 72(1)(c)</p>	<p>Subsections 38(a) and 69(1) provide the basic rules regarding capital gains arising from charitable donations. Subsections 38(a.1) and (a.2) modify the basic rules for, respectively, donations of certain types of securities (see Regulation 6210) and donations of ecological property to charity. Subparagraph 39(1)(a)(i.1) and subsection 46(5) provide special rules for, respectively, donations of culturally significant objects and arrangements such as “art flips”. Subsection 40(1.01) and paragraph 72(1)(c) provide special rules re capital gains arising from the donation of “non-qualifying securities”</p>
<b><u>General Provisions Regarding Charitable Donations</u></b>	
<p>Section 110.1 Section 118.1 Subsections 248(30)-(38)<sup>5</sup> Regulation 3503 Schedule VIII of Regulations</p>	<p>These provisions provide the tax advantages for charitable donations. Section 110.1 provides for a charitable tax deduction for corporations and section 118.1 provides for a charitable tax credit for individuals. Subsections 248(30)-(38) set out the rules for calculating the “eligible amount” of a donation — the amount for which a</p>

<sup>5</sup> These subsections derive from the proposed amendments to the *Income Tax Act (Canada)* released in July, 2005, which at the time of writing, have yet to be enacted into law.

<b><u>General Provisions Regarding Charitable Donations</u></b>	
	receipt may be issued. Regulation 3503 and Schedule VIII to the Regulations enumerate the foreign universities to which receiptable charitable donations may be made.
<b><u>Special Provisions Regarding Charitable Donations</u></b>	
<p>Subsection 43(2)  Subsections 169(1.1) &amp; 171(1.1)  Section 43.1  Paragraphs 87(2)(m.1) &amp; 88(1)(e.2)  Paragraph 67.1(2)(b)  Paragraphs 87(2)(v), 88(1)(e.6) &amp; 88(1)(e.61)  Paragraph 110(1)(d.01)  Subsections 110(2) &amp; (2.1)  Section 143  Section 143.2  Paragraph 152(6)(c)  Section 217  Section 237.1 / 237.2</p>	<p>These provisions provide special rules applicable to certain charitable donations. Subsection 43(2) applies to ecological gifts. Also, subsections 169(1.1) &amp; 171(1.1) are relevant to the valuation of gifts of ecological property. Section 43.1 applies to gifts of remainder interests in real estate. Paragraphs 87(2)(m.1) and 88(1)(e.2) apply to gifts of “non-qualifying securities” in the context of, respectively, an amalgamation and winding-up. Paragraph 67.1(2)(b) provides for a special rule regarding the deductibility of meal expenses incurred for a charitable fund-raising event. Paragraph 87(2)(v) applies to a gift to charity by a corporation that subsequently amalgamates. Paragraphs 88(1)(e.6) &amp; 88(1)(e.61) apply to gifts made by a corporation that subsequently winds up. Paragraph 110(1)(d.01) applies to gifts of stock options to charity. Subsection 110(2.1) provides for special rules for the donation of the proceeds of disposition of stock options. Subsection 110(2) provides special rules for donations made to religious orders by members of such orders who have taken vows of perpetual poverty. Section 143 provides special rules for donations made by “congregations”. Paragraph 152(6)(c) allows for the amendment of a tax return to reflect charitable donations. Section 217 enables a non-resident person to elect to pay tax under Part I instead of Part XIII and to thereby utilize the tax benefits</p>

	of
<b><u>Special Provisions Regarding Charitable Donations</u></b>	
	donations to registered charities. Sections 143.2, 237.1 and 237.2 provide for special rules for gifting arrangements that constitute “tax shelters”.

The reader is encouraged to also consult the various interpretation bulletins, information circulars, advance tax rulings, technical interpretations and guides that elaborate on these provisions. Certain of these documents are available at the charities page of the Canada Revenue Agency web site <<http://www.cra-arc.gc.ca/tax/charities/menu-e.html>>.

The reader should be aware that on December 20, 2002 a number of proposed amendments to the provisions of the *Income Tax Act (Canada)* that are relevant to registered charities were released. These amendments were revised and re-released in July, 2005. As of the date of writing, these proposed amendments have not been enacted into law. Nevertheless, certain of these amendments are presently being applied by the Canada Revenue Agency.<sup>6</sup> In this regard, the reader is encouraged to consult Technical News No. 26, published by the Canada Revenue Agency, for an explanation of the current administrative practices in relation to the proposed amendments.

By way of summary, there are four key respects in which the proposed amendments impact registered charities.

First, amendments pertaining to the circumstances in which a donor will be entitled to a charitable gift receipt have been proposed. Previously, a donor was not entitled to a charitable gift receipt if the donor received any consideration for the “gift”. Also, it was previously the case that charitable gift receipts were required to be issued for the full fair market value of the donated property or not at all. The proposed amendments allow for a practice known as “split-receipting”. In particular, under the proposed 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 receipt is the “eligible amount”, *i.e.*, the fair market value of the property donated minus the value of the “advantage”. A number of technical amendments are required to give effect to this proposed amendment.

Second, amendments to the definitions of “charitable organization” and “public foundation” in subsection 149.1(1) have been proposed. There has historically been a limit on the amount of a charity’s capital that may have been contributed by one person or a group of persons not dealing at arm’s length with one another in order for it to qualify as either a “charitable organization” or a “public foundation”. The limit for a “charitable organization” has been 50 per cent and for a “public foundation” it has been either 50 per cent or 75 per cent depending upon

<sup>6</sup> See *Richert v. Stewards’ Charitable Foundation*, [2005] B.C.J. No. 279 (S.C.) for a judicial acknowledgement of this administrative practice.

when the foundation was registered.<sup>7</sup> Under the proposed amendments, large capital contributions from a single person or group of persons not dealing at arm's length with one another will not preclude an entity from qualifying as a "charitable organization" or a "public foundation", provided that such person or persons do not control the charity.

Third, the creation of an additional basis upon which charitable registration may be revoked under subsections 149.1(2) to (4) has been proposed. Under the proposed amendments, charitable registration may be revoked where a registered charity transfers property to a person or entity other than a "qualified donee", except where the transfer is in the course of the charity carrying on charitable activities. We understand that this proposed amendment is intended, at least in part, to remedy ambiguity under the *Income Tax Act (Canada)* regarding whether a charitable foundation may disburse property to an entity that, although charitable at common law, does not constitute a "qualified donee". If enacted this proposed amendment will bring the wording of the *Income Tax Act (Canada)* into conformity with the administrative position of the Canada Revenue Agency to the effect that such transfers are not permitted.<sup>8</sup>

Fourth, the proposed amendments alter the scope of the "gifting arrangements" that are caught by the definition of "tax shelter" set out in subsection 237.1(1). Upon this proposed amendment being enacted, taxpayers who donate to registered charities via such charitable gifting arrangements could have the value of the resultant charitable gift receipt significantly reduced.

*Canada-United States Tax Convention Act, 1984 — Article XXI, S.C. 1984, c. 20.*

Article XXI of the *Canada-United States Tax Convention Act, 1984* deals with a variety of cross-border tax issues applicable to donations to charities in Canada and the U.S. In particular, Article XXI sets out the circumstances in which the U.S. source income of a Canadian charity will be exempt from tax in the U.S. and vice versa. Article XXI also provides rules regarding the extent to which a U.S. donor will be entitled to tax relief in respect of donations to a Canadian charity and vice versa.

*Canada Corporations Act, R.S.C. 1970, c. C-32.*

A charity may take on a variety of legal forms, such as, for example, a corporation, an unincorporated association or a trust. A charity organized as a corporation may be incorporated under the federal or a provincial incorporating statute. The *Canada Corporations Act* is the federal incorporating statute. The *Canada Corporations Act* establishes the basic corporate framework for a federally incorporated charity. Since most incorporated charities are structured as non-share capital corporations, the excerpts from the *Canada Corporations Act* included in this consolidation are those relevant to this corporate structure. The reader is encouraged to also consider the Not for Profit Policy Summary published by Industry Canada

<sup>7</sup> See the current definitions of "charitable organization" and "public foundation" in subs. 149.1(1).

<sup>8</sup> See *Registered Charities Newsletter* (CCRA: Newsletter No. 9, Spring 2000).

## COMMENTARY

for a practical discussion of certain of the requirements for a federally incorporated charity. A link to this policy summary is available from the Industry Canada homepage at <<http://strategis.ic.gc.ca/engdoc/main.html>>.

The federal government has proposed successor legislation to the *Canada Corporations Act*. At the time of writing, the successor legislation, Bill C-21, the *Canada Not-For-Profit Corporations Act*, is in draft form. Given that it is currently in the early legislative stages, we have not included the proposed, successor legislation in this consolidation. We nevertheless make the following observations regarding the current draft of the proposed new legislation with a view to giving the reader a general sense of the direction that the law may take in the near future.

### Transitional Provisions

If Bill C-21 is passed, all corporations that are currently governed by Part II of the *Canada Corporations Act* will be required to apply for a certificate of continuance under the new legislative regime. If an existing corporation fails to take this step within three years after the coming into force of Bill C-21, it may be subject to dissolution.

### Incorporation:

Bill C-21 proposes the replacement of the current system of federal incorporation — the discretionary “letters patent” system — with the faster and more efficient system of incorporation “as of right”. In addition, it is proposed that three individuals will no longer be required to establish a new incorporation. Instead, one or more individuals or corporations will be able to incorporate a corporation by sending signed articles of incorporation and other specified documents to the “Director”, a new position created by Bill C-21 the scope of which is to exercise regulatory powers under the new legislation and to act as a public registrar of corporations.

### Capacity and Powers of the Corporation:

Bill C-21 provides not-for-profit corporations with the capacity, rights, powers and privileges of natural persons. It does not require the passage of by-laws in order to confer any power on a corporation or its directors. Corporations will still be precluded, though, from carrying on activities or exercising powers in a manner contrary to their mission as articulated in their articles.

### Financial Accountability and Disclosure:

Bill C-21 imposes additional financial disclosure obligations on corporations by requiring that they make financial statements available to members on request. Incorporated charities that constitute “soliciting corporations”, which generally will include charities that engage in fundraising activities, will also be required to file their financial statements with the Director who will make them available to the public. Different levels of financial accountability will be imposed on different corporations depending upon variables such as annual revenue.

Administrative Obligations:

Bill C-21 requires all corporations to file annual returns, keep registered offices and maintain corporate records for specified periods of time. The required records will include registers of directors, officers and members, debt obligations, minutes of members meetings, accounting records and corporate documents such as articles and by-laws.

Directors:

Bill C-21 introduces a number of important changes in relation to the directors of not-for-profit corporations. These changes bring the duties and responsibilities of such directors more in line with those of their for-profit counterparts. The proposed changes include the following.

There will be greater flexibility in the composition of boards and in the meetings of directors. Soliciting corporations will be required to have at least three directors whereas non-soliciting corporations need only have one director. There is also provision for directors' written resolutions in lieu of holding meetings, a flexible and rotating board and a maximum term of three years.

With respect to the duties of directors, under the current legislative regime, the standard of care to which directors are subject is determined by a fluctuating common law. By contrast, Bill C-21 specifically sets out express duties. These include the duty to act honestly and in good faith with a view to the best interests of the corporation, the duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, the duty to comply with the new legislation and any governing corporate documents; the duty to manage or supervise the management of the activities and affairs of the corporation; and the duty to disclose all conflicts of interest.

With respect to defences available to directors, the current legislative regime does not explicitly provide directors facing liability claims with any defences. Bill C-21, though, specifically provides a due diligence defence available to directors who have exercised the care, diligence and skill that a reasonably prudent person would have demonstrated in comparable circumstances. Under Bill C-21, due diligence includes reliance in good faith on the reports of professionals and on financial statements. Bill C-21 also allows corporations in some circumstances to indemnify directors and to maintain insurance for the benefit of directors.

With respect to statutory liabilities, Bill C-21 provides that directors can be liable to employees of the corporation for up to six months' wages. In addition, directors may be liable where they have authorized, permitted or acquiesced to an offence committed by the corporation.

Members:

Bill C-21 expands the rights of members. For example, unlike the current legislative regime, members are given the right to requisition directors to call members meetings. In addition, Bill C-21 explicitly addresses matters relating to members

## COMMENTARY

meetings such as the conduct of electronic meetings, voting in absentia and the replacement of meetings by written resolution of members.

With respect to the issues dealt with at members meetings, Bill C-21 provides that members are able to submit notice of a proposal that they wish to raise at members meetings and the corporation, subject to certain exceptions, will be required to include the proposal in the notice of the meeting.

With respect to the control of members over the affairs of the corporation, Bill C-21 provides for “unanimous member agreements”. This mechanism allows members in limited circumstances to restrict the powers of the directors to manage or supervise the management of the corporation.

With respect to member remedies, Bill C-21 makes available to members derivative actions and the oppression remedy. In short, the derivative action can be used by members to commence actions in the name of the corporation and the oppression remedy allows members to bring claims seeking relief from the oppression of their rights. Courts are given wide latitude to order remedies when satisfied of the merits of a derivative or oppression action. A faith-based defence, though, is made available for religious non-profit organizations.

### Changes to the Corporation:

Bill C-21 outlines specific circumstances in which special resolutions of members — two-thirds vote — are required to make “fundamental changes” to the corporation. This includes altering the conditions and rights of membership, the number of required directors and/or the distribution of assets upon dissolution. There are also detailed provisions dealing with circumstances in which a corporation wishes to amalgamate with one or more other corporations, liquidate, dissolve or be continued under the laws of another jurisdiction.

In short, Bill C-21 introduces profound changes to the federal law pertaining to not-for-profit corporations. The reader is encouraged to monitor the status of Bill C-21 so as to ensure compliance with its provisions if and when it is enacted into law.

*Civil Marriage Act*, S.C. 2005, c. 33.

The *Civil Marriage Act* extended the institution of marriage to include same-sex relationships. The statute contains provisions that were intended to put to rest concerns that charities whose activities and purposes reflect the traditional view of marriage would be considered discriminatory at law and possibly thus non-charitable. The statute declares that no benefit shall be deprived from any person or organization under any law of the Parliament of Canada due to the exercise or expression of the view that marriage is restricted to heterosexual relationships. In addition, the statute enacted an amendment to the *Income Tax Act (Canada)* — new subsection 149.1(6.21) — that expressly provides that the charitable registration of institutions organized for the advancement of religion shall not be revoked due solely to the exercise of freedom of conscience in relation to this issue.

*Criminal Code*, R.S.C. 1985, c. C-46.

As is true of other entities, charities are required to conduct their affairs within the bounds of criminal law. The *Criminal Code* is therefore of general application to charities. There are, however, specific *Criminal Code* provisions of which charities should be aware. Section 336, for example, provides that it is a criminal breach of trust for the trustee of a charitable purpose trust to convert, with the intent to defraud, the property of the trust to a use not authorized under the trust. The maximum penalty for this offence is 14 years in prison.

Also, the *Criminal Code* contains provisions dealing with gambling that are fundamental to the regime of statutes and regulations that regulate charitable gaming. These provisions, while not included in this consolidation, are discussed below.

In addition, in response to the events of September 11, 2001, Parliament enacted a variety of legislative measures to combat terrorism, including the *Anti-Terrorism Act*, S.C. 2001, c. 41. Many aspects of the *Anti-Terrorism Act* impact charities. Among these is the creation of Part II.1 of the *Criminal Code*.

In short, Part II.1 of the *Criminal Code* criminalizes the direct or indirect participation in and facilitation of terrorist activities and terrorist groups. While the provisions of Part II.1 of the *Criminal Code* have not been drafted to apply exclusively to charities, the potential application of these provisions should nevertheless be of concern to charities. This is especially true for charities that fund activities overseas. The wording of Part II.1 of the *Criminal Code* is very broad and the consequences of running afoul of these provisions are severe, including the forfeiture of charitable property and the loss of charitable registration under the *Charities Registration (Security Information) Act* (discussed below). It is therefore important for charities to be advised of the potential effect of Part II.1 of the *Criminal Code* so that appropriate due diligence measures may be established.

*Charities Registration (Security Information) Act*, S.C. 2001, c. 41.

The new *Charities Registration (Security Information) Act* was created by the *Anti-Terrorism Act*. The *Charities Registration (Security Information) Act* is intended to provide a means to ensure that charities do not directly or indirectly fund terrorist activities. In particular, the *Charities Registration (Security Information) Act* provides a two-step process whereby a registered charity or an applicant for registered charity status may, respectively, be de-registered or denied charitable registration for supporting terrorist activities.

The first step of the process is for the Solicitor General of Canada or the Minister of National Revenue to sign a certificate stating that there are reasonable grounds to believe that the registered charity or applicant for registered charity status has made or will make resources available for terrorist activities. The second step is for the certificate to be referred to the Federal Court for a determination of whether the certificate is reasonable. A determination by the Federal Court that the certificate is reasonable is deemed to be conclusive proof that the registered charity has ceased to comply with the requirements for registered charity status or that the applicant is ineligible for such status. A notable aspect of the *Charities Registration (Security Information) Act* is that the registered charity or applicant

in respect of whom a certificate has been issued may not be entitled to examine copies of the intelligence reports on which the certificate is based and may not be entitled to be present during the entire hearing before the Federal Court.

*Cultural Property Export and Import Act*, R.S.C. 1985, Chap. C-51.

The *Cultural Property Export and Import Act*, as it relates to charities, must be read in conjunction with certain provisions of the *Income Tax Act (Canada)*. There are provisions in the *Income Tax Act (Canada)* that are intended to encourage the donation of culturally significant objects to designated institutions. In particular, the *Income Tax Act (Canada)* provides that the donation of culturally significant objects to designated institutions will not result in the donor realizing a capital gain in respect of such objects (see sub-paragraph 39(1)(a)(i.1) of the *Income Tax Act (Canada)*) and further provides for a donation limit of 100 per cent of the donors' income with a five year carry-forward in respect of such donations (see paragraph (c) of the definition of "total gifts" in sub-paragraph 118.1(1) for individual donors and sub-paragraph 110.1(1) for corporate donors). The *Cultural Property Export and Import Act* establishes the procedure by which an institution, such as, for example, a charity, may be designated as a designated institution, an object may be designated a culturally significant object and the fair market value of such an object may be determined.

#### **Ontario Statutes:**

*Accumulations Act*, R.S.O. 1990, c. A.5.

The *Accumulations Act* provides that no disposition of any property (real or personal) may direct the accumulation of income derived from such property for any longer than the applicable accumulations period. There are six possible accumulations periods enumerated in subsection 1(1). The statute should be consulted any time property is held in trust on terms that provide for the capitalization of income derived from the property. Where the terms of a trust provide for the accumulation of income beyond the applicable accumulations period, subsection 1(6) of the *Accumulations Act* directs how such income is to be distributed.

*Assessment Act*, R.S.O. 1990, c. A.31.

Although the key tax benefits associated with charitable status relate to income tax, there are additional tax benefits. The *Assessment Act*, for example, provides for a limited exemption from real property tax. Two key observations may be made in relation to excerpts from the *Assessment Act* included in this consolidation. First, the default rule under the *Assessment Act* is that all real property in Ontario is subject to real property tax.<sup>9</sup> Thus, although the *Assessment Act* sets out exemptions from real

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<sup>9</sup> Subsection 3(1). Note, though, that the *Assessment Act* does not establish a complete regime for the taxation of all real property situate in Ontario. For real property situate in territories of Ontario without municipal organization, resort must be had to the *Provincial Land Tax Act*, R.S.O. 1990, c. P. 32 (discussed below).

property tax, the bias of the statute is towards its application.<sup>10</sup> Second, the *Assessment Act* does not contain a blanket exemption from real property tax for lands held or occupied by charities. Instead, the *Assessment Act* enumerates specific examples of charities that are exempt from real property tax. This marks a critical divergence from the approach adopted in the provincial income tax statutes, which generally rely upon the conferral of charitable status under the *Income Tax Act (Canada)* as a means of identifying the institutions that should be similarly benefited under provincial income tax law. The result is that an institution may qualify as “charitable” at common law and under federal and provincial income tax law, but nevertheless fail to qualify for exemption from real property tax under the *Assessment Act*. The excerpts and regulations that have been included relate generally to identifying when and to what extent an exemption from real property tax under the *Assessment Act* will apply.

*Charities Accounting Act*, R.S.O. 1990, c. C. 10.

The *Charities Accounting Act* serves two main purposes. First, the *Charities Accounting Act* vests in the Ontario Public Guardian and Trustee (the “PGT”) a supervisory jurisdiction over charities in Ontario. Second, the *Charities Accounting Act* establishes certain legal requirements applicable to charities in Ontario.

With respect to the supervisory jurisdiction of the PGT, the *Charities Accounting Act* vests in the PGT a variety of powers in relation to charities. By way of example, this includes the power to investigate certain complaints brought against charities, to consent to certain matters that would otherwise require the consent of a court, to require a passing of accounts and to advise the Attorney General to enact regulations under the *Charities Accounting Act*. The web site for the PGT may be found at <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>>.

With respect to establishing legal requirements applicable to charities, notable provisions of the *Charities Accounting Act* include the restriction on the ability of charities to hold land for any purpose other than the actual use of the land for charitable purposes, the express recognition that the prudent investor provisions of the *Trustee Act* (discussed below) apply to incorporated charities and certain notice requirements where property is being held by an executor or trustee for charitable purposes.

*Charitable Gifts Act*, R.S.O. 1990, c. C. 8.

The *Charitable Gifts Act* places restrictions on the business and investment activities of charities. In particular, the *Charitable Gifts Act* prohibits most charities in Ontario from owning more than a ten per cent interest in any business. A charity with an interest in a business in excess of ten per cent is required to dispose of the excess portion of the interest within seven years, or such longer period as may be determined by a court, of having acquired the interest. Upon the disposition of

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<sup>10</sup> The general rule set out in subsection 3(1) of the *Assessment Act* is that, subject to specifically enumerated exemptions, “[a]ll real property in Ontario is liable to assessment and taxation”.

## COMMENTARY

such an interest in a business, a charity may invest the proceeds of disposition only in investments authorized by the *Insurance Act*, R.S.O. 1990, c. I.8.

During the permissible “hold period”, a charity holding more than a 50% interest in a business is required to determine jointly with the business and the PGT the profits of the business. The charity’s share of these profits are required under the *Charitable Gifts Act* to be paid to the charity rather than retained in the business.

The penalty for contravening the *Charitable Gifts Act* is a \$10,000 fine and/or imprisonment for up to one year.

*Corporations Act*, R.S.O. 1990, c. C. 38.

The *Corporations Act* is the provincial analogue to the *Canada Corporations Act*. As such, the *Corporations Act* establishes the basic corporate framework for charities incorporated under Ontario law. Since most incorporated charities are structured as non-share capital corporations, the excerpts from the *Corporations Act* included in this consolidation are those relevant to this corporate structure. The reader is encouraged to also consider the *Not-For-Profit Incorporator’s Handbook* (Toronto: Queen’s Printer for Ontario) prepared jointly by the Companies Branch of the Ministry of Consumer and Commercial Relations and the PGT.

*Corporations Tax Act*, R.S.O. 1990, c. C.40.

The *Corporations Tax Act* provides the legislative framework for the taxation of corporations in Ontario. The statute extends under Ontario corporate tax law important charitable tax benefits afforded to corporations under the *Income Tax Act (Canada)*. In particular, section 57, paragraph 57.11(a) and paragraph 71(1)1 of the Ontario *Corporations Tax Act* exempt incorporated registered charities under the *Income Tax Act (Canada)* from, respectively, income tax, corporate minimum tax and capital tax in Ontario. Also, section 34 of the *Corporations Tax Act* contains provisions allowing corporations to deduct for Ontario corporate tax purposes charitable gifts for which receipts have been issued as contemplated by section 110.1 of the *Income Tax Act (Canada)*. The provisions of the Ontario *Corporations Tax Act* that have been included in this consolidation generally relate to these two issues.

*Donation of Food Act, 1994*, S.O. 1994, c. 19.

The *Donation of Food Act, 1994* protects donors of food and distributors of donated food from liability resulting from injuries or death caused by the consumption of donated food. The exclusion of liability generally applies except where the donated or distributed food was unfit for human consumption and the donor or distributor acted with reckless disregard or with the intent to injure or cause death. The *Donation of Food Act, 1994* does not protect persons who distribute donated food on a for profit basis.

*Education Act*, R.S.O. 1990, c. E.2.

Section 257.2.1 of the *Education Act* authorizes the Minister of Finance to enact regulations providing in certain circumstances for a rebate of property taxes relating

to school purposes. The section applies only in relation to land situate in territories without municipal organization.<sup>11</sup> Regulation 3/02 enacted pursuant to the *Education Act* provides for the circumstances in which such a tax rebate will be available to charities.<sup>12</sup>

*Estates Act*, R.S.O. 1990, c. E.21.

Subsection 49(8) of the *Estates Act* provides that every executor, administrator or trustee shall provide notice to the Public Trustee where the executor, administrator or trustee receives under a will or other written instrument property to be applied for a charitable purpose.

*Hospitals and Charitable Institutions Inquiries Act*, R.S.O. 1990, c. H. 15.

The *Hospitals and Charitable Institutions Inquiries Act* grants the Lieutenant Governor in Council the broad discretion to cause an inquiry to be made in any matter affecting a hospital, sanatorium, charitable institution or other organization granted public aid by the Ontario Legislature.

*Income Tax Act*, R.S.O. 1990, c. I.2.

The Ontario *Income Tax Act* is restricted in its application to “individuals”, which is defined in subsection 1(1) to generally mean natural persons and certain trusts. The statute extends under Ontario income tax law important charitable tax benefits afforded to “individuals” under the *Income Tax Act (Canada)*. In particular, section 6 of the Ontario *Income Tax Act* provides that individuals exempt from federal income tax by virtue of subsection 149(1) of the *Income Tax Act (Canada)* are also exempt from provincial income tax under the Ontario *Income Tax Act*. In effect, this section exempts unincorporated registered charities from provincial income tax.<sup>13</sup> In addition, subsection 4(3.1) of the Ontario *Income Tax Act* entitles individuals, subject to certain limitations, to deduct the charitable tax credit provided for in subsection 118.1(3) of the *Income Tax Act (Canada)* from the income tax otherwise payable under provincial income tax law. The provisions of the Ontario *Income Tax Act* that have been included in this consolidation generally relate to these two issues.

*Land Transfer Tax Act*, R.S.O. 1990, c. L. 6.

The *Land Transfer Tax Act* provides for a tax that is triggered by a conveyance of land. Charities do not enjoy a blanket exemption from land transfer tax. Section 1.1 of the *Land Transfer Tax Act* explicitly states that exempt status under any other statute does not automatically result in an exemption from land transfer tax.

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<sup>11</sup> See the discussion below of the *Municipal Act, 2001*, S.O. 2001, c. 25, for similar provisions relating to property situate in territories with municipal organization.

<sup>12</sup> Section 8 of Regulation 509/98, which we have omitted, contains similar provisions that are restricted in their application to taxation years 1998, 1999 and 2000.

<sup>13</sup> Note that para. 149(1)(f) of the *Income Tax Act (Canada)* exempts “registered charities” from tax payable under Part 1 of the *Income Tax Act (Canada)*.

Nevertheless, a charity will in some circumstances be able to avail itself of an exemption. Subsection 2(1) of the *Land Transfer Tax Act*, for example, provides that land transfer tax is calculated on the basis of the “value of the consideration for the conveyance”. Therefore, no land transfer tax is payable where land is transferred to a charity for no consideration. Also, regulations passed pursuant to the *Land Transfer Tax Act* exempt from land transfer tax the conveyances of “life lease interests” to charities<sup>14</sup> and conveyances taking place in the course of the restructuring of certain hospitals.<sup>15</sup>

*Ministry of Community and Social Services Act*, R.S.O. 1990, c. M.20.

The *Ministry of Community and Social Services Act* authorizes in subsection 13(1) the Lieutenant Governor in Council to make regulations designating a charity to be subject to the control and management of the Minister of Community and Social Services. The circumstances in which such regulations may be enacted include circumstances in which those persons managing the charity so request and circumstances in which the Lieutenant Governor in Council determines that doing so is necessary to ensure the proper application of publicly donated funds or is within the best interests of those relying upon the charity’s services.

*Municipal Act, 2001*, S.O. 2001, c. 25.

Section 361 of the *Municipal Act, 2001* requires every municipality to have a real property tax rebate program for registered charities that occupy properties situate in territories with municipal organization that are designated in the “commercial” or “industrial” class. The excerpts included elaborate on the program requirements and the extent of the tax rebate available.

*Perpetuities Act*, R.S.O. 1990, c. P.9.

The *Perpetuities Act* sets out various statutory rules pertaining to the doctrine of law known as the “rule against perpetuities”. This doctrine can be especially difficult to apply,<sup>16</sup> but the essence of the rule may be stated simply enough. The rule against perpetuities has been said to consist of two key elements.<sup>17</sup> The first is a prohibition against perpetual trusts.<sup>18</sup> The second is a requirement that “contingent interests”<sup>19</sup> must “vest” within a period of time known as the “perpetuities pe-

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<sup>14</sup> O. Reg. 88/04. See also Tax Bulletin LTT 1-2004, “Exemption for Certain Transfers of Life Lease Interests under the *Land Transfer Tax Act*” (April 2004).

<sup>15</sup> O. Reg. 676/98.

<sup>16</sup> By way of illustration, a U.S. decision, *Lucas v. Hamm*, 364 P.2d 685 (Cal.S.C. 1961), held that a lawyer was not professionally negligent for misunderstanding the doctrine.

<sup>17</sup> See, for example, D. Waters, M. Gillen and L. Smith, *Waters’ Law of Trusts in Canada*, 3rd ed. (Carswell: Toronto, 2005) at pp. 645 to 656.

<sup>18</sup> This aspect of the rule has been described as the “rule against inalienability”. See *ibid* at p. 646.

<sup>19</sup> An interest in property will be contingent if it has yet to vest in a person. This could be for any number of reasons. The person may, for example, have yet to satisfy a con-

riod”, which is the period terminating on the 21st anniversary of the date of death of a life “in being”.<sup>20</sup> Charities are exempt from the first aspect of the rule. There are, however, circumstances in which the second aspect of the rule may apply to charities, although the precise scope of such circumstances appears to be as yet unresolved.

Although the rule against perpetuities originated as a judge made rule, it has been legislatively codified, albeit in a modified form, in several jurisdictions of Canada, including in Ontario via the *Perpetuities Act*. A critical change effected by the enactment of the *Perpetuities Act* was the adoption of the “wait and see” approach to applying the rule against remoteness of vesting. Initially, a contingent interest was held to be invalid if there was a possibility, however remote, that it might vest beyond the perpetuity period. In contrast, subsection 4(1) of the *Perpetuities Act* now provides that the mere possibility of vesting beyond the perpetuities period will not invalidate a contingent interest in property. In effect, we “wait and see” whether the interest will vest within the perpetuities period. Another critical reform was the adoption under the *Perpetuities Act* of an attenuated perpetuities period for interests subject to “conditions subsequent” and “determinable limitations”. Subsection 15(3) of the statute provides that the perpetuities period for such interests cannot exceed 40 years. The potential application of the statute should be considered whenever a charity holds a contingent interest in property.

*Provincial Land Tax Act*, R.S.O. 1990, c. P. 32.

The *Provincial Land Tax Act* should be read together with the *Assessment Act*, since both statutes provide for the taxation of real property situate in Ontario. The *Provincial Land Tax Act* is the relevant statute for land situate in territories of Ontario without municipal organization. It contains a limited exemption from real property tax that is similar (although not identical) to that provided under the *Assessment Act*. In short, the *Provincial Land Tax Act* provides a limited exemption from real property tax for specifically enumerated charities rather than a blanket exemption for all land held or occupied by charities. As with the *Assessment Act*, it is therefore possible for an institution to qualify as “charitable” at law, but nevertheless fail to qualify for exemption from real property tax under the *Provincial Land Tax Act*. The excerpts that have been included relate generally to identifying when and to what extent an exemption from real property tax under the *Provincial Land Tax Act* will apply.<sup>21</sup>

*Public Guardian and Trustee Act*, R.S.O. 1990, c. P.51.

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dition precedent in respect of the property. Alternatively, the identity of the person may as yet be unknown.

<sup>20</sup> This aspect of the rule has been described as the “rule against remoteness of vesting”. See D. Waters, M. Gillen and L. Smith, *Waters’ Law of Trusts in Canada*, 3rd ed. (Carswell: Toronto, 2005) at p. 645.

<sup>21</sup> Paragraph 38(1)(b) of the *Provincial Land Tax Act* authorizes the Lieutenant Governor in Council to make regulations declaring classes of land to be exempt from real property tax. At the date of writing, there are no such regulations of specific relevance to charities.

## COMMENTARY

Section 12 of the *Public Guardian and Trustee Act* specifically authorizes the Public Guardian and Trustee to administer charitable trusts.

*Religious Organizations' Lands Act*, R.S.O. 1990, c. R. 23.

The *Religious Organizations' Lands Act* serves two broad purposes. First, the Act provides a mechanism by which an unincorporated "religious organization" may own land. In particular, the Act provides that land can be held by a religious organization through "trustees" appointed by the religious organization for that purpose. The Act vests in the trustees a variety of powers that are coincident to the ownership of land, such as, for example, the power to conduct actions with respect to, mortgage, purchase and alienate land. The trustees may exercise the powers granted to them under the statute, however, only where they are so authorized by a resolution of the religious organization.

Second, the Act provides a limited exception to the restrictions set out in the *Charities Accounting Act*, discussed above, on holding land. In particular, the Act provides that an unincorporated religious organization that holds land that it is not using for a religious purpose may lease out such land for up to a forty year period. Otherwise, the land must be used for a religious purpose, as defined in the Act, or must be sold.

*Retail Sales Tax Act*, R.S.O. 1990, c. R. 31.

The *Retail Sales Tax Act* provides for a tax applicable where a "purchaser" acquires certain property or services. The tax is generally calculated as a percentage of the "fair value" of the property or service acquired. There is no blanket exemption for charities. Section 1.1 of the *Retail Sales Tax Act* explicitly states that exempt status under any other statute does not automatically result in an exemption from retail sales tax. Nevertheless, a charity will in some circumstances be able to avail itself of an exemption or rebate. The excerpts and regulations that have been included relate generally to identifying when and to what extent an exemption or rebate will apply.

*Substitute Decisions Act, 1992*, S.O. 1992, c. 30.

The *Substitute Decisions Act, 1992* provides a statutory regime to regulate substitute decision making in Ontario. Of particular interest to charities is the fact that section 37 of the *Substitute Decisions Act, 1992* explicitly empowers a substitute decision maker to make charitable gifts out of the property of an incapable person subject to the various requirements enumerated therein.

*Trustee Act*, R.S.O. 1990, c. T.23.

The *Trustee Act* is a statute of general application to trustees. It contains provisions that deal with issues such as the retirement and appointment of trustees, the powers and rights of trustees and the investments of trust property made by trustees.

While there is no doubt that the *Trustee Act* applies to charities, the law is presently not clear regarding the extent to which this is the case. In this regard, it is useful to note that a charity may take on a variety of legal forms, such as, for ex-

ample, a charitable trust and a charitable corporation. Charitable trusts are, not surprisingly, generally subject to the *Trustee Act*. Charitable corporations, however, are not *per se* subject to the *Trustee Act* in all circumstances.

Determining whether a charitable corporation is subject to the *Trustee Act* in any given circumstance is a complicated issue. It will suffice for the purposes of this consolidation to note the following with respect to this issue.

First, the issue of whether the *Trustee Act* applies to a charitable corporation will often times reflect the particular activity of the charity that is in question. For example, recent amendments to the *Charities Accounting Act* (discussed above) have made it clear that a charitable corporation constitutes a trustee for the purposes of the investment provisions of the *Trustee Act*. Sections 27 to 31 of the *Trustee Act* therefore apply to the investment activities of charitable corporations. In this regard, the reader should be aware that the *Trustee Act* allows trustees to invest in any form of property in which a prudent investor may invest and specifically authorizes trustees to invest in mutual funds.<sup>22</sup> The *Trustee Act* also allows trustees to delegate investment responsibilities to an agent in limited circumstances.

Second, the issue of whether the *Trustee Act* applies to a charitable corporation may also reflect the particular asset of the charity that is in question. In this regard, it is necessary to delineate between the assets of a charitable corporation that are held for specific charitable purposes and those that are held generally for the charitable objects of the corporation.<sup>23</sup> It is in relation to the first category of assets that a charitable corporation may in some circumstances be considered to be a “trustee”.

Third, even though it may not be said without qualification that directors of charitable corporations are for all purposes “trustees”, it is clear that they are subject to trustee-like duties. Therefore, to the extent that the *Trustee Act* illuminates the general nature of these duties, it is of relevance to charitable corporations.

*University Foundations Act, 1992*, S.O. 1992, c. 22.

The *University Foundations Act, 1992* establishes a parallel foundation for each of the major post-secondary institutions in Ontario. The Act provides for the basic structure of each foundation, including the legal form (i.e., non-share capital corporation), objects, board composition, quorum requirements, fiscal year, indemnification of directors, etc. Of particular interest is the fact that the Minister of Colleges and Universities is given the power under the Act to issue “policy directives” in respect of a particular foundation. The board of a foundation in respect

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<sup>22</sup> Prior to the *Trustee Act* being amended to allow for investments by trustees in mutual funds, such investments were considered to constitute an impermissible delegation to mutual fund managers of trustees’ investment responsibilities. See *Haslam v. Haslam* (1994), 3 E.T.R. (2d) 206 (Ont. Gen. Div.).

<sup>23</sup> See *Christian Brothers of Ireland in Canada (Re)*, [1998] O.J. No. 823, 37 O.R. (3d) 367 (Gen. Div.), varied [2000] O.J. No. 1117, 47 O.R. (3d) 674 (C.A.); leave to appeal dismissed [2000] S.C.C.A. No. 277 (S.C.C.).

of which any such policy directives have been issued is required to implement them “promptly”.

**Omitted Statutes:**

The statutes included in this consolidation generally include the main statutes that are applicable to charities. Not every statute that may be applicable to charities has been included. The statutes that have been omitted include the following:

*Athletics Control Act*, R.S.O. 1990, c. A. 34.

Subsection 5(1) of the *Athletics Control Act* provides that every person conducting a professional boxing or wrestling contest or exhibition must pay a tax calculated as a percentage (between 1 per cent and 5 per cent) of the gross receipts derived therefrom. Subsection 5(3) of the statute affords the Minister discretion to alter the amount payable where he or she is satisfied that the entire proceeds of the contest or exhibition will be applied for charitable purposes.

*Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4.

A cemetery may in some circumstances qualify as charitable at law. Such a cemetery must comply not only with the various requirements of general application to charities but also those of special application to cemeteries. In Ontario, the latter statutory requirements are set out in the *Cemeteries Act (Revised)*, which provides a detailed regime for the licensing and operating of a cemetery or crematorium.

*Competition Act*, R.S.C. 1985, c. C-34.

The *Competition Act* is a federal statute, the purpose of which is to encourage competition and to prohibit unfair business practices. The *Competition Act* was recently amended so that the term “business” is now defined to include the “raising of funds for charitable or other non-profit purposes”. The *Competition Act* therefore currently provides for a variety of rules that regulate the fundraising activities of charities. This includes rules that regulate telemarketing, promotional contests, lotteries and the making of representations to the public. In addition, any charity carrying on a business activity will be required to comply with the *Competition Act* regarding the manner in which the business activity is carried out. For more information regarding the *Competition Act*, including the Bulletins and Guidelines published by the Competition Bureau, the reader is encouraged to visit <<http://www.competitionbureau.gc.ca>>.

*Conservation Land Act*, R.S.O. 1990, c. C.28.

The *Conservation Land Act* contains various provisions that enhance the capacity of “conservation bodies” to encourage and support responsible, environmental stewardship. The statute is of interest to charities inasmuch as subsection 3(1)

defines “conservation body” to include registered charities designated as charitable foundations under the *Income Tax Act (Canada)*.<sup>24</sup>

*Crown Foundations Act, 1996, S.O. 1996, c. 22.*

The *Crown Foundations Act, 1996* allows the Lieutenant Governor in Council to establish by order foundations for the purpose of benefiting one or more “institutions”. The statute defines institutions to include certain categories of charities, including public hospitals, the Royal Ontario Museum and various other cultural organizations. The statute provides for the objects, powers and various other matters pertaining to the governance of such foundations.

*Employer Health Tax Act, R.S.O. 1990, c. E.11.*

Every “employer” in Ontario is subject to employer health tax pursuant to the *Employer Health Tax Act*. The tax is calculated as a percentage of the “total Ontario remuneration” paid by an employer. There is no blanket exemption for charities. Subsection 2(4) of the *Employer Health Tax Act* explicitly states that exempt status under any other statute does not automatically result in an exemption from employer health tax. Nevertheless, a charity will in some circumstances be able to avail itself of a reduction of employer health tax. Section 5 of Regulation 319 passed pursuant to the *Employer Health Tax Act* provides for relief from employer health tax for employers who are registered charities under the *Income Tax Act (Canada)* and who employ persons who work outside of Canada for a continuous period of at least 183 days.

*Excise Tax Act, R.S.C. 1985, c. E-15.*

Part IX of the *Excise Tax Act (Canada)* (the “ETA”) contains the rules relating to the application of the goods and services tax (“GST”). The GST applies to charities in a very different manner than it applies to most other organizations. Accordingly, there are numerous special rules and exemptions that apply to charities.

One of the main differences between charities and other organizations is that most of the goods and services supplied by charities are exempt from the application of GST. Therefore, as a general rule, charities do not need to charge and collect GST on property or services they provide. Further, charities are generally not required to register under the ETA for GST purposes. Unlike commercial entities, however, charities generally are not entitled to recover the GST that they pay on their expenses. A charity’s ability to recover the GST that it incurs is instead limited to special rebates that range from 50 to 83 percent, depending upon the charity and its activities.

However, not all goods and services supplied by charities are necessarily exempt from GST. For example, any charity making GST taxable supplies is generally required to register for GST purposes if its GST taxable revenues exceed \$50,000.

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<sup>24</sup> See also s. 1 of the *Conservation Land Act, O.R. 293/03*, which prescribes all registered charities created by statute to be conservation bodies.

## COMMENTARY

As well, charities that have registered for GST (whether voluntarily or otherwise) are required to account for it in a different manner than other organizations. Charities are required to use a special calculation known as the “Net Tax Calculation for Charities” when making the required calculations to complete their tax returns.

Finally, the ETA distinguishes between charities that are hospital authorities, school authorities, public colleges, universities and local municipal authorities and those charities that are none of the foregoing. The former group is referred to as “public institutions” for GST purposes and follow their own unique rules for GST purposes.

*French Language Services Act*, R.S.O. 1990, c. F. 32.

The *French Language Services Act* provides in subsection 5(1) that a person has the right to receive a “service” in French from a “government agency”. Section 1 defines “government agency” broadly enough to include certain charities, namely, those designated as a “public service agency” under the regulations.<sup>25</sup>

*Highway Traffic Act*, R.S.O. 1990, c. H. 8.

The *Highway Traffic Act* requires in subsection 11.1(1) that every person who sells or transfers a used motor vehicle shall provide to the purchaser or transferee a “used vehicle information package”. In turn, subsection 11.1(3) of the statute provides that the purchaser or transferee of a used motor vehicle must provide a copy of the used vehicle information package to the Ministry of Transportation before obtaining a permit for the vehicle. Sections 2 and 3 of Regulation 601/93 passed pursuant to the *Highway Traffic Act* provide an exemption from these requirements where a used vehicle is transferred to a charity for no consideration.

*Human Rights Code*, R.S.O. 1990, c. H. 19.

Membership and participation in charitable institutions is sometimes restricted on grounds that could be said to be discriminatory at law. A religious charity may, for example, restrict membership to adherents to a specific religion or a denomination thereof. The Ontario *Human Rights Code* contains provisions (see, for example, section 18) that expressly allow for such practices.

*Liquor Licence Act*, R.S.O. 1990, c. L. 19.

Section 19 of the *Liquor Licence Act* allows for the issuance of a permit — a special occasion permit — authorizing the holder thereof to sell or serve liquor on a prescribed special occasion. Section 3 of Regulation 389/91 describes the circumstances that qualify for purposes of section 19 of the statute as special occasions. Fundraising events and auctions conducted by registered charities under the *Income Tax Act (Canada)* are specifically enumerated. In turn, subsection 3(6) of Regulation 720 authorizes a manufacturer of liquor to give liquor to a registered charity holding a special occasion permit.

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<sup>25</sup> See O. Reg. 398/93 for a complete list of these institutions.

*Mining Tax Act*, R.S.O. 1990, c. M. 15.

The *Mining Tax Act* provides for a special tax payable by the “operator” of a mine. The tax is levied as a percentage of the operator’s profit as determined under the statute. Paragraph 3(5)(f) of the statute allows for the deduction of certain charitable donations for the purposes of calculating the operator’s profit.

*Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B.

The *Ontario Energy Board Act, 1998* provides for unique treatment for certain charities. Subsection 79.1(14), for example, provides that a “distributor” shall make a payment of sorts to each “designated consumer” who held an account with the distributor on November 25, 2002. “Designated consumer” is defined in section 56 to include registered charities.

*Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Schedule A.

The *Personal Health Information Protection Act, 2004* establishes a statutory regime for the protection of “personal health information”. Section 32 of the statute provides that personal health information may be used for the purpose of fundraising activities so long as certain requirements are complied with. Section 10 of Regulation 329/04 passed pursuant to the statute elaborates on these requirements.

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

The *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) applies to any organization that collects, uses or discloses personal information in the course of commercial activities. Charities that engage in commercial activities should therefore consider the implications of PIPEDA. It will be a question of fact as to whether a particular activity of a charity constitutes a commercial activity within the meaning of PIPEDA. In this regard, however, it is important to note that the definition of “commercial activity” set out in PIPEDA specifically includes in the definition the “selling, bartering or leasing of donor, membership or other fundraising lists”. It therefore appears certain that the transfer of a donor list by a charity will trigger the application of PIPEDA.

Where it does apply to an organization, PIPEDA requires that certain measures be implemented by the organization to ensure that personal information is protected and secured. In particular, PIPEDA specifically provides that every organization subject to its provisions is, subject to certain exceptions, required to comply with Schedule 1 to PIPEDA. This schedule incorporates the privacy standards that are based on those established by the Canadian Standards Association International in its *Model Code for the Protection of Personal Information*.

*Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17.

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* imposes an obligation to file various reports with respect to certain types of financial

transactions. The reporting obligations are applicable mainly, although not exclusively, to financial entities. The intent of the statute is to provide a mechanism by which money laundering and terrorist financing offences may be detected. It may be viewed as a companion statute to Part II.1 of the *Criminal Code* (discussed above) and the *Charities Registration (Security Information) Act* (discussed above) as reports filed under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* could conceivably contribute to the creation of an evidentiary basis to support a criminal prosecution or the revocation of charitable registration under those statutes.

*Securities Act*, R.S.O. 1990, c. S.5.

Under the *Securities Act*, anyone who “trades” in “securities” is required to comply with various requirements, including a registration requirement. There is a limited exception from the registration requirement set out in paragraph 35(2)7 for securities issued by corporations organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes. This exception may have application to charities that have been incorporated as share capital corporations rather than as member based or non-share capital corporations.

*Statutes Authorizing the Gifting of Lost, Abandoned or Confiscated Property to Charity.*

The latin maxim “*nemo dat qui non habet*” articulates a foundational rule of property law: he who hath not cannot give. There are, however, a number of statutory exceptions to the *nemo dat* rule that are of interest to charities. Several statutes in Ontario authorize a non-owner to transfer ownership to a charity in limited circumstances. These circumstances include instances where an article has been lost, abandoned or confiscated or where it has been retained in the possession of a lien claimant for over twelve months. See, for example, section 24 of the *Niagara Parks Act*, R.S.O. 1990, c. N.3, section 15 of the *Provincial Parks Act*, R.S.O. 1990, c. P. 34, section 27.1 of the *Public Lands Act*, R.S.O. 1990, c. P.43, section 17 of the *St. Lawrence Parks Commission Act*, R.S.O. 1990, c. S. 24, sections 11 and 27 of the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M. 22, section 63 of the *Municipal Act, 2001*, S.O. 2001, c. 25 and sections 19 and 20 of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R. 25.

*Statutory Regime Applicable to Charitable Gaming.*

Societal attitudes regarding gambling have in recent years become more permissive. One of the manifestations of this phenomenon is that charitable gaming has grown in popularity as a fundraising mechanism for many charities.

The regime of laws and regulations regulating the charitable gaming industry is highly complicated and technical. This regime may be briefly described as follows.

The starting point for the analysis of charitable gaming is the *Criminal Code*. Subject to certain exceptions, gambling is an offence under the *Criminal Code*. One of the exceptions to this general rule is set out in paragraph 207(1)(b) of the

*Criminal Code*, which provides that a charitable or religious organization may conduct a lottery scheme if authorized to do so by a licence issued by a province.

In Ontario, the issuance of licences to conduct lottery schemes is governed by Order-in-Council 2688/93. This Order-in-Council sets out in very broad terms the basic framework within which licences to conduct lottery schemes may be granted or revoked. The framework established by Order-in-Council 2688/93 is explained in great detail in the *Lottery Licensing Policy Manual* (Toronto: Entertainment Standards Branch, 1993). The *Lottery Licensing Policy Manual* also sets out the eligibility criteria for lottery licences and the terms and conditions that may be attached to their issuance.

Once a charity has been issued a licence, it will need access to gaming premises, gaming assistants and gaming equipment in order to conduct a lottery scheme. The supply of this equipment and these services by third parties is regulated under the *Gaming Control Act, 1992*, S.O. 1992, c. 24. As per the *Alcohol and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c. 26, Sched., the administration of the *Gaming Control Act, 1992* and the regulations passed thereunder is the responsibility of the Alcohol and Gaming Commission of Ontario. Certain gambling activities are also provided by the Ontario Lottery and Gaming Corporation, which is created by and subject to the *Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, c. 12, Sched. L.

For an in-depth commentary on the law of charitable gaming, the reader is referred to Donald J. Bourgeois, *The Law of Charitable and Casino Gaming* (Toronto: Butterworths, 1999).

*Statutory Regime Applicable to Hospitals and Other Health Care Facilities.*

The promotion of health has long since been recognized as being charitable at common law. Hospitals and other health care facilities are therefore very often subject to the various statutes and rules of common law applicable to charities. These entities, however, are also subject to the unique requirements of the various statutes that regulate hospitals and other health care facilities. An incomplete list of such statutes includes the *Public Hospitals Act*, R.S.O. 1990, c. P. 40, the *Private Hospitals Act*, R.S.O. 1990, c. P. 24, the *Charitable Institutions Act*, R.S.O. 1990, c. C.9., the *Nursing Homes Act*, R.S.O. 1990, c. N. 7, the *Independent Health Facilities Act*, R.S.O. 1990, c. I.3, the *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H. 13, the *Community Psychiatric Hospitals Act*, R.S.O. 1990, c. C. 21, the *Homes for Special Care Act*, R.S.O. 1990, c. H. 12, the *Long-Term Care Act, 1994*, S.O. 1994, c. 26, the *Elderly Persons Centres Act*, R.S.O. 1990, c. E.4, the *Medical Radiation Technology Act, 1991*, S.O. 1991, c. 29 and the *Mental Health Act*, R.S.O. 1990, c. M.7

*Statutory Regime Relating to Means Tested Public Assistance.*

Provincial statutes providing for means tested public assistance contain provisions that outline in detail how eligibility for such public assistance is to be determined. These provisions include formulas for calculating the income of applicants. It will be of interest for many charities to know that several statutes exclude (in whole or

in part) from an applicant's income donations received by him or her from a charity. The result is that the receipt by an applicant of assistance from a charity may not disqualify him or her from public assistance. See, for example, section 43 of the *Ontario Disability Support Program Act, 1997*, O. Reg. 222/98, section 54 of the *Ontario Works Act, 1997*, O. Reg. 134/98 and section 50 of the *Social Housing Reform Act, 2000*, O. Reg. 298/01.<sup>26</sup>

*Statutory Regime Applicable to Provincial Parks.*

The statutes regulating provincial parks in Ontario contain various provisions that provide charities with privileged access to such parks. Regulations enacted pursuant to section 7.1 of the *Provincial Parks Act*, R.S.O. 1990, c. P. 34, for example, allow certain charities to enter provincial parks for either no fee or for a reduced fee.<sup>27</sup> Similarly, regulations passed pursuant to the *Public Lands Act*, R.S.O. 1990, c. P. 43 relax the rules relating to camping on Crown land as they apply to charities.<sup>28</sup>

*Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

Subsection 12(5) of the *Tax Court of Canada Act* provides that the Tax Court of Canada has exclusive jurisdiction to hear and determine applications relating to subsection 188.2(4) of the *Income Tax Act (Canada)*. In effect, this affords the Tax Court of Canada exclusive jurisdiction to resolve disputes pertaining to the suspension of a registered charity's receiving privileges.

*Tourism Act*, R.S.O. 1990, c. T. 16.

The *Tourism Act* establishes various statutory rules applicable to every "tourist establishment", defined broadly in section 1 to include premises providing sleeping accommodations for the traveling public or for use of the public engaging in recreational activities. In order to exempt certain charities that would otherwise be subject to the *Tourism Act*, the definition of "tourist establishment" explicitly excludes certain charitable camps and not-for-profit clubs.

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<sup>26</sup> See also s. 4 of the *Ontario Guaranteed Annual Income Act*, R.R.O. 1990, Reg. 874, which provides that absences from Ontario by a person for the purposes of his or her employment with an international charitable organization will not interrupt that person's residence in Ontario for purposes of determining eligibility for benefits under the *Ontario Guaranteed Annual Income Act*, R.S.O. 1990, c. O.17.

<sup>27</sup> See ss. 34 and 36 of the *Provincial Parks Act*, R.R.O. 1990, Reg. 952.

<sup>28</sup> See subs. 2(1) of the *Public Lands Act*, O. Reg. 326/94. See also subs. 8(3) of the *Conservation Authorities Act*, R.R.O. 1990, Reg. 136.

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