

2013 EDITION

CHARITIES LEGISLATION
& COMMENTARY

Adam Parachin
Maria Elena Hoffstein
Terrance S. Carter



Charities Legislation & Commentary, 2013 Edition

© LexisNexis Canada Inc. 2012

October 2012

All rights reserved. No part of this publication may be reproduced or stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the *Copyright Act*. Applications for the copyright holder's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorized act in relation to a copyrighted work may result in both a civil claim for damages and criminal prosecution.

Library and Archives Canada Cataloguing in Publication

Hoffstein, M. Elena

Charities legislation & commentary / Maria Elena Hoffstein,

Terrance S. Carter, Adam Parachin. — 2013 ed.

Includes index.

ISBN 978-0-433-47218-6

1. Charity laws and legislation—Canada. 2. Nonprofit organizations—
Law and legislation—Canada. I. Carter, Terrance S. II. Parachin, Adam
III. Title. IV. Title: Charities legislation and commentary.

KE1373.H63 2007

346.71'064

C2007-904372-0

KF1388.H63 2007

Published by LexisNexis Canada, a member of the LexisNexis Group

LexisNexis Canada Inc.

123 Commerce Valley Dr. E., Suite 700

Markham, Ontario

L3T 7W8

Customer Service

Telephone: (905) 479-2665 • Fax: (905) 479-2826

Toll-Free Phone: 1-800-668-6481 • Toll-Free Fax: 1-800-461-3275

Email: customerservice@lexisnexis.ca

Web Site: www.lexisnexis.ca

Printed and bound in Canada.

Order Today!

Take Advantage of Our 30-Day Risk-Free* Examination!

5 Ways to Order

☎ Phone: 1-800-668-6481 • 905-479-2665

☎ Fax: 1-800-461-3275 • 905-479-2826

✉ Email: customerservice@lexisnexis.ca

🌐 Online: www.lexisnexis.com/store.ca

‡ Contact: Your Account Executive

Multiple Copy Discounts

Number of Copies	You Save
10 to 24	5%
25 to 49	10%
50 to 99	15%
100 or more	20%

* Pre-payment required for first-time purchasers. Purchasers will be placed on standing order to receive future editions automatically on 30-day risk-free examination terms. New editions are published regularly as required. Price and other details are subject to change without notice. We pay shipping and handling if payment accompanies order.

DEDICATION

This consolidation is written for and dedicated to you, the reader. It has been prepared with the specific intention of streamlining your quest for knowledge regarding the statutory treatment of “charity”. If it serves its purpose, then your research will be made more pleasurable, or at least less frustrating.

Adam Parachin

To my husband, Victor, and my wonderful children, Eric and Talia, to my daughter-in-law, Naomi Pliamm, and to Ian Zenlea, for their love and support.

Maria Elena Hoffstein

To my wife, Wendy Ruth Carter, and to my children, Sean, Ryan, and Stephanie, for their love, support and encouragement, which has given me the opportunity to pursue my interests in the law of charities.

Terrance S. Carter

ACKNOWLEDGMENT

The authors would like to acknowledge and thank Christine Kellowan, Anuja Thakar, Jason Todoroff, Matthew Di Giovanni, Erin Dobbelsteyn, Deanne Sowter, Heather Geertsma, Pamela Shin, Dawn E. Phillips and Derek B. Mix-Ross, for their work in researching and compiling the numerous statutes over the years. As well, the authors would like to thank Nancy E. Claridge, Ryan M. Prendergast and Dean E. Blachford for the thankless and tedious job of proofreading the manuscript over the years.

ABOUT THE AUTHORS

Adam Parachin, B.A., LL.B., LL.M., is a law professor at the Faculty of Law at the University of Western Ontario. He holds law degrees from both Osgoode Hall Law School and the University of Toronto. His principal areas of teaching and research include charities, trusts, estates and property. Prior to becoming a law professor, he was an associate in the estates, trusts and charities department of Fasken Martineau DuMoulin LLP.

Elena Hoffstein, B.A., M.A., LL.B., is a Partner of the Toronto law firm Fasken Martineau DuMoulin LLP. Her practice focuses on personal tax and estate planning, family business succession planning, estate administration and litigation and charities, including public organizations, private family foundations, hospitals and hospital related organizations and non-profit entities. Elena has been ranked by *Lexpert* as one of the most frequently recommended Toronto private client practitioners and as one of the leading experts in the area of charity and not-for-profit law in Canada and as one of the top 500 lawyers in Canada. Ms. Hoffstein is an active member of a variety of professional and community organizations, as well as a frequent speaker and an author of an extensive list of conference articles.

Terrance S. Carter, B.A., LL.B., is Managing Partner of Carters Professional Corporation, and practises in the area of charity and not-for-profit law, and is counsel to Fasken Martineau DuMoulin LLP. Mr. Carter is a member of Canada Revenue Agency's Technical Issues Group, is a past member of CRA's Charity Advisory Committee, is the immediate past Chair of the National Charity and Not-for-Profit Section of the Canadian Bar Association, and has been recognized as a leading expert in Canada by *Lexpert* and *Best Lawyers in Canada*. Mr. Carter is also a frequent writer and speaker on legal issues relating to charities and not-for-profit organizations across Canada and internationally, as well as editor of www.charitylaw.ca, www.antiterrorismlaw.ca and www.churchlaw.ca.

LEGISLATIVE CURRENCY

Note: The legislation reproduced in this edition is current to the *Canada Gazette* Part II, Vol. 146, No. 33 (August 18, 2012); the *Ontario Gazette*, Vol. 145, No. 33 (August 18, 2012); the Notice of Ways and Means Motion to Amend the Income Tax Act and Income Tax Regulations (March 29, 2012); and the Legislative Proposals Relating to the Income Tax Act and Related Regulations (August 14, 2012).

Pending legislative changes include the following:

Bill C-38 (*An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*), S.C. 2012, c. 19, which received Royal Assent on June 29, 2012 and is in force in part.

At the time of publication, the Ontario *Not-for-Profit Corporations Act, 2010* had received Royal Assent (October 25, 2010) but had not yet been proclaimed in force. The entire Act is reproduced in this consolidation in shaded text.

All other pending legislation is reproduced in shaded text.

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. The consequence is that an applicable statute or legislative amendment can all too easily be overlooked.

This consolidation aims to facilitate charity law research by setting out excerpts from, and in some cases the entire text of, the key federal and Ontario statutes that apply to charities current to August 14, 2012. A brief description of the statutes included in this consolidation is set out below. Before proceeding, we offer the following observations.

The text of every statutory provision that may be of interest to charities is not set out in the consolidation. We have excluded statutes that deal with highly specialized subject matters, that are only tangentially related to charities or that are otherwise unlikely to arise with recurrence in charity law research. Nevertheless, in an effort to ensure the comprehensiveness of this consolidation as a research tool, the commentary below enumerates and describes both those federal and Ontario statutes that we have included and those that we have omitted. The intention is for the commentary to paint as complete a portrait of the statutory regime as possible, notwithstanding our editorial decision to exclude certain statutes and regulations from the actual text of the consolidation.

Significant legislative reform has occurred since the last edition. In December 2010, Bill C-47, enacting amendments to the *Income Tax Act* which were introduced in the 2010 Federal Budget, received Royal Assent. Amendments affecting charities include much anticipated changes to the disbursement quota rules and new anti-avoidance provisions involving charities. Further changes affecting charities were introduced in the 2011 Federal Budget, including substantive changes to the regulation of charities and other qualified donees, in particular, registered Canadian amateur athletic associations. The Ontario government has passed its new incorporating statute: the *Not-for-Profit Corporations Act, 2010*, modeled after the new federal *Canada Not-for-Profit Corporations Act*. The 2011 Ontario Budget made changes to the *Assessment Act* that had an impact on some non-profit hospices. In December 2010, the Ontario government also passed Bill 120, the *Securing Pension Plan Benefits Now and for the Future Act*, which will make it easier and less expensive for employees of charities to participate in a single pension plan. The recent implementation of the harmonized sales tax (“HST”) in Ontario reflects another important development for charities this year. All of these changes are reflected in the updated commentary that follows. Once the year’s legislative developments are taken into account, the book and commentary now provide excerpts from and/or analysis of some approximately 153 statutes and 76 regulations.

As we noted in previous editions of this publication, the law of charity is in a state of transition. At the time of publication, a variety of statutory amendments remained in draft form. To avoid confusion, we have noted in the descriptions below and in the body of the text the amendments that have yet to be enacted into law.

Statutes Included:

Federal Statutes Included:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), 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 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</i> (Canada)</u>	<u>General Description</u>
<u>Tax Exemptions for Registered Charities</u>	
Paragraph 149(1)(f) Paragraph 181.1(3)(c) Paragraph 210.1(c) ¹ 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. 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. ²

¹ Proposed amendments to the *Income Tax Act* (Canada) by Bill C-10 (*Income Tax Amendments Act, 2006*) introduced in November of 2006 (originally as Bill C-33) provide for the repeal of paragraph 210.1(c) and the re-enactment of this paragraph in proposed new paragraph 210(2)(c). Bill C-10 died on the order paper in September of 2008 before being enacted. It is anticipated that it will be reintroduced in the foreseeable future.

² The proposed new non-resident trust rules in section 94 privilege registered charities in certain respects. These provisions have been excluded from this consolidation, since they are currently in draft form, and their relevance is tangential.

COMMENTARY

<u>General Requirements for Charitable Registration</u>	
Section 149.1	<p>Section 149.1 sets out the key rules applicable to charitable registration. These include rules applicable to the</p> <ul style="list-style-type: none"> • Designation of registered charities as charitable organizations, public foundations and private foundations; • Disbursement quota requirements of registered charities; • Permissible expenditures of registered charities; • Restrictions on activities such as political activities and business activities; and • Grounds for revocation of charitable registration. • Definition of Canadian amateur athletic association and an ineligible individual and refusal of registration
Section 149.2	Section 149.2 sets out the excess corporate holding regime and charities' divestment obligations.
Regulations 3500-3502	Regulations 3500 – 3502 set out rules applicable to proper gift receipting practices of registered charities.
Regulations 3701-3702	Regulations 3701 – 3702 provide for rules relevant to calculating the disbursement quota obligations of charitable foundations.
<u>Loss or Denial of Charitable Registration</u>	
Subsections 149.1(2), (3), (4), (4.1), (4.3) & (25) Section 168 Section 172	The grounds for revocation of charitable registration are set out in subsections 149.1(2), (3), (4), (4.1), (4.3) and (25). 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.
<u>Special Taxes and Penalties in Respect of Registered Charities</u>	
Section 163.2 Part V (Sections 187.7, 188, 188.1, 188.2 & 189)	These sections establish special taxes and penalties in respect of registered charities. Section 163.2 provides for penalties that could apply in relation to

CHARITIES LEGISLATION & COMMENTARY

<p>Part XI.2 (Sections 207.3, 207.31 & 207.4)</p>	<p>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 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. Subsection 188.1(3.1) provides the penalty for having excess business holdings. Subsection 188.1(3.2) describes the penalty for non-compliance with divestment obligations. 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 subsection 149.1(14). Subsections 188.1(7)-(10) provide for a penalty where a charity issues an improper gift receipt. Subsections 188.1(11)-(12) provide for a penalty for participating in transactions which have the purpose of allowing the charity to avoid or unduly 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 and 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>
<p><u>Obtaining Information Relating to Registered Charities</u></p>	
<p>Subsections 241(1), (3.2), (4)(f.1), (9) & (10)</p>	<p>These provisions allow government regulators to release certain information relating to registered charities to certain persons. In December of 2006, several of these provisions were amended by <i>An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to</i></p>

COMMENTARY

	<p><i>another Act</i>. These amendments increase the level of information sharing and collection among virtually all federal agencies that could potentially investigate or bring allegations and charges against charities and their directors and officers. These amendments also highlight the increasing focus on, and investigation of, charities and their possible links to terrorism.</p>
<p><u>Miscellaneous Provisions Applicable to Registered Charities</u></p>	
<p>Paragraph 150(1.1)(a) Regulation 204(3)(c) Subsection 230(2) Subsection 248(1) Subsection 82(1) Regulation 5800</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. Regulation 5800 requires registered charities and registered Canadian athletic associations to maintain records of any minutes of executive meetings and all documents and by-laws governing the organization/association. The records must be kept for a period of not less than two years from the date that the charitable registration or amateur athletic association’s registration is revoked. Subsection 248(1) provides definitions for “private foundation”, “public foundation”, “qualified donee” and “registered charity”. Subsection 82(1) alters the variables included in a registered charity’s calculation of dividend compensation payment deductions.</p>
<p><u>Capital Gains Arising from Charitable Donations</u></p>	
<p>Paragraphs 38(a), (a.1) (a. 2) & (a.3) Regulation 6210 Subparagraph 39(1)(a)(i.1) Subsection 46(5) Subsection 69(1) Subsection 40(1.01) & Paragraph 72(1)(c) Subsection 40(12)</p>	<p>Paragraph 38(a) and subsection 69(1) provide the basic rules regarding capital gains arising from charitable donations. Paragraphs 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. Paragraph 38(a.3) extends the list of eligible donations that are exempt from capital gains taxes to partnership interests. 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 regarding capital gains arising from</p>

	the donation of “non-qualifying securities”. Subsection 40(12) provides a rule for disposing of capital property included in a flow through share.
<u>General Provisions Regarding Charitable Donations</u>	
Section 110.1 Paragraph 110.1(8)(e) Section 118.1 Subsections 248(30)-(41) Regulation 3503 Regulation 3505 Schedule VIII of Regulations	These provisions allow for tax advantages for charitable donations. Section 110.1 ³ provides for a charitable tax deduction for corporations. Subsection 110.1(9) deals with donations of medicines. Section 118.1 provides for a charitable tax credit for individuals. Sections 110.1(10-13) and 118.1(21-24) deal with options — delaying recognition of a gift to a qualified donee of an option to acquire property until the option is exercised by the qualified donee. Section 118 (13.1-13.3) enacts new rules regarding donations of non-qualifying securities. Sections 110.1(14-15) and 118.1(25-26) govern situations where gifted property is returned to a donor. Sections 110.1(17) and 118.1(28) allow CRA to reassess a taxpayer outside the normal reassessment period. Subsections 248(30)-(41), which remain in draft form, set out the split-receipting rules. Subsection 248(40) provides that these rules do not apply to inter-charity transfers. ⁴ Regulation 3503 and Schedule VIII to the Regulations enumerate the foreign universities to which receiptable charitable donations may be made. Regulation 3505 sets out the conditions for donations of medicines described under paragraph 110.1(8)(e).
<u>Special Provisions Regarding Charitable Donations</u>	
Subsection 43(2) Subsections 169(1.1) & 171(1.1) Section 43.1 Paragraphs 87(2)(m.1) & 88(1)(e.2)	These provisions set out special rules applicable to certain charitable donations. Subsection 43(2) applies to ecological gifts. Also, subsections 169(1.1) and 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,

³ Both the 2007 and 2008 Federal Government Budgets amended this section to allow for donations of medicines for use in the third world. See section 12 of the *Budget Implementation Act, 2008*, S.C. 2008, c. 28.

⁴ See A. Parachin, “Split-Receipting and Inter-Charity Gifts”, E.T.P.J. (March 2008). The split-receipting rules were contained in Bill C-10, which died on the order paper in September, 2008. It is anticipated that these rules will be reintroduced in the foreseeable future.

COMMENTARY

<p>Paragraph 67.1(2)(b) Paragraphs 87(2)(v), 88(1)(e.6) & 88(1)(e.61) Paragraph 110(1)(d.01) Subsections 110(2) & (2.1) Section 143 Section 143.2 Paragraph 152(6)(c) Section 217 Sections 237.1 & 237.2</p>	<p>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 fundraising event. Paragraph 87(2)(v) applies to a gift to charity by a corporation that subsequently amalgamates. Paragraphs 88(1)(e.6) & 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 of donations to registered charities. Sections 143.2, 237.1 and 237.2 provide for special rules for gifting arrangements that constitute “tax shelters”.</p>
---	---

There were several amendments to the *Income Tax Act* under Bill C-13 which received Royal Assent on December 15, 2011. One of the main changes is the introduction of a new regulatory regime for qualified donees. For instance, some donees will need to apply to be on a public list maintained by the CRA and the CRA may request to have access to the qualified donee’s books and records. The definition of who qualifies as a qualified donee has also expanded to include registered Canadian amateur athletic associations (RCAAA), Canadian municipalities, municipal or public bodies performing a function of government in Canada, and prescribed universities, among others. The CRA now has discretion to refuse or revoke registration of a charity or RCAAA where an individual who controls or manages it fits within the definition of an ineligible individual. The Bill C-13 amendments also allow the CRA to reassess a taxpayer outside the normal reassessment period when the gifted property has been returned to a donor. Bill-C13 also allows tax credit deferment for gifts of non-qualifying securities, and it delays the recognition of an option until the option has been exercised. Lastly, Bill C-13 limits tax exemptions for flow through shares.

The reader is encouraged to 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 website <<http://www.cra-arc.gc.ca/chrts-gvng/menu-eng.html>>.

2012 Federal Budget:

The Federal government released a Federal budget (the “Budget”) on March 29, 2012. The Budget contains important measures for charities, including new rules relating to political activities, tax shelters and foreign charities. Some of the more significant new measures are summarized below. Readers interested in learning more can view the budget online at <<http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html>>.

Rules Regarding Political Activities by Registered Charities

The *Income Tax Act* permits registered charities to engage in “political activities” subject to certain conditions. “Political activities” are generally understood to include activities aimed at encouraging the change or retention of a law or policy, either in Canada or abroad. A charity may devote a limited amount of its resources to political activities that are non-partisan and related to its charitable purposes. Any amount spent on political activities must be reported in the annual information return the charity files.

The Budget proposes to amend the definitions of “political activity” and “charitable purpose”. The definition of “political activity” will be amended to include a gift to a qualified donee where it can “reasonably be considered” that a purpose of the gift is to support the political activities of the donee. The definition of “charitable purpose” will be amended to exclude gifts to qualified donees where the gift constitutes a political activity under the new definition. As a result of these changes, any gift from a charity in support of a qualified donee’s political activities will be considered an expenditure on political activity by the donor charity. The Budget also indicates that charities will be required to provide more information when reporting on their political activities, including information about the extent to which such activities are funded by foreign sources.

Additionally, the Budget proposes intermediate sanctions to aid the CRA in enforcing the restrictions on political activities by registered charities. The CRA will be given the power to suspend the tax-receipting privileges of a charity for one year where the limits on political activity expenditures in the *Income Tax Act* are exceeded. Prior to the Budget, the CRA’s only sanction in such circumstances was revocation of charitable status.

Where an incomplete annual information return is filed, the CRA will be able to suspend tax-receipting privileges until the missing information is provided. Although the Federal government indicates that this sanction has been introduced to address a perceived lack of transparency with respect to political activities, the provision could be drafted broad enough to apply in any case where an incomplete return is filed.

The Budget provides few details on what additional information charities will be required to provide on their political activities but may be broad enough to require the disclosure of the amount of funding received from foreign sources for political activities.

COMMENTARY

Rule Regarding the Registration of Foreign Charities

The Budget proposes measures to restrict the ability of foreign charities to obtain qualified donee status. In order to be registered as a qualified donee, foreign registered charities will be required to:

- 1) Receive a gift from the Government of Canada;
- 2) Pursue activities that are related to disaster relief or urgent humanitarian aid or which are in the national interest of Canada; and
- 3) Apply for qualified donee status.

Where these requirements are met, the Minister of National Revenue, in consultation with the Minister of Finance, has the discretionary power to grant qualified donee status for a 24-month period. The period will begin on a date set by the Minister of National Revenue and will normally be the date of the gift from the government. These measures will apply to applications by foreign charities for qualified donee status made on or after the later of January 1, 2013 and the date the enacting legislation receives Royal Assent. Foreign charities that are currently qualified donees will continue as such until their current status expires. The Budget states that further guidance on these measures will be forthcoming.

Rules Regarding Tax Shelters

The Budget also proposes new measures designed to encourage tax shelter registration and reporting. Currently, tax shelter promoters who sell an interest in, or accept consideration in respect of, a tax shelter that is unregistered, or who file false information in an application to register a tax shelter, face a penalty of the greater of \$500 and 25 percent of the consideration received or receivable in respect of the tax shelter. In addition, no participant in the tax shelter may claim any related claim or deduction until the penalty has been paid. Under the Budget, the amount of the penalty will be increased to the greater of the amount determined under the existing rules and 25 percent of the amount asserted by the promoter to be the value of the property that participants in the tax shelter can transfer to the donee. The proposed changes will take effect upon the enacting legislation receiving Royal Assent.

The Budget also creates a new penalty which will apply where a promoter fails to either:

- 1) File an annual information return in response to a demand by the CRA;
or
- 2) Report in the return an amount paid by a participant in respect of a tax shelter.

Currently, the penalty for not filing a return on time is the greater of \$100 and \$25 times the number of days that the return is outstanding, to a maximum of \$2,500. The new penalty increases this amount, so that the promoter is required to pay 25 percent of the consideration received or receivable by the promoter in respect of all interests in the tax shelter that should have been, but were not,

reported. Where the amounts paid by the participants are not reported, the penalty will be the greater of 25 percent of the consideration received or receivable by the promoter and the amount asserted by the promoter to be the value of the property the participants could transfer to a donee. The sanction will apply to returns filed and CRA demands to file made after the enacting legislation receives Royal Assent.

Finally, the Budget provides that tax shelter identification numbers will expire one year after their issue. Although promoters are currently required to register tax shelters with the CRA, the identification number has no expiry, allowing promoters to market the scheme indefinitely. This change applies to applications made on or after March 29, 2012. Tax shelter identification numbers issued as a result of applications filed before March 29, 2012 will expire at the end of 2013.

Tax Breaks for Books

Charities and not for profits devoted to the promotion of literacy in Canada and which are prescribed by regulation will now be entitled to claim a refund of the GST (or the federal portion of the HST) paid to acquire books to be given away. This measure applies to books in respect of which tax becomes payable after March 29, 2012.

Draft Legislation Regarding Gift Receipting and Other Matters:

At the time of writing, a variety of additional proposed amendments to the *Income Tax Act* (Canada) were pending. Draft technical language for these amendments has gone through several iterations. The most current technical language was released by the Department of Finance on July 16, 2010. The 2012 budget confirms the Government's intention to proceed with them, although modified to take into account consultations and deliberations since their release. The amendments propose the following changes to the law.

First, the proposed split-receipting rules broadened the circumstances in which a donor is entitled to a charitable gift receipt.⁵ Previously, a gift receipt could not be issued if a donor received any consideration for a "gift". 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". The proposed amendments prevent these rules from applying to inter-charity gifts.

Second, amendments to the definitions of "charitable organization" and "public foundation" in subsection 149.1(1) were proposed. There has historically been a limit on the amount of a charity's capital that may have been contributed by one

⁵ These rules are being administered by the Canada Revenue Agency even though they have yet to be enacted into law. See Technical News No. 26 and *Richert v. Stewards' Charitable Foundation*, [2005] B.C.J. No. 279 (B.C.S.C.), *affd.* [2006] B.C.J. No. 86 (B.C.C.A.). For a detailed critique of the split-receipting rules and case law dealing with the meaning of charitable "gift", see A. Parachin, "Reforming the Meaning of 'Charitable Gift': The Case for an Alternative to Split Receipting" (2009), 57 *Can. Tax J.* 787.

COMMENTARY

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 when the foundation was registered.⁶ 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) was proposed. Under the proposed amendments, charitable registration can be revoked where a registered charity makes a "gift" to a person or entity other than a "qualified donee", except where the transfer was 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 that such transfers are not permitted.⁷

Fourth, the proposed amendments altered 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 have donated to registered charities via such charitable gifting arrangements could have the value of the resultant charitable gift receipt significantly reduced.

Fifth, the proposed amendments altered, in the limited circumstances described in proposed subsection 248(35), the determination of the fair market value of property that is the subject of a gift. For the purposes of determining the eligible amount of the gift, the fair market value 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. This proposed amendment does not apply to inventory, real property or immovables situated in Canada, certified cultural property, publicly traded shares or ecological gifts. This also does not apply where the donor acquired the property from a transferor on a tax-deferred rollover basis.

Canada Business Corporations Act, R.S.C. 1985, c. C-44.

As its name implies, the *Canada Business Corporations Act* (the "CBCA") is the federal incorporating statute applicable to business corporations (rather than to charitable corporations). As a general rule, its provisions do not therefore

⁶ See the current definitions of "charitable organization" and "public foundation" in subsection 149.1(1).

⁷ See *Registered Charities Newsletter* (CRA: Newsletter No. 9, Spring 2000).

apply to federally incorporated charities. Having said that, section 157.1 of the *Canada Corporations Act* explicitly provides that certain provisions of the CBCA apply to charities. The applicable provisions are those found in Part XIX of the CBCA, which outline the jurisdiction of a court to order an investigation of a corporation, and certain provisions found in Part XX of the CBCA, which outline the jurisdiction of a court to grant leave in relation to derivative actions.

It is worth noting that not all of the CBCA provisions referenced in section 157.1 of the *Canada Corporations Act* apply to federally incorporated charities. Although the provisions of Part XIX.1 of the CBCA are listed in section 157.1 of the *Canada Corporations Act*, the CBCA itself makes clear in paragraph 237.2(2)(c) that part of the CBCA is inapplicable to registered charities.⁸ The provisions comprising Part XIX.1 of the CBCA have therefore been excluded from this consolidation notwithstanding their reference in section 157.1 of the *Canada Corporations Act*.

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* establishes the basic corporate framework for a federally incorporated charity. The *Canada Not-for-Profit Corporations Act* (see below) is a new Act that received Royal Assent on June 23, 2009, and came into force October 17, 2011. It replaces the old letter patent system of incorporation for charities and not-for-profit corporations. The CNCA does not automatically apply to federal not-for-profit corporations. Corporations incorporated under the CCA will still be governed by the CCA until they take action to make the transition to the CNCA. Corporations that do not make the transition will be assumed to be inactive and will consequently be dissolved. The deadline for transitioning is October 17, 2014. The guide to transitioning is available at: <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04954.html>. Since most federally registered incorporated charities were structured as non-share capital corporations prior to the new Act, some portions of the *Canada Corporations Act* included in this consolidation will remain relevant to the corporate structure of those federally incorporated charities. The reader is encouraged to consult the transitional provisions of the new Act and to also consider the Not for Profit Policy Summary published by Industry Canada for a practical discussion of certain of the requirements for a federally incorporated charity. A link to this policy summary is available online from the Industry Canada homepage at <<http://strategis.ic.gc.ca/engdoc/main.html>> under “Programs and Services” by subject: Not-for-Profit Organizations.

⁸ Section 157.1 of the *Canada Corporations Act* is not limited in its application to charitable corporations. The reference to the provisions comprising Part XIX.1 of the CBCA in section 157.1 of the *Canada Corporations Act* is therefore not redundant, since it will be meaningful for the non-charitable corporations to which that section of the *Canada Corporations Act* applies.

COMMENTARY

Canada Not-for-Profit Corporations Act, S.C. 2009, c. 23.

The *Canada Not-for-Profit Corporations Act* came into force on October 17, 2011. The Act replaces the old letters patent system under the *Canada Corporations Act* and brings the structure and governance of charities and not-for-profits more in line with the practices of the *Canadian Business Corporations Act* model.

We make the following observations regarding the new Act with a view to giving the reader a general sense of the direction that the new law takes charities.

Transitional Provisions:

All corporations that were previously governed by Part II of the *Canada Corporations Act* will be required to apply for a certificate of continuance under the new legislative regime (s. 211). If an existing corporation fails to take this step within three years after the coming into force of the new Act, it may be dissolved (s. 297(5)).

Incorporation:

The new Act replaces the old system of federal incorporation – the discretionary “letters patent” system – with the faster and more efficient system of incorporation “as of right” (s. 9). In addition, three individuals are no longer required to establish a new incorporation. Instead, one or more individuals or corporations are able to incorporate a corporation by sending signed articles of incorporation and other specified documents to the “Director” (ss. 6, 8), a new position created by the Act, the scope of which is to exercise regulatory powers under the new legislation and to act as a public registrar of corporations (s. 281).

Capacity and Powers of the Corporation:

The new Act provides not-for-profit corporations with the capacity, rights, powers and privileges of natural persons (s. 16). It does not require the passage of by-laws in order to confer any power on a corporation or its directors (s. 17(1)). Corporations are precluded, however, from carrying on activities or exercising powers in a manner contrary to their mission as articulated in their articles (s. 17(2)).

Financial Accountability and Disclosure:

The new Act imposes additional financial disclosure obligations on corporations by requiring that they make financial statements available to members on request (s. 174(2)). The new Act has additional reporting requirements for “soliciting corporations”. Incorporated charities that constitute “soliciting corporations” are those corporations that have received income in excess of the prescribed amount in the form of donations from outside sources. Donations from the following sources are excluded for the purpose of determining whether a corporation is a “soliciting corporation”: members, directors, officers, employees and spouses of

any of the preceding. The definition also excludes grants or similar financial assistance received from federal or provincial governments and municipalities or an agency of government. Soliciting corporations are also required to file their financial statements with the Director (s. 176). Different levels of financial accountability are imposed on different corporations depending upon variables such as annual revenue (s. 179).

Administrative Obligations:

The new Act requires all corporations to file annual returns (s. 278), keep registered offices (s. 20) and maintain corporate records for specified periods of time (s. 21). The required records 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:

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

There is greater flexibility in the composition of boards and in the meetings of directors. Soliciting corporations are required to have at least three directors, whereas non-soliciting corporations need only have one director (s. 125). There is also provision for directors' written resolutions in lieu of holding meetings (s. 127(5)), as well as a flexible and rotating board (s. 128(4)).

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. In contrast, the new Act 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" (s. 148(1)(a)), the duty to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (s. 148(1)(b)), the duty to comply with the new legislation and any governing corporate documents (s. 148(2)), the duty to manage or supervise the management of the activities and affairs of the corporation (s. 124) and the duty to disclose all conflicts of interest (s. 141).

With respect to defences available to directors, the current legislative regime does not explicitly provide directors facing liability claims with any defences. The new Act, though, specifically provides a due diligence defence to directors who "exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances" (s. 150). Under the new Act, due diligence includes reliance in good faith on the reports of professionals and on financial statements. The new Act also allows corporations in some circumstances to indemnify directors and to maintain insurance for the benefit of directors (s. 151).

COMMENTARY

With respect to statutory liabilities, the Act provides that directors could be liable to employees of the corporation for up to six months' wages (s. 146). In addition, directors may be liable where they have "authorized, permitted or acquiesced" to an offence committed by the corporation (s. 262(4)).

Members:

The new Act expands the rights of members. For example, unlike the *Canada Corporations Act* regime, members are given the right to requisition directors to call members meetings (s. 167). In addition, the Act explicitly addresses matters relating to members meetings such as the conduct of electronic meetings, (s. 165(4)), voting in absentia and the replacement of meetings by written resolution of members (s. 166).

With respect to the issues dealt with at members meetings, the new Act 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 (s. 163).

With respect to the control of members over the affairs of the corporation, the Act provides for "unanimous member agreements" (s. 170). This mechanism will allow 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, the Act makes available to members derivative actions (s. 251) and the oppression remedy (s. 253). 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 (ss. 251(3), 253(2)).

Changes to the Corporation:

The new Act outlines specific circumstances in which special resolutions of members — two-thirds vote — are required to make "fundamental changes" to the corporation (s. 197). 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 (s. 204), liquidate (see Part 14), dissolve (see Part 14) or be continued under the laws of another jurisdiction (s. 213).

In short, the new Act introduces profound changes to the federal law pertaining to not-for-profit corporations.

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

Article XXI of Schedule 1 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.

Charities Registration (Security Information) Act, S.C. 2001, c. 41, Part 6.

The *Charities Registration (Security Information) Act* was created by the *Anti-Terrorism Act*, S.C. 2001, c. 41. 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.⁹

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.

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 and religion in relation to this issue.

⁹ Paragraph 38.01(6)(d) and subsection 38.01(8) of the *Canada Evidence Act* designate the Federal Court as the proper entity for the purposes of sections 6 and 7 of the *Charities Registration (Security Information) Act* unless the hearing is open to the public.

COMMENTARY

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 in subsection 2(1) 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>>.

Conflict of Interest Act, S.C. 2006, c. 9, Part 1.

The *Conflict of Interest Act* contains specific measures to help strengthen accountability and increase transparency and oversight in the operations of the Federal Government. It creates a “legislative regime to govern ethical conduct of public office holders, both during and after employment”. Subsection 15(1) prohibits a reporting public office holder from continuing as, or becoming a director or officer in a corporation or an organization, except as required in the exercise of his or her official powers, duties and functions. Subsection 15(3) provides an exception to this rule, allowing a reporting public office holder to continue as, or become, a director or officer in an organization of a philanthropic, charitable or non-commercial character if the Conflict of Interest and Ethics Commissioner is of the opinion that it is not incompatible with his or her public duties as a public office holder.

A recent amendment (s. 15(1.1)) provides another exception to s. 15(1) by permitting a reporting public office holder to engage in employment or practice a profession in order to maintain his or her employment opportunities or ability to practice the profession upon leaving public office, within certain limitations (*i.e.*, cannot receive remuneration and it must not be incompatible with their duties as a public office holder.)

Section 22 (not included in this text) also requires a public office holder to provide a confidential report to the Conflict of Interest and Ethics Commissioner within 60 days after being appointed as a public office holder. Among other things, the report must contain a “description of the reporting public office holder’s involvement in philanthropic, charitable or non-commercial activities in the two-year period before the day of appointment”.

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5.

The extensive network of federal and provincial statutes that have an impact on charities results in the legislatures enacting law affecting charities under several different heads of power.

Section 92(7) of the *Constitution Act, 1867* is the provinces' primary head of power, granting them jurisdiction over the regulation of charities as well as for the establishment, maintenance and management of hospitals.¹⁰

Section 91(3) of the *Constitution Act, 1867* gives the federal government jurisdiction over raising of money by any mode or system of taxation. It is through this power that the federal government largely controls charities, namely by using the *Income Tax Act*.

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 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 above).

Cultural Property Export and Import Act, R.S.C. 1985, c. 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,

¹⁰ The territories of Nunavut and Yukon are granted similar powers in the *Nunavut Act*, S.C. 1993, c. 28, s. 23(1)(h), and the *Yukon Act*, S.C. 2002, c. 7, s. 18(1)(s), respectively. Interestingly, while the *Northwest Territories Act*, R.S.C. 1985, c. N-27, s. 16(q), includes "the establishment, maintenance and management of hospitals" in its list of legislative powers, the Act is silent with respect to charities.

COMMENTARY

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 subparagraph 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 subsection 118.1(1) for individual donors and subsection 110.1(1) for corporate donors). The *Cultural Property Export and Import Act* establishes the procedure by which an institution, 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.

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

Section 12 of the *Tax Court of Canada Act* grants the Tax Court jurisdiction to hear and determine references, appeals and applications for extensions of time under the *Cultural Property Export and Import Act*. Subsection 12(5) of the *Tax Court of Canada Act* gives the Tax Court the jurisdiction to resolve a dispute pertaining to the suspension of a registered charity's receipting privileges under subsection 188.2(4) of the *Income Tax Act* (Canada).

Ontario Statutes Included:

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 period longer than the applicable accumulations period. The *Good Government Act, 2009*, S.O. 2009, c. 33 amended section 4 of the *Accumulations Act* thereby establishing that rules relating to accumulations do not apply and are deemed never to have applied to charitable trusts.¹¹

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.¹² This rule marks a critical divergence from the approach adopted in the provincial income tax statutes, which generally

¹¹ For an analysis and critique of the *Accumulations Act*, see A. Parachin, "Charitable Trusts and Accumulations of Income" (2009), 29 E.T.P.J. 383 and A. Parachin, "Trusts and Accumulations of Income" (2009), 29 E.T.P.J. 381.

¹² See 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, 2006*, S.O. 2006, c. 33, Sched. Z.2 (discussed below).

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. Second, 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 in this consolidation 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 primary purpose of the *Charities Accounting Act* is to vest in the Ontario Public Guardian and Trustee (the “PGT”) a supervisory jurisdiction over charities in Ontario. This jurisdiction 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 *Charities Accounting Act* was amended by the *Good Government Act, 2009* in 2009. In its amended form, the *Charities Accounting Act* grants the PGT the authority to ask questions about substantial business interests held by charities. The legislation permits questions relating to the business records of the entity, information respecting the assets and liabilities of the entity, accounts of income and expenses for the entity, financial statements of the entity and the particulars of any fees, salary or other remuneration paid to any person by the entity. A charity has a substantial business interest if the executor or trustee beneficially owns, controls or has discretion, either directly or through another entity, over more than 20 per cent of the voting rights or 20 per cent of the assets of the entity. The charity is not required to submit this information annually; instead the Act simply gives the Public Guardian and Trustee the power to make inquiries. If the charity obstructs such an inquiry a fine of up to \$25,000 can be assessed. The website for the PGT may be found at <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>>.

The *Good Government Act, 2009* further amended the *Charities Accounting Act* by repealing the previous restriction on the ability of charities to hold land for any purpose other than the actual use or occupation of the land for charitable purposes. Under the previous rule, the PGT could seize and sell land held by a charity that was not used or occupied for its charitable purposes for a period of three or more years. The three-year restriction was repealed by the *Good Government Act, 2009*.

In addition, the *Good Government Act, 2009* amended the *Charities Accounting Act* by introducing a new section 14. Essentially what this section does is to statutorily cure all breaches of the now repealed *Charitable Gifts Act*.

City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A.

Section 329 of the *City of Toronto Act* provides for a tax rebate program for registered charities holding commercial or industrial property. The purpose of

COMMENTARY

the program is to selectively relieve charities from the burden of paying property taxes. Technical details include the following: the rebate amount is 40 per cent or more of the taxes, one-half of the rebate is paid 60 days after the receipt by the city of the application and the application must be filed after January 1 of the year but no later than the last day of February of the following year.

Community Care Access Corporations Act, 2001, S.O. 2001, c. 33.

Community Care Access Corporations (CCACs) were established by the Ministry of Health and Long-Term Care to provide access to government-funded home and community services and long-term care homes. CCACs are governed by the *Community Care Access Corporations Act, 2001*, which, as a result of amendments introduced by the *Local Health System Integration Act, 2006*, S.O. 2006, c. 4, provides that the Minister of Health and Long-Term Care may order a CCAC to “transfer some or all of [its] assets, liabilities, rights and obligations...to one or more other [CCACs] or another person or entity”.¹³

Such a transfer order could result in property that was originally donated to the CCAC for a charitable purpose being transferred to another entity and being applied in a manner contrary to the wishes of the initial donor of the property or the general rules of charity law. To protect against such an outcome, the *Community Care Access Corporations Act, 2001* provides that, if any property held by a CCAC for a charitable purpose is transferred by a Minister’s order, “all gifts, trusts, bequests, devises and grants of property that form part of the property being transferred shall be deemed to be gifts, trusts, bequests, devises and grants of property to the transferee.”¹⁴ The statute also contains provisions intended to ensure that a donor’s requirement that property donated to a CCAC be used for a “specified purpose” continue to apply notwithstanding an order issued under the statute requiring the CCAC to transfer that property to another CCAC, person, or entity.¹⁵

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 and Personal Property Security Branch of the Ministry of Government Services and the PGT. The *Corporations Act* is being replaced by the *Not-for-Profit Corporations*

¹³ Section 15(3)(a).

¹⁴ See section 16.1(1).

¹⁵ See section 16.1(2). Similar provisions are entrenched in the *Local Health Integration Networks Act, 2006* and discussed below.

Act (discussed below). At the time of writing, the *Not-for-Profit Corporations Act* is not yet enacted.

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, clause 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.

Courts of Justice Act, R.S.O. 1990, c. C.43: Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

The *Rules of Civil Procedure* generally govern the practice and procedure of civil litigation in Ontario and as such will be of relevance to charities involved in civil proceedings. Two of the Rules are particularly relevant to charities, however. Rule 74, which applies to non-contentious estate proceedings, requires that notice of an application to appoint an estate trustee with a will be served on all persons entitled to share in the distribution of the estate, including charities (Rule 74.04(2)). Rule 75.1 establishes a mandatory mediation regime to resolve specified Toronto, Ottawa and County of Essex estates, trusts and substitute decisions proceedings. Of particular relevance to charities is Rule 75.1.02, which specifies that the regime applies to proceedings brought under the *Charities Accounting Act*, the *Estates Act*, and the *Trustee Act*, among other statutes.

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.

Subsection 8(1)22 allows the Ministry of Education and Training to fund an individual, a voluntary association or a corporation without share capital having charitable objects or an educational nature. Subsection 171(1)39 allows a school

COMMENTARY

board only when requested in writing by a charitable organization to employ and pay teachers when that organization is educating children.

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.¹⁶ Ontario Regulation 3/02 enacted pursuant to the *Education Act* provides for the circumstances in which such a tax rebate will be available to charities.

Section 257.6 of the *Education Act* provides that real property in a territory without municipal organization used by a non-profit hospital service corporation for providing laundry or food to a hospital is exempt from property tax relating to school purposes.

Election Finances Act, R.S.O. 1990, c. E.7.

The *Election Finances Act* regulates political contributions in Ontario. Subsection 16(1)(b) specifically excludes “registered charities within the meaning of paragraph 248(1) of the *Income Tax Act (Canada)*” from the group of persons that can make election contributions to political parties, constituency associations, candidates and leadership contestants registered under the Act. Additionally, section 37.10 prohibits registered charities from accepting contributions for the purpose of “third party election advertising”, defined as “political advertising that appears during an election period and is placed by or on behalf of a third party”. “Political advertising”, in turn, is defined as “any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or the election of a registered candidate”.

Charities are also subject to restrictions on political engagement at common law and under the *Income Tax Act (Canada)*.¹⁷

Employment Standards Act, 2000, S.O. 2000, c. 41.

The *Employment Standards Act, 2000* establishes numerous rules governing employment relations in Ontario, including rules with respect to overtime pay (Part VIII), minimum wage (Part IX) and public holidays (Part X). Regulations enacted under the *Employment Standards Act, 2000* provide for limited exemptions to certain of the rules established in the statute. By way of example, the rules with respect to overtime pay, minimum wage and public holidays do not apply to any person employed as a student in a recreational program operated by a registered charity.¹⁸

¹⁶ 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.

¹⁷ See A. Parachin, “Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes” (2007) 45 *Alta. L. Rev.* 1.

¹⁸ See sections 7, 8 and 9 of *Exemptions, Special Rules and Establishment of Minimum Wage*, O. Reg. 285/01. Note that the exemption only applies where the student’s employment is “directly connected with the recreational program”.

Also, although Part XX of the *Employment Standards Act, 2000* imposes on directors liability for employee wages, section 80 exempts directors of certain charities incorporated under the *Corporations Act* (Ontario) from this general rule.

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 of Ontario 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.¹⁹ 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. This Act will eventually be replaced by the *Taxation Act, 2007*.

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. 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

¹⁹ Note that paragraph 149(1)(f) of the *Income Tax Act* (Canada) exempts “registered charities” from tax payable under Part 1 of the *Income Tax Act* (Canada).

COMMENTARY

consideration for the conveyance”. Therefore, no land transfer tax is payable where land is transferred to a charity for no consideration. Also, regulations enacted pursuant to the *Land Transfer Tax Act* exempt from land transfer tax the conveyances of “life lease interests” to charities²⁰ and conveyances taking place in the course of the restructuring of certain hospitals.²¹

The Ontario Budget 2010 announced new regulations that would exempt certain transfers of land to and between charities from provincial land transfer tax. Effective March 26, 2010, O. Reg. 386/10 makes such transfers exempt from land transfer tax if there is no consideration (other than the assumption of an existing liability) and the charitable purpose for which the land is being held remains the same. The purpose of the new rule is to facilitate the reorganization of charities in Ontario.

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. Also included are provisions from Ontario Regulation 389/98, enacted under the *Municipal Act, 2001*, which expressly allow municipalities to increase property tax rates to an amount greater than would ordinarily be allowed under the *Municipal Act, 2001*, in order to fund the tax rebate program. A similar regime is established in the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A and the corresponding Ontario Regulation 121/07, excerpts of which are included in this book.

Section 69 of the *Municipal Act, 2001* excuses buses used to transport pupils, including buses owned and operated by, or operated under a contract with, a school board, private school or charitable organization, from certain municipal by-laws regarding passenger transportation systems.

²⁰ 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).

²¹ O. Reg. 676/98.

The *Eligible Investments and Related Financial Agreements Regulation*²² prescribes securities that a municipality may invest in. Subsection 2.10 allows municipalities to hold a variety of instruments, including bonds, debentures, promissory notes or other evidence of debt of a corporation if the municipality had acquired the bond, debenture, promissory note or other evidence of debt as a gift in a will and the gift had not been made for a charitable purpose.

Not-for-Profit Corporations Act, 2010, S.O. 2010, c. 15.

The new Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) passed third reading in the Ontario legislature on October 19, 2010 and received Royal Assent on October 25, 2010. As of the publication date of this book, the ONCA is expected to be proclaimed in force by January 1, 2013.

The ONCA represents a significant modernization of not-for-profit legislation in Ontario and the first major statutory change in Ontario not-for-profit corporate law in decades. In this regard, the Act once it is proclaimed into force, will serve as a replacement for the Ontario *Corporations Act* (“OCA”).

The new legislation replaces the discretionary letters patent system of the OCA with a statutory right of incorporation. Additionally, the ONCA will provide for a minimum of three directors, while permitting *ex officio* directors. Directors will be held to an objective standard of care and the statute provides for a due diligence defence. As well, members will be entitled to new rights and remedies under the ONCA, including the oppression remedy.

Transitional Provisions

Existing OCA corporations will be required to continue under the ONCA within three years of the ONCA coming into force (s. 207). Although failure to complete the continuance process within the three-year time frame will not result in the corporation being dissolved by the government, its letters patent, supplementary letters patent and by-laws will be deemed to be amended to comply with the new statutory requirement, resulting in non-compliant provisions deemed to become invalid. This will result in uncertainty in relation to which provisions remain to be valid. Social clubs with share capital will have five years to do the same (s. 211).

As part of the continuance process, OCA corporations can, by articles of amendment, amend any provision in its letters patent, supplementary letters patent, by-laws or special resolution to bring the provision into conformity with the ONCA. The Ontario government will release guidebooks and standard by-laws to assist in this process. The CRA is expected to provide guidance for registered charities. For charities, amendment of charitable objects on continuance is expected to trigger a CRA review.

²² O. Reg. 438/97.

COMMENTARY

Incorporation

This Act replaces the letters patent system with a statutory regime similar to the CNCA and OBCA. Under section 9, ministerial discretion to incorporate is removed to allow incorporation as a right rather than through a discretionary process. Now only one incorporator is needed to incorporate (*i.e.*, individual or corporation) (s. 7). This Act creates the certificate of incorporation instead of letters patent (s. 9). In this regard, the ONCA is more closely related to the Ontario *Business Corporations Act* (“OBCA”) than the OCA.

Capacity and Powers of the Corporation

Under sections 15 to 20, a corporation under the ONCA has the capacity and rights of a natural person. Under the ONCA, the concept of a corporation’s activities being *ultra vires* is now eliminated. In contrast, the CNCA does not require the passage of a by-law to confer any particular powers on the corporation or its directors.

Public Benefit Corporation Designation

A major change for corporations under the ONCA is the Public Benefit Corporation (“PBC”) designation. PBCs are charitable corporations, or a non-charitable corporation that receives more than \$10,000 in a fiscal year in funding from public donations or the federal or provincial governments, or a municipality. Once a corporation reaches the \$10,000 threshold, the PBC status does not attach to the corporation until the first annual meeting of members in the next fiscal year.

There are several consequences of the PBC designation to a corporation. Firstly, being a PBC means that not more than one third of the directors of a PBC may be employees of the corporation or of any of its affiliates. Additionally, as discussed below, there is also a higher threshold for dispensing with the auditor and/or review engagement requirements for PBCs.

Financial Accountability and Disclosure

Under the ONCA there is a higher threshold for dispensing with the auditor and/or review engagement requirements for PBCs. On liquidation of such corporations, the articles must provide for the distribution of any remaining property on dissolution if it is a charitable corporation, to a charitable corporation with similar purposes to its own or to a government or government agency or if it is a non-charitable corporation, to another public benefit corporation with similar purposes to its own or to a government or government agency (s. 167(1)).

Administrative Obligations

The ONCA puts forth certain administrative obligations upon corporations. If any of the purposes of the corporation are of a commercial nature, the articles must state that the commercial purpose is intended only to advance or support one or more of the corporation’s not-for-profit purposes (s. 8(3)). For charities, this

corporate authority must be read subject to the restrictions under the *Income Tax Act* for related business.

If by-laws are not passed within 60 days after incorporation, the corporation will be deemed to have passed the standard by-laws approved by the Director.

Directors

The ONCA stipulates that there must be a minimum of three directors. The articles of incorporation may provide a maximum and minimum range (s. 22). For PBCs, under section 23(3) no more than one third of the directors may be employees of the corporation or of any of its affiliates. The directors are elected at a meeting of members; as well, the board may appoint one or more additional directors — up to one third of the number of directors at the previous annual meeting of members — to hold office until the next annual general meeting (s. 24(7)). Selected directors are no longer required to be corporate members. The term for directors will be a maximum of four years (s. 24(1)). Additionally, *ex officio* directors will continue to be permissible (s. 23(4)).

The duties and obligations of directors and officers are the same as in the CNCA, which states that directors and officers are to act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence and skill of a reasonably prudent person (s. 43). With respect to defences available to directors and officers, there is a due diligence defence which can exempt them from liability if they have exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. The directors and officers are deemed to have exercised this good faith when they rely on financial statements and reports of professionals. The standard of care under the ONCA is an objective test which replaces the common law standard of care (s. 44). However, in the case of charities this objective standard must be read in light of the large body of common law relating to the standard of care for charities in their fiduciary obligations.

Members

A corporation must have members. If it has only one class of members then everyone in the class is a voting member. If the corporation has two or more classes, then the articles must give the right to vote to at least one class. Where there is more than one class of members the ONCA gives non-voting members some protections.

All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership. Non-voting members are given voting rights in some limited circumstances, such as an extraordinary sale (which is defined under s. 118(1) as a “lease or exchange of all or substantially all of the property of the corporation”), amalgamation (s. 111(3)), continuance to another jurisdiction, or if there is change to any rights or conditions attached to those non-voting members or a change in the rights of other classes of members relative to the rights of the non-voting members (s. 103(1)(e)). Thus, a class of members could reject a

COMMENTARY

change effectively resulting in a class veto (limited opt-out available). Corporations wanting maximum flexibility should opt for one class of members.

In terms of voting rights at meetings, every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member. The corporation must send a proxy to each member entitled to a notice of meeting (mandatory solicitation of proxies). By-laws may provide for three other methods of voting for persons who cannot be present at a meeting in addition to or as an alternative to proxies: by mail, telephone, or by computer (electronic means). If requested, financial statements and an auditor's report or financial review shall be given to members upon request at least 21 days before an annual general meeting. The default voting procedure is one vote per member, unless the articles provide otherwise.

Members are entitled to certain rights. A member entitled to vote at an annual meeting may raise any matter as a "proposal" but must give 60 days notice. A proposal may include nominations for directors if signed by at least five per cent of members or a lower percentage if set out in the by-laws. Nominations can also be made at the meeting. All proposals must relate in a significant way to the activities and affairs of the corporation. Directors may refuse to discuss the proposal if they give at least ten days notice, but a member may appeal the refusal to a court (s. 56). Members may requisition meetings of the members, but they will need ten percent of the votes to do so or lower if the by-laws so state (s. 60).

Additional rights provided to members include the right to access membership lists which is to include the names and addresses of all other members (s. 96(1)). The by-laws may provide that more information is required to be granted if such a request is made by a member. Members also have the right to inspect financial records (s. 98(2)). There are also certain minimum rights in the event of a disciplinary action or termination of membership (e.g., a minimum of 15 days notice with reasons before the disciplinary action or termination becomes effective; and an opportunity to be heard).

Members have available certain remedies as well. Members may request from a court a compliance order where a corporation, or its directors and officers, fail to comply with the duties set out in the ONCA and its regulations, and/or the articles or by-laws of the corporation. Alternatively, members may seek to bring forth a derivative action (s. 183). A derivative action gives members the right to bring an action in the name of the corporation (religious corporations are exempt from this remedy under s. 183(3)) to enforce one of its rights. The right to a dissent and appraisal remedy will be limited to corporations that are not public benefit corporations. Unlike the CNCA, no oppression remedy will be available under the ONCA.

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,²³ but the essence of the rule may be stated simply enough. The rule against perpetuities has been said to consist of two key elements:²⁴ the first is a prohibition against perpetual trusts; the second is a requirement that “contingent interests”²⁵ must “vest” within a period of time known as the “perpetuities period”, which is the period terminating on the 21st anniversary of the date of death of a life “in being”.²⁶ Charities are exempt from the first aspect of the rule. There are, however, circumstances in which the second aspect of the rule applies to charities.

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, 2006, S.O. 2006, c. 33, Sched. Z.2.

The *Provincial Land Tax Act, 2006* replaces the *Provincial Land Tax Act, R.S.O. 1990, c. P.32* and came into force on January 1, 2009. It 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, 2006* is the relevant statute for land situate in territories of Ontario without municipal organization. It provides a limited exemption from real property tax for specifically enumerated entities, including non-profit hospital service corporations and property held in trust for a band or body of Indians (s. 3). The list is much more limited than it was under the *Provincial Land Tax Act*. The excerpts that

²³ 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.

²⁴ For a review of the rule against perpetuities and its application to churches, see A. Parachin, “Charities and the Rule Against Perpetuities” (2008) 21:3 *The Philanthropist* 256.

²⁵ An interest in property will be contingent if it has yet to vest in a person. This situation could be for any number of reasons. The person may, for example, have yet to satisfy a condition precedent in respect of the property. Alternatively, the identity of the person may as yet be unknown.

²⁶ This aspect of the rule has been described as the “rule against remoteness of vesting”.

COMMENTARY

have been included relate generally to identifying when and to what extent a tax rebate from real property tax under the Act will apply.²⁷

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

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* provides a mechanism by which an unincorporated "religious organization" may hold 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 holding property in land, such as the power to conduct actions with respect to the mortgaging, purchasing and alienation of 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.

The Act previously provided that a religious organization holding land not used by it for a religious purpose could lease the land out for up to a 40-year period. This provided a limited exception to the former provisions of the *Charities Accounting Act*, establishing that the Public Guardian and Trustee could seize and sell land held by a charity that for a period of three or more years was not actually used or occupied by it for its charitable purposes. The *Good Government Act, 2009*, S.O. 2009, c. 33 amended the *Charities Accounting Act* (eliminating the three-year rule) and also the 40-year exception to this rule set out in the *Religious Organizations' Lands Act*.

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.

²⁷ Clause 25(1)(f) of the *Provincial Land Tax Act, 2006* authorizes the Minister to make regulations regarding tax rebates for "eligible charities". See s. 11 of O. Reg. 229/09 for the definition of "eligible charities" and the conditions under which tax rebates are available.

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.

Taxation Act, 2007, S.O. 2007, c. 11, Sched. A.

The Act, which applies in respect of taxation years ending after December 31, 2008, implements a number of new tax provisions that were announced in the 2007 Ontario Economic Outlook and Fiscal Review. Section 9 of the Act lists a number of non-refundable tax credits that may be deducted by an individual in computing the amount of his or her personal income tax, including a “charitable donations tax credit”.²⁸

The formula for calculating the charitable donations tax credit is set out in subsection 9(21) of the Act, although it was repealed and replaced with a new formula on January 1, 2009. Both formulas are included in this text.

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 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 reflect the particular activity of the charity that is in question. For example, recent amendments to the *Charities Accounting Act* 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

²⁸ Under s. 8 of the Act, this tax credit is the *only* non-refundable tax credit under the “Personal Income Tax” subdivision to which a trust is entitled.

COMMENTARY

trustees to invest in mutual funds.²⁹ 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.³⁰ 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 of which any such policy directives have been issued is required to implement them “promptly”.

Omitted Statutes:

Not every statute that may be applicable to charities has been included; those that have been omitted include the following:

Federal Statutes Omitted:

Aeronautics Act, R.S.C. 1985, c. A-2.

Regulations enacted under the Federal *Aeronautics Act* – the *Canadian Aviation Regulations*, SOR/96-433 – provide in subsection 401.28(1) that the holder of a private pilot licence may act as the pilot-in-command of an aeroplane or helicopter for “hire or reward” in only limited circumstances. The limited circumstances

²⁹ 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] O.J. No. 677, 3 E.T.R. (2d) 206 (Ont. Gen. Div.).

³⁰ See *Christian Brothers of Ireland in Canada (Re)*, [1998] O.J. No. 823, 37 O.R. (3d) 367 (Ont. Gen. Div.); varied [2000] O.J. No. 1117, 47 O.R. (3d) 674 (Ont. C.A.); leave to appeal dismissed [2000] S.C.C.A. No. 277 (S.C.C.).

include conducting a flight for a charity, provided that any payment received is calculated on a cost recovery basis.³¹

Air Travellers Security Charge Act, S.C. 2002, c. 9, Part 2.

In its 2001 budget, the federal government provided \$2.2 billion to enhance aviation security.³² To fund this initiative, the *Air Travellers Security Charge Act, 2002* was passed, which created a security charge to be paid by travellers who acquire an air transportation service in Canada. However, the charge does not apply to air travel that is donated for no consideration by an air carrier to a registered charity that arranges free flights for individuals (e.g., for medical purposes) “in pursuit of its charitable purposes”.³³

Airport Personal Property Disposal Regulations, C.R.C., c. 1563.

Allows airports to donate to charity unclaimed property after 30 days.

“Anti-spam Legislation”, S.C. 2010, c. 23.

On December 15, 2010, Bill C-28 received Royal Assent. At the time of writing, the CASL is not in force, although according to the CASL website, a coming into force date will be announced in the coming months. The “Anti-Spam Legislation” does not have a short title yet and is currently called the “*Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*”. The “Anti-Spam Legislation” creates a new regulatory scheme for spam and related unsolicited electronic messages. As well, it amends four existing statutes dealing with privacy and telecommunications.

The “Anti-Spam Legislation” contains a general prohibition against sending a “commercial electronic messages” without the consent of the receiver and without having certain prescribed information in the message. However, this does not apply to “non-commercial activity” and charities can engage prospective donors through email if the email does not involve selling or promoting a product. Charities and non-profit organizations that send a “commercial electronic message” to individuals who have donated to the charity in the last 24 months, volunteered or performed volunteer work with the charity

³¹ See subsection 401.28(4).

³² See online at <<http://www.fin.gc.ca/budget01/bp/bptoc-eng.asp>>.

³³ See subsection 11(1.1)(b). Section 164 (2.01) of the *Income Tax Act* requires all returns to be filed before any rebate or refund owed the taxpayer is paid by the federal government. As an administrative rule, the CRA considers charities exempt from this portion of the *Income Tax Act*. See “*Compliance refund hold legislation Restrictions on refunds and rebates*”, available online at <<http://www.cra-arc.gc.ca/nwsrm/fctshts/2008/m04/fs080401-eng.html>>.

COMMENTARY

in the last 24 months or were a member of the non-profit organization in the last 24 months are also exempted under the legislation.

Bank Act, S.C. 1991, c. 46: Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations, SOR/2002-133.

Banks, insurance companies, and trust and loan companies that have annual incomes of over \$1,000,000,000 are required to publish “public accountability statements” annually. Pursuant to the *Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations*, those statements must include detailed examples of the declarant’s charitable donations made during the period.³⁴

Canada Agricultural Products Act, R.S.C. 1985, c. 20 (4th Supp).

In the *Dairy Products Regulations*,³⁵ the Crown is allowed to donate dairy products forfeited under the Act to charities. There are similar regulations that allow the Crown to donate forfeited agricultural products under the *Egg Regulations*, *Fresh Fruit and Vegetable Regulations*, *Honey Regulations*, *Livestock and Poultry Carcass Grading Regulations*, *Maple Products Regulations*, *Processed Egg Regulations*, and the *Processed Products Regulations*.

Canada Consumer Product Safety Act, S.C. 2010, c. 21

The *Canada Consumer Product Safety Act* (“CCPSA”) received Royal Assent on December 15, 2010 and was proclaimed in force as of June 20, 2011. Among other things, the CCPSA generally requires those who manufacture, import or sell consumer products for commercial purposes to prepare and maintain certain records to ensure that unsafe products can be traced back to their source. Charities and non-profit organizations that sell “for a commercial purpose” consumer products regulated by the CCPSA will be required to maintain records of the name and address of the supplier and purchaser, as well as the location and time period of when that consumer product was sold or transferred, for a minimum of six years.

However, Health Canada is currently developing a regulatory proposal to allow for an exemption from the record keeping requirements for those persons who receive consumer products that are donated by a person other than a person who manufactures, imports or sells consumer products. This exemption is being prepared in recognition that there may be situations involving certain donated consumer products, where records of the source and date of receipt would do

³⁴ More specifically, subsection 3(1)(d) states that the statement must include:
[T]he total value in money of either
(i) the charitable donations made during the period by the declarant and the affiliates in respect of which the statement is published, or
(ii) the charitable donations made during the period by the financial group of which the declarant is a member [. . .]

³⁵ SOR/79-840.

little to support product traceability. This exemption, if adopted, would arguably apply to charities receiving donations of consumer products from individuals, such as used clothing and other household goods.

Canadian Human Rights Act, R.S.C. 1985, c. H-6.

In 1977, the federal government was the last jurisdiction in Canada to pass human rights legislation. At that time the provinces and territories already had human rights legislation in place. The federal statute was enacted to provide for an anti-discrimination rule where the existing provincial and territorial statutes left gaps, e.g., circumstances in which persons receive services from federal businesses. Its provisions essentially mirror those of the Ontario human rights statute (discussed below).

Canada Labour Code, R.S.C. 1985, c. L-2.

Subsections 70(2) and (3) of the Labour Code apply to people, who for religious convictions or beliefs, object to joining a trade union. These subsections allow them to contribute their union dues to a registered charity mutually agreed on by the employee and the union.

Canadian Ownership and Control Determination Act, R.S.C. 1985, c. C-20.

The *Canadian Ownership and Control Determination Act* establishes a legislative framework whereby a person may apply for a certificate attesting to the Canadian ownership rate and control status of that person. Regulations enacted under the statute establish special rules for charities. In particular, registered charities are deemed to have a 100 per cent Canadian ownership rate.³⁶ Also, a trust may elect to have a discretionary power over trust income or capital disregarded in determining its Canadian ownership rate if that power can only be exercised in favour of certain prescribed persons, including persons obliged to apply such income or capital exclusively in furtherance of charitable purposes.³⁷

Combating Terrorism Act (Bill C-17)

On September 22, 2010, Bill C-17, also known as the *Combating Terrorism Act*, received its second reading in the House of Commons and then passed through to the committee stage. The Bill proposed to reintroduce *Criminal Code* provisions relating to investigative hearings and recognizance with conditions that first came into force with Bill C-36, the *Anti-Terrorism Act*, in December 2001. An election was called in March 2011 and the bill died on the order paper as a result. This was a government bill and there is a possibility that it will be reintroduced at a future date.

³⁶ See paragraph 12(1)(h) of the *Canadian Ownership and Control Determination Regulations, 1984*, SOR/84-431.

³⁷ See paragraph 51(1)(c) of the *Canadian Ownership and Control Determination Regulations, 1984*, SOR/84-431.

Copyright Act, R.S.C. 1985, c. C-42.

The *Copyright Act* extends the privileged position of charities in law to the realm of copyright law. In particular, this statute exempts charities from certain copyright laws of general application. Section 19 of the *Copyright Act* articulates the general rule that the performer and maker of a published “sound recording” are entitled to “equitable remuneration” for the public performance of the recording. Subsection 32.2(3) articulates an exemption from this general rule for charities. In particular, subsection 32.2(3) provides that a charity may undertake the live public performance of a “musical work” or “sound recording” without being held liable to pay compensation if it does so in furtherance of its charitable purposes.

Corporations Returns Act, R.S.C. 1985, c. C-43.

The *Corporations Returns Act* provides that corporations carrying on business in Canada meeting certain criteria must file a return every “reporting period” with the Chief Statistician in Canada. The return must contain the particulars enumerated in the Act and accompanying regulations. Subsection 3(2) of the Act exempts from this requirement corporations with the “primary object” of furthering a charitable purpose.

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

It is an indictable offence under the *Crimes Against Humanity and War Crimes Act* for any person to commit a “war crime” either in Canada (subsection 4(1)) or outside of Canada (subsection 6(1)). The definition of “war crime” under the statute underscores the special cultural and legal significance of charity under both Canadian and international law in that this definition explicitly includes intentional attacks against buildings dedicated to charitable purposes.³⁸

Customs Tariff, S.C. 1997, c. 36.

Regulations under the *Customs Tariff* prescribe rules requiring that the country of origin of goods imported into Canada be clearly marked on such goods.³⁹ Goods imported for the purpose of being donated to charity are explicitly exempted from this requirement.⁴⁰ Other regulations under the *Customs Tariff*

³⁸ See the definition of “war crime” in subsection 4(3), subsection 6(3) and in paragraph 2 of article 8 of the *Rome Statute of the International Criminal Court*, which appears as a schedule to the *Crimes Against Humanity and War Crimes Act* and informs the meaning of “war crime” under the statute by virtue of subsections 4(4) and 6(4). For a further discussion, see Didier Pfirter, “Article 8(2)(b)(ix) – Attacking Protected Objects” in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc., USA, 2001) at 162-3.

³⁹ See section 2 of the *Marking of Imported Goods Order* (C-54.011 – C.R.C., c. 535) and section 2 of the *Determination of Country of Origin for the Purpose of Marking Goods (Non-NAFTA Countries) Regulations*, SOR/94-16.

⁴⁰ See section 3 of the *Marking of Imported Goods Order* (C-54.011 – C.R.C., c. 535), Schedule II of the *Determination of Country of Origin for the Purpose of Marking Goods (Non-NAFTA Countries) Regulations*, SOR/94-16, and Schedule II of the *Determination of Country of Origin for*

exempt certain imported goods – films, videotapes, and slides of a documentary nature – from the payment of duty when they are consigned to charitable organizations and subsequently exported from Canada within a prescribed period of time.⁴¹ In addition, a remission order has been made under section 115 of the *Customs Tariff* whereby remission of duties is granted in respect of food donated by a non-resident to a registered charity for charitable distribution in Canada.⁴²

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 harmonized sales tax (“HST”) applies to the same base of taxable goods and services as the GST. Effective July 1, 2010, Ontario combines its respective provincial sales taxes with the GST to create HST.

The GST/HST 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/HST. Therefore, as a general rule, charities do not need to charge and collect GST/HST on property or services they provide. Further, charities are generally not required to register under the ETA for GST/HST purposes. Unlike commercial entities, however, charities generally are not entitled to recover the GST/HST that they pay on their expenses. A charity’s ability to recover the GST/HST that it incurs is instead limited to special rebates.

However, not all goods and services supplied by charities are necessarily exempt from GST/HST. For example, any charity making GST/HST taxable supplies is generally required to register for GST/HST purposes if its GST/HST taxable revenues exceed \$50,000. Further, for goods and services exported out of Canada and for which the charity cannot claim input tax credits (“ITCs”), charities can apply for a 100 per cent rebate of the GST/HST. The charity need not be registered for GST/HST in order to receive this rebate.

As well, charities that have registered for GST/HST (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.

the Purpose of Marking Goods (NAFTA Countries) Regulations, SOR/94-23. See also the *Charitable Goods Remission Order*, SI/98-8, enacted under the *Financial Administration Act*, R.S.C. 1985, c. F-11, which grants remission of all “taxes paid or payable under Division III of Part IX and under any other Part of the *Excise Tax Act*, and of the customs duties paid or payable under section 21 of the *Customs Tariff*, on goods donated by a non-resident of Canada to religious, charitable or educational institutions in Canada”.

⁴¹ See sections 3 and 4 and the Schedule to the *Temporary Importation (Excise Levies and Additional Duties) Regulations*, SOR/89-427.

⁴² *Charitable Food Donations Anti-Dumping and Countervailing Duty Remission Order*, SOR/98-536.

COMMENTARY

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/HST purposes and follow their own unique rules for GST/HST purposes.

Expropriation Act, R.S.C. 1985, c. E-21.

The *Expropriation Act* establishes a statutory regime under which the Crown may expropriate any interest in land or immovable for a “public work” or “other public purpose”.⁴³ The statute contains provisions designed to ensure that a person whose interest in land has been expropriated is fairly compensated by the state. The general rule is that the compensation should correlate with the market value of the expropriated interest or right.⁴⁴ The statute contains special rules to protect charities from financial loss where an interest or right in land has been expropriated from a charity and the market value of the expropriated interest or right is less than the cost of a replacement interest or right in land.⁴⁵

Financial Administration Act, R.S.C. 1985, c. F-11.

The *Defence Materiel Loan Regulations*, C.R.C., c. 690, authorize the Minister of Defence to loan materiel, including any “vessel, vehicle, aircraft, animal, missile, arms, ammunition, clothing, stores, provisions or equipment” to certain recipients if, in doing so, “the national interest would thereby be served”. Section 5 requires that a “reasonable charge” be computed and levied for the loan of materiel, but the charge may be waived where the loan is made “for community activities of a non-commercial, charitable nature”.

Fish Inspection Act, R.S.C. 1985, c. F-12.

Regulations enacted under the *Fish Inspection Act* provide a host of regulatory rules relating to the importing, exporting or marketing of fish. A relieving provision exists under paragraph 18(1)(h) of the *Fish Inspection Regulations*, C.R.C., c. 802. This relieving provision applies in relation to “the importing, exporting or marketing of fish for charitable purposes, international events or national festivities, if the lot size is less than 1,000 kg”.

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

Regulations enacted under the *Immigration and Refugee Protection Act* establish a regulatory framework for, *inter alia*, the issuance of work permits to foreign nationals in Canada.⁴⁶ The regulations privilege charity by specifically enumerating

⁴³ See subsection 4(1).

⁴⁴ See subsection 26(2).

⁴⁵ See subsection 26(5). A similar provision appears in subsection 14(2) of Ontario’s *Expropriations Act*, R.S.O. 1990, c. E.26, although the Ontario version is not explicitly restricted in its application to charities.

⁴⁶ See the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

work in furtherance of a charitable purpose as qualifying as a category of work for which a work permit may be issued⁴⁷ and by exempting foreign nationals who undertake charitable work from certain fees.⁴⁸

Indian Act, R.S.C. 1985, c. I-15.

Section 114 of the *Indian Act* allows the Governor in Council to authorize the Minister of Indian Affairs and Northern Development to enter into agreements with religious or charitable organizations to provide education for Indian children in accordance with the Act.

Lobbying Act, R.S.C. 1985, c. 44 (4th Supp.).

The federal *Lobbying Act* establishes the general rule that certain persons who communicate with federal “public office holders” regarding proposed changes to the law or other matters of public policy shall file an annual return with the federal government. The persons required to file such returns include incorporated charities that employ individuals to make such communications⁴⁹ and individuals who, for payment, make such communications on behalf of charities.⁵⁰

In addition to complying with this statute, charities engaged in lobbying activities need to be mindful of the restrictions imposed upon them further to the so-called “doctrine of political purposes”.⁵¹

National Housing Act, R.S.C. 1985, c. N-11.

One of the stated purposes of the *National Housing Act* is to facilitate access to housing finance and to promote competition and efficiency in the provision of such financing.⁵² One way that the statute seeks to attain this objective is to authorize the Canada Mortgage and Housing Corporation to finance certain housing and land development projects through the provision of loans. Of special relevance to charities is the fact that the Canada Mortgage and Housing Corporation is authorized to make loans to charitable corporations in respect of housing projects for students and to forgive the repayment of such loans.⁵³

Old Age Security Act, R.S.C. 1985, c. O-9.

This Act deals with charitable workers not from Canada but engaged in charitable activities in Canada. It prevents such persons from claiming their time in

⁴⁷ See paragraph 205(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

⁴⁸ See paragraph 299(1)(f) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

⁴⁹ See subsection 7(1) and the definition of “organization” in subsection 2(1).

⁵⁰ See subsection 5(1) and the definition of “organization” in subsection 2(1).

⁵¹ For a description and critique of the doctrine, see A. Parachin, “Charity, Politics and Public Benefit”, Canadian Bar Association, *Fourth National Symposium on Charity Law* (Toronto: Ontario Bar Association Conference Centre, May 11, 2006).

⁵² See section 3.

⁵³ See sections 87 and 88.

COMMENTARY

Canada with the charity towards the residency requirement for seeking old age security.

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*. Charities are specifically referenced in relation to one such standard, “Principle 3”, which states that “the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate”. Explanatory notes to this principle provide that, “organizations that do not have a direct relationship with the individual may not always be able to seek consent. For example, seeking consent may be impractical for a charity or a direct-marketing firm that wishes to acquire a mailing list from another organization. In such cases, the organization providing the list would be expected to obtain consent before disclosing personal information”.⁵⁴

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.⁵⁵ The intent of the statute is to provide a

⁵⁴ For more information about the application of PIPEDA to registered charities, see the Federal Privacy Commissioner’s fact sheet, “The Application of the Personal Information Protection and Electronic Documents Act to Charitable and Non-Profit Organizations” (March 31, 2004), online: <http://www.priv.gc.ca/fs-fi/02_05_d_19_e.cfm>.

⁵⁵ Casinos are also subject to the Act’s requirements (s. 5). Section 1(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations* (SOR/2001-317) specifies that the term “casino” does not include “a person or entity that is a registered charity as defined in subsection 248(1) of the *Income Tax Act* and is licensed, registered,

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.⁵⁶

Telecommunications Act, S.C. 1993, c. 38.

The *Telecommunications Act* establishes a legislative framework for the provision of telecommunication services in Canada. A key issue dealt with by the statute pertains to the rates that may be charged consumers for telecommunication services.⁵⁷ The general rule established in subsection 27(2) is that telecommunication carriers are prohibited from charging rates that confer preferential treatment to certain consumers. An exception is set out in subsection 27(6) whereby telecommunication carriers are authorized to provide services at no charge or at a reduced rate to certain consumers, including charities.

Territorial Lands Act, R.S.C. 1985, c. T-7.

The *Territorial Lands Act* regulates work on, mineral rights to, and access to federal Crown lands in the Northwest Territories. Regulations enacted under the statute – the *Northwest Territories and Nunavut Mining Regulations*, C.R.C., c. 1516 (formerly the *Canada Mining Regulations*) – provide that the owner or operator of a mine must pay royalties to the federal government each fiscal year.⁵⁸ The royalties are calculated on the basis of the “value of the output of the mine”.⁵⁹ Since no deduction for charitable donations is permitted for the purposes of determining the value of the output of a mine, such donations do not reduce the amount of royalties payable under the regime.⁶⁰

On the upshot, the regulations also confer a benefit of sorts on charities. Although a permit is necessary to mine or remove material from the lands regulated by the

permitted or otherwise authorized to carry on business temporarily for charitable purposes, if the business is carried out in the establishment of the casino for not more than two consecutive days at a time under the supervision of the casino”. Section 1.1 goes on to explain that such business is considered to be an activity conducted by the supervising casino.

⁵⁶ See also the above discussion on the *Income Tax Act* (Canada) under the heading “Obtaining Information Relating to the Registration of Charities” in the table located in the federal *Income Tax Act* section of the commentary.

⁵⁷ See Part III.

⁵⁸ See subsection 65(1) of the *Northwest Territories and Nunavut Mining Regulations*, C.R.C., c. 1516.

⁵⁹ *Ibid.*

⁶⁰ Paragraph 65.1(10)(q) of the *Northwest Territories and Nunavut Mining Regulations*, C.R.C., c. 1516.

COMMENTARY

statute, charities are exempt from the fee that is normally required to be paid to acquire such a permit.⁶¹

Veterans' Land Act, R.S.C. 1970, c. V-4.

The purpose of this Act is to assist veterans acquire and settle on land. However, there is a section that is relevant to charities. Section 28 of the *Veterans' Land Act* allows the Director to sell any land at his or her disposal as a site for any educational, religious or charitable purpose, or any other purpose if it is in the public interest.

Ontario Statutes Omitted:

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 thereof. 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.

Funeral, Burial and Cremation Services Act, 2002, S.O. 2002, c. 33

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.

Charitable Gifts Act, R.S.O. 1990, c. C.8 (repealed).

The *Charitable Gifts Act* was repealed in 2009 by the *Good Government Act, 2009*, S.O. 2009, c. 33. Prior to its repeal, the *Charitable Gifts Act* placed restrictions on the business and investment activities of charities. In particular, the *Charitable Gifts Act* prohibited most charities in Ontario from owning more than a 10 per cent interest in any business for longer than seven years. Given its repeal, the statute is no longer included in this consolidation. Notwithstanding the repeal of the *Charitable Gifts Act*, the *Income Tax Act (Canada)* continues to regulate the ability of charities to hold large positions in for-profit entities and to directly carry on business activities.

⁶¹ See sections 4 and 24 of the *Territorial Coal Regulations*, C.R.C., c. 1522 and section 12 of the *Territorial Quarrying Regulations*, C.R.C., c. 1527.

Colleges Collective Bargaining Act, 2008, S.O. 2008, c. 15.

Section 13 requires members of the employee organization to make payments to the organization in the form of membership dues. Subsection 13(2) has an exemption for members who, for religious convictions or beliefs, object to paying dues. The Ontario Labour Relations Board will make an order to exempt the employee from paying the dues to the employee organization.

Subsection 13(3) requires the employee to instead make equivalent payments to a charitable organization mutually agreed on by the employee and the employee organization. If there is no agreement as to which charitable organization the payments should be made, then the Labour Relations Board will designate one.

Child and Family Services Act, R.S.O. 1990, c. C.11.

The *Child and Family Services Act* provides in subsection 193(2) that, except in the case of a children's aid society, a licence is necessary to place a child for adoption. Subsection 193(4) explicitly lists a "non-profit agency", defined in section 192 as a non-share capital corporation with charitable objects, as being among the applicants who may qualify for such a licence. Charities involved in this kind of work are subject to a number of duties, including a duty imposed by section 72 of the statute to report to a Children's Aid Society where there exist reasonable grounds to suspect that a child may be in need of protection. The duty applies where, *inter alia*, there are concerns over physical harm, abandonment, emotional harm and sexual exploitation through molestation or child pornography.

City of Hamilton Act, 1999, S.O. 1999, c. 14, Sched. C.

The *City of Hamilton Act, 1999* establishes the general rule in section 11.12 that the city may make a by-law requiring authorization to operate a "passenger transportation system" in the city. A specific exemption from this requirement is provided for buses operated by a charitable organization.⁶²

City of Ottawa Act, 1999, S.O. 1999, c. 14, Sched. E.

The *City of Ottawa Act, 1999* sets out in section 12.18 an analogous provision to that discussed above in the context of the *City of Hamilton Act, 1999*. In particular, section 12.18 establishes that the city may make a by-law requiring authorization by the city to operate a "passenger transportation system" in the city, but provides a specific exemption for buses operated by a charitable organization.⁶³

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

⁶² See paragraph 11.12(2)2.

⁶³ See paragraph 12.18(2)1.

COMMENTARY

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).⁶⁴

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

The *Consumer Protection Act, 2002* establishes in Part IV rules applicable to contracts for the provision of “personal development services”, which is defined in subsection 20(1). Subsection 29(2) explicitly provides that the rules do not apply where the personal development services are provided by a charity.

Charities are also exempted from some of the requirements of Ontario Regulation 17/05, enacted under the *Consumer Protection Act, 2002*, relating to the issuing of gift cards. Charities are exempt from the prohibition on expiry dates (s. 25.3(1)) and fees charged on gift cards (s. 25.4).

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.

Day Nurseries Act, R.S.O. 1990, c. D.2.

Section 6 of the *Day Nurseries Act* provides that, where the Minister of Community and Social Services is satisfied as to the capability of a corporation competently operating a day nursery, he or she may approve the corporation to receive government funding for that purpose. Regulations enacted under the statute specifically enumerate corporations with charitable objects as being among the limited corporations that may be approved under section 6 of the statute.⁶⁵

Discriminatory Business Practices Act, R.S.O. 1990, c. D.12.

The *Discriminatory Business Practices Act* prohibits in subsection 5(1) any person in Ontario from engaging in a “discriminatory business practice”.⁶⁶ In an apparent recognition of the fact that a person’s involvement in charitable work will often reflect personal attributes – discrimination in business on the basis of which is prohibited under the statute – subsection 5(5) prohibits seeking information about a person’s involvement in charitable activities for the purposes of engaging in a discriminatory business practice. Subsection 5(6) actually deems the collection

⁶⁴ See also section 1 of *Conservation Bodies*, O. Reg. 293/03, which prescribes all registered charities created by statute to be conservation bodies.

⁶⁵ See section 2 of the *Day Nurseries Act General Regulation*, R.R.O. 1990, Reg. 262.

⁶⁶ The statute does not define “discriminatory business practice”. It does, however, deem in section 4 certain activities to be discriminatory business practices.

of such information about a person to be for the purpose of engaging in a discriminatory practice until the contrary is established.

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

Subsection 8(1)22 allows the Ministry of Education and Training to fund an individual, a voluntary association or a corporation without share capital having charitable objects or an educational nature. Subsection 171(1)39 allows a school board only when requested in writing by a charitable organization to employ and pay teachers when that organization is educating children.

Elderly Persons' Housing Aid Act, R.S.O. 1990, c. E.5.

The *Elderly Persons' Housing Aid Act* seeks to provide provincial funding for the purpose of constructing and equipping low rental housing units for elderly persons. Corporations with charitable objects are explicitly enumerated in subsection 1(1) as being among the corporations to which the provincial government may disburse cash in furtherance of the statute's purpose.

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 the *General Regulation*⁶⁷ enacted 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.

Environmental Protection Act, R.S.O. 1990, c. E.19.

The *Environmental Protection Act* provides in section 9 that an "environmental compliance approval" is necessary to undertake certain specified activities that will result in the discharge of a contaminant into the environment. Regulations enacted under the statute provide an exception from this requirement where a contaminant discharging apparatus is being used for the preparation of food or beverages being sold or distributed in furtherance of a charitable purpose.⁶⁸

⁶⁷ R.R.O. 1990, Reg. 319.

⁶⁸ See subsection 1(1)9 of *Environmental Compliance Approvals — Exemptions from Section 9 of the Act*, O. Reg. 524/98.

COMMENTARY

Financial Administration Act, R.S.O. 1990, c. F.12.

The *Financial Administration Act* establishes rules of general application governing, *inter alia*, the investment and disbursement of “public money” in Ontario. Section 6 of the statute explicitly authorizes the Minister of Finance to accept property received by way of gift or bequest for the permanent endowment of any charitable purpose in Ontario.

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.⁶⁹

Health Insurance Act, R.S.O. 1990, c. H.6, General Regulation R.R.O. 1990, Reg. 552.

Section 1.7 of this regulation allows a resident to leave Canada for a maximum of five 12-month periods and still be considered to meet the physical presence requirements to qualify for provincial health insurance. To be eligible under this section, the resident must have (*inter alia*) left in order to work or serve full-time for a registered charity under the *Income Tax Act*.

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 O. Reg. 601/93 enacted pursuant to the *Highway Traffic Act* provide an exemption from these requirements where a used vehicle is transferred to a charity for no consideration.

In addition, subsections 177(2) and (4) of the *Highway Traffic Act* provide that it is an offence to stop, attempt to stop or approach a vehicle while it is on a roadway for the purpose of selling a commodity or service to any person in the vehicle. Although the offence is arguably not worded in such a way to catch fundraising activities on roadways, subsection 177(3.1) makes explicitly clear that it is not an offence for registered charities to engage in fundraising on roadways with a maximum speed limit of 50 kilometres per hour.⁷⁰

⁶⁹ See O. Reg. 398/93 for a complete list of these institutions.

⁷⁰ A similar provision appears in the *Safe Streets Act*, 1999, S.O. 1999, c. 8 (discussed below).

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

Sections 1 and 5 of the Ontario *Human Rights Code* grant every person the right to equal treatment with respect to services, goods and facilities, or employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. Membership, participation and employment in charitable institutions are sometimes restricted on grounds that are discriminatory under this statutory rule. In fact, some charities could not carry out their mission without falling offside this statutory anti-discrimination rule. Churches, for example, exercise religious preference by restricting employment, e.g., pastoral employment, to persons adhering to a particular religious dogma. Since the freedom to exercise religious preference in this context is necessary in order for a church to achieve its very charitable purpose – the advancement of religion – it is not prohibited. The Ontario *Human Rights Code* sets out exemptions from the general anti-discrimination rule (see, for example, sections 18 and 24(1)(a)) that apply in this and other circumstances involving charities and not-for-profits. In order for an institution to fall within the statutory exemptions it must be primarily engaged in serving the interests of persons identified by the prohibited ground of discrimination. The scope of these exemptions from the general anti-discrimination rule of the *Human Rights Code* was recently tested in a case dealing with whether a religious charity could require its employees to comply with a faith-based lifestyle policy prohibiting (among other expressions of sexuality) homosexual relationships.⁷¹

On June 13, 2012 the Ontario Legislature passed third reading of Bill 33, “*Toby’s Act (Right to be free from Discrimination and Harassment Because of Gender Identity and Gender Expression)*”. Once it receives Royal Assent, the Bill will amend the *Human Rights Code* to specify that every person in Ontario has the right to equal treatment without discrimination due to gender identity or gender expression with respect to goods, services, facilities, employment, accommodation, contracts and vocational associations (such as trade unions, trade or occupational associations or self-governing professions). It is expected that the amendments will become law later this year and once in force charities and not-for-profits operating in Ontario will be subject to these amendments. The terms “gender identity” and “gender expression” are not specifically defined in the Code. However, the goal of the amendments is to extend legal protection to people who identify themselves as “transgendered”. See also the Human Rights Commission (Ontario) Policy on Discrimination and Harassment because of Gender Identity released in March 2000 which defines “gender identity” (<<http://www.ohrc.on.ca/en/policy-discrimination-and-harassment-because-gender-identity>>). With respect to the term “gender expression” it is understood to mean the manner by which a person expresses their gender identity including how they dress, behave, speak and interact with others.

⁷¹ *Ontario (Human Rights Commission) v. Christian Horizons*, [2010] O.J. No. 2059 (Ont. S.C.J.).

COMMENTARY

In addition, the Code will be amended to provide that every person has the right to be free from harassment with respect to employment and accommodation because of their gender expression. Freedom from harassment with respect to services was not, however, included.

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 O. Reg. 389/91 describes the circumstances that qualify for purposes of section 19 of the statute as special occasions. Public events and auctions conducted by registered charities under the *Income Tax Act* (Canada) are specifically enumerated. In turn, subsection 3(6) of Ontario Regulation 720 authorizes a manufacturer of liquor to give liquor to a registered charity holding a special occasion permit.

Local Health System Integration Act, 2006, S.O. 2006, c. 4.

The *Local Health System Integration Act, 2006* establishes a number of “local health integration networks” (“LHIN”) across Ontario with a view to better co-ordinating the provision of health care services, enhancing the efficient management of scarce health care resources and enabling better access to health care services.⁷² The legislative framework assigns a specific “geographic area” to each LHIN. Within its specific geographic area, the function of an LHIN is to plan, fund and integrate health services provided therein by “health service providers” (“HSP”), which is defined in subsection 2(2) to include certain institutions that are *prima facie* charitable at law, *e.g.*, hospitals, homes for the aged, nursing homes, *etc.*⁷³

Each LHIN has the authority to require an HSP within its geographic area to provide (or cease to provide) a particular health care service, to transfer property to another HSP, *etc.*⁷⁴ The statute also vests in the Minister of Health and Long-Term Care, after receiving advice from an LHIN, to order an HSP to dissolve, amalgamate or transfer operations or property to another HSP.⁷⁵

A key problem that the statute seeks to minimize or avoid is the possibility of an order from an LHIN or the Minister forcing an HSP to apply property in a manner contrary to the wishes of the initial donor of the property or the general rules of charity law. For example, there are provisions to guard against LHINs and the Minister from ordering an HSP to transfer property to a non-charity⁷⁶ or from ordering an HSP that is a religious organization from performing a health

⁷² See the Preamble and the stated purposes of the statute in section 1.

⁷³ Individual chiropractors, dentists, doctors and optometrists providing health services directly or indirectly through a health profession corporation are excluded from the definition of HSP under subsection 2(3).

⁷⁴ See section 26.

⁷⁵ See section 28.

⁷⁶ See clause 26(2)(g) and subsection 28(4).

care service that is contrary to an applicable religious tenet.⁷⁷ The statute also contains provisions intended to ensure that a donor's requirement that property donated to an HSP be used for a "specified purpose" continue to apply notwithstanding an order issued under the statute requiring the HSP to transfer that property to another HSP.⁷⁸

Lobbyists Registration Act, 1998, S.O. 1998, c. 27, Sched.

Ontario's *Lobbyists Registration Act, 1998* contains similar provisions to the federal *Lobbying Act* that apply in relation to lobbying directed at the Ontario government. In particular, certain persons who "lobby" "public office holders" in Ontario are required to file an annual return with the Ontario government. The persons required to file such returns include "consultant lobbyists" – basically, individuals who "lobby" on behalf of others for payment – who lobby on behalf of charities⁷⁹ and charities that employ "in house lobbyists" – basically, individuals employed by charities where a significant part of such individuals' duties involve lobbying.⁸⁰

In addition to complying with this statute, charities engaged in lobbying activities need to be mindful of the restrictions imposed upon them further to the so-called "doctrine of political purposes".⁸¹

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. Clause 3(5)(f) of the statute allows for the deduction of certain charitable donations for the purposes of calculating the operator's profit.

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. 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 O. Reg. 329/04 enacted pursuant to the statute elaborates on these requirements.

⁷⁷ See clause 26(2)(f) and subsection 28(2). The protection in this regard is defined in the statute with specific reference to constitutional protections under the *Canadian Charter of Rights and Freedoms*.

⁷⁸ See section 30.

⁷⁹ See section 4 and the definitions of "lobby", "organization" and "public office holder" in subsection 1(1).

⁸⁰ See section 6 and the definitions of "lobby", "organization" and "public office holder" in subsection 1(1).

⁸¹ For a description and critique of the doctrine, see A. Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes", 45 *Alta. L. Rev.* 1.

COMMENTARY

Private Career Colleges Act, 2005, S.O. 2005, c. 28, Sched. L.

Section 6 of the *Private Career Colleges Act, 2005* requires that all private colleges provide a security to the province in order to protect financial interests of students in situations where the college finds itself unable to meet its obligations. Section 14 of the Act also imposes an annual registration requirement for private colleges. Private colleges established by registered charities are exempted from these requirements by virtue of s. 32 of Ontario Regulation 414/06, enacted under the Act.

Residential Tenancies Act, 2006, S.O. 2006, c. 17.

The *Residential Tenancies Act, 2006* replaced the *Tenant Protection Act, 1997*, S.O. 1997, c. 24, effective January 1, 2007. The *Residential Tenancies Act, 2006* establishes a legislative framework to regulate landlord-tenant relationships. The statute affords special treatment to certain charities in the same ways as did the *Tenant Protection Act, 1997*. First, section 5 completely exempts certain living accommodations from the scope of the statute. The list of exempted living accommodations includes those that will often be provided by charities in the course of carrying out charitable activities.⁸² Second, subsection 7(1) exempts certain rental units from several of the statute's provisions. The list of exempted rental units includes those that will often be operated in the course of carrying out charitable activities.

Safe Streets Act, 1999, S.O. 1999, c. 8.

The *Safe Streets Act, 1999* has provisions similar to section 177 of the *Highway Traffic Act* (described above). Subsections 3(2) and 5(1) of the *Safe Streets Act, 1999* make it an offence for a person to "solicit" another person in specific circumstances. The term "solicit" is defined broadly enough in section 1 to include fundraising activities. The specific circumstances in which solicitation is prohibited include along a "roadway". Similar to subsection 177(3.1) of the *Highway Traffic Act*, subsection 3(3) of the *Safe Streets Act*, makes it explicitly clear that it is not an offence for registered charities to engage in fundraising on roadways with a maximum speed limit of 50 kilometres per hour. However, the *Safe Streets Act* does not have a general exception for charities. This means that charities are also prohibited from engaging in what the statute defines as aggressive solicitation.

Securing Pension Plan Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24

On December 8, 2010, Bill 120, the *Securing Pension Plan Benefits Now and for the Future Act, 2010*, received Royal Assent. The changes will make it easier and less expensive for employees of several related charities to participate in a single pension plan. The extension of the definition of "affiliate" in the bill will

⁸² See clauses 5(c), (e), (f), (g) and (l).

allow affiliated non-share capital companies to qualify for the exemption from the “multi-employer pension plan” provisions. The amendments contained in the bill will also allow those employees the protection provided by the Pension Benefits Guarantee Fund. The coming into force provisions are varied for different sections.

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

Under the *Securities Act*, anyone who trades in securities is required to comply with a registration requirement and anyone who issues securities is required to comply with a prospectus requirement. The *Securities Act* contains statutory exemptions from these requirements. Also, s. 143 of the *Securities Act* empowers the Ontario Securities Commission to grant additional exemptions. Further to this statutory power, the Ontario Securities Commission (as well as the other provincial and territorial securities regulators in Canada) has adopted National Instrument 45-106. Section 2.38 of this National Instrument exempts charities from the prospectus requirements where no part of the net earnings benefit any security holder of the charity and no commission or other remuneration is paid in connection with the sale of the security.

Services and Supports to Promote the Social Inclusion of Persons With Developmental Disabilities Act, 2008, S.O. 2008, c. 14

Section 41 allows a regional municipality to enter into an agreement with a charitable organization that operates or intends to operate a supported group living residence, with respect to the construction, operation or maintenance of the residence.

Others

Statutes Conferring, or Otherwise Facilitating Transfers of, Property to Charity.

A number of statutory enactments confer property to charity or otherwise facilitate such transfers. For example, several statutes depart from the foundational property law rule “*nemo dat qui non habet*” – he who hath not cannot give – by authorizing a non-owner to transfer ownership to charity in certain circumstances. These circumstances include instances where statutes authorize the gifting to charity of property in a lost or abandoned article.⁸³ Other statutes authorize the gifting to charity of property in forfeited or state confiscated articles.⁸⁴ Certain other

⁸³ See, for example, section 24 of the *Niagara Parks Act*, R.S.O. 1990, c. N.3; section 36 of the *Provincial Parks and Conservation Reserves Act*, 2006, S.O. 2006, c. 12; 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; section 3 of the *Airport Personal Property Disposal Regulations*, C.R.C., c. 1563 (enacted under the *Department of Transport Act*, R.S.C. 1985, c. T-18); and subsection 85(3) and sections 106 and 109 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (enacted under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20).

⁸⁴ See, for example, sections 11 and 27 of the *Ministry of Correctional Services Act Regulation – General*, R.R.O. 1990, Reg. 778; section 63 of the *Municipal Act, 2001*, S.O. 2001, c. 25; sections 19 and 20 of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25; sections 28 and 30

statutes direct or authorize the transfer of property to charity by way of distribution upon dissolution of certain corporations,⁸⁵ beneficiary designation⁸⁶ or otherwise.⁸⁷ Similarly, regulations enacted under the *Motor Vehicle Dealers Act, 2002* facilitate fundraising for charities by exempting charities conducting auto auctions from the necessity to register as a motor vehicle dealer.⁸⁸

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*

of the *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.) (see also the accompanying regulations: sections 37 and 38 of the *Egg Regulations*, C.R.C., c. 284; sections 48 and 48.1 of the *Fresh Fruit and Vegetable Regulations*, C.R.C., c. 285; sections 59 and 60 of the *Honey Regulations*, C.R.C., c. 287; sections 81 and 81.1 of the *Dairy Products Regulations*, SOR/79-840; section 17 of the *Livestock and Poultry Carcass Grading Regulations*, SOR/92-541; sections 24 and 25 of the *Maple Products Regulations*, C.R.C., c. 289; sections 28 and 29 of the *Processed Egg Regulations*, C.R.C., c. 290; and sections 73 and 73.1 of the *Processed Products Regulations*, C.R.C., c. 291); section 9 of the *Feeds Act*, R.S.C. 1985, c. F-9 (see also the accompanying regulations: subsection 37(5) of the *Feeds Regulations, 1983*, SOR/83-593); section 9 of the *Fertilizers Act*, R.S.C. 1985, c. F-10 (see also the applicable regulations: subsection 24(5) of the *Fertilizers Regulations*, C.R.C., c. 666); section 12.9 of the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sched. E; and subsections 51(5) and 74.1(6) of *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A. Interestingly, produce that is donated to charities or non-profit organizations are not subject to the *Fresh Fruit and Vegetable Regulations*, C.R.C., c. 285 (see section 2.1(2)(j)), nor are donated agricultural products subject to the *Licensing and Arbitration Regulations*, SOR/84-432 (see section 2.1(2)(d)).

⁸⁵ See, for example, subsection 58(3) of the *Animal Pedigree Act*, R.S.C. 1985, c. 8 (4th Supp.); sections 122, 354, and 361 of the *Canada Co-Operatives Act*, S.C. 1998, c. 1; subsections 5(3.1) and 162(2) of the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35; subsection 2(2) of the *Day Nurseries Act Regulation – General*, R.R.O. 1990, Reg. 262; section 6 of Ontario Regulation 187/93 (enacted under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A).

⁸⁶ See, for example, subsection 54(4) of the *Canadian Forces Superannuation Regulations*, C.R.C., c. 396 (enacted under the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17); subsection 26(5) of the *Supplementary Death Benefit Regulations*, C.R.C. c. 1360 (enacted under the *Public Service Superannuation Act*, R.S.C. 1985 c. P-36; and subsection 31(5) of the *Royal Canadian Mounted Police Superannuation Regulations*, C.R.C., c. 1393 (enacted under the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11).

⁸⁷ Subsection 52(1) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A provides that employees who object to joining a union or paying union dues on religious grounds may be permitted to instead make equivalent donations to a charity. Similar provisions appear in subsection 13(3) of the *Colleges Collective Bargaining Act 2008*, S.O. 2008, c. 15, and subsection 70(2) of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

⁸⁸ Ontario Regulation 333/08.

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 1413/08. 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 *Lottery Licensing Policy Manual* sets out the eligibility criteria for lottery licences and the terms and conditions that may be attached to their issuance.⁸⁹

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* is the responsibility of the Alcohol and Gaming Commission of Ontario.⁹⁰ 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.

A charity with a licence also enjoys exemption from certain requirements of the *Consumer Protection Act, 2002*.⁹¹

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 *Local Health System Integration Act, 2006*, S.O. 2006, c. 4; the *Public Hospitals Act*, R.S.O. 1990, c. P.40; the *Private Hospitals Act*, R.S.O. 1990, c. P.24; the *Homes for Special Care Act*, R.S.O. 1990, c. H.12; the *Home Care and Community Services 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; the *Mental Health Act*, R.S.O. 1990, c. M.7; and the *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8.

⁸⁹ The Lottery Licensing Policy Manual was updated June 1, 2012 and is available online at: <http://www.agco.on.ca/en/services/index_llpm_MUN.aspx>.

⁹⁰ Some of these regulations make specific provisions regarding charitable gaming. See, for example, Ontario Regulation 78/12, enacted under the *Gaming Control Act, 1992*, S.O. 1992, c. 24. See also Ontario Regulation 81/12, enacted under the *Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, c. 12, Sched. L.

⁹¹ See section 8 of Ontario Regulation 17/05.

Statutory Regime Relating to Means Tested Public Assistance and Other Government Benefits.

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 Regulation – General*, O. Reg. 222/98; section 54 of the *Ontario Works Act, 1997 Regulation – General*, O. Reg. 134/98; section 50 of Ontario Regulation 298/01 (under the *Housing Services Act, 2011*, S.O. 2011, c. 6); and section 13 of the *Old Age Security Act*, R.S.C. 1985, c. O-9.

In addition, in an apparent effort to remove disincentives associated with participating in foreign charitable work, certain statutes providing for state benefits that are contingent upon meeting residency requirements waive such requirements where extended absences from the jurisdiction are owing to participation in charitable activities. See, for example, section 4 of the *Ontario Guaranteed Annual Income Act Regulation – General*, 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. See also subsection 21(5) of the *Old Age Security Regulations*, C.R.C., c. 1246, which sets out an analogous rule for purposes of determining eligibility for benefits under the *Old Age Security Act*, R.S.C. 1985, c. O-9.

Statutory Regime Applicable to Government Parks and Waterways.

The statutes regulating government parks and waterways contain various provisions that allow charities privileged access. For example, regulations enacted under the *Provincial Parks and Conservation Reserves Act, 2006*, S.O. 2006, c. 12 allow non-residents of Canada to camp in conservation areas or provincial parks so long as the camping group is a charitable or non-profit organization. Similarly, regulations enacted pursuant to the *Public Lands Act*, R.S.O. 1990, c. P.43,⁹² and the *Provincial Parks and Conservation Reserves Act, 2006*⁹³ relax the rules relating to camping on Crown land, provincial parks and conservation reserves as they apply to charities.⁹⁴ In addition, regulations enacted under the *Department of*

⁹² See subsection 2(1) of Ontario Regulation 326/94 (enacted under the *Public Lands Act*, R.S.O. 1990, c. P.43). See also subsection 8(3) of Ontario Regulation 136 (under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27).

⁹³ See section 18 of Ontario Regulation 347/07 and subsection 11(1) of Ontario Regulation 319/07, both enacted under the *Provincial Parks and Conservation Reserves Act, 2006*, S.O. 2006, c.12.

⁹⁴ See also regulations enacted under the *Canada National Parks Act*, S.C. 2000, c. 32, such as the *National Parks of Canada Water and Sewer Regulations*, C.R.C., c. 1134, s. 20.

Transport Act, R.S.C. 1985, c. T-18 allow for a permit to be issued free of charge, authorizing a vessel operated by a charitable organization to pass through certain swing bridges and historic canals.⁹⁵ In a similar vein, an order enacted under the *Financial Administration Act* authorizes the Minister of Fisheries and Oceans to waive the prescribed fee or charge for any “special service” provided by the Department of Fisheries and Oceans to a registered charity.⁹⁶

Certain other regulations make it explicitly clear that charities are not always given favourable treatment in respect of national parks. Regulations enacted under the *Canada National Parks Act*, S.C. 2000, c. 32 provide that no person shall carry on a “business” in a national park in Canada without a licence.⁹⁷ The definition of “business” explicitly includes fundraising and any undertaking – including activities performed on a non-profit basis – carried on in a national park by a charitable organization.⁹⁸

Statutory Regime Applicable to Third Sector – Government Partnerships.

Recent years have witnessed an increased emphasis on collaboration between governments and the third sector. Charities and other non-profits have increasingly been viewed by governments as essential instruments of public policy implementation and program delivery. This trend is reflected in legislative developments. For example, Ontario’s *Poverty Reduction Act, 2009* expressly acknowledges that charities, non-profits and voluntary organizations are integral to a poverty reduction strategy.⁹⁹ Other statutes expressly contemplate governments entering into agreements with charities to achieve common goals.¹⁰⁰ These statutes are on the periphery of the core statutory regime regulating charities but they offer insights as to the changing role played by charities in contemporary society. We anticipate that future years will witness a proliferation of these sorts of statutory provisions.

⁹⁵ See subsection 34(3) and subsection 39(3) of the *Historic Canals Regulations*, SOR/93-220.

⁹⁶ See section 5 of the *Minister of Fisheries and Oceans Authority to prescribe Fees or Charges Order*, SI/88-41, enacted under the *Financial Administration Act*. The term “special service” is defined in section 1 as “any service, information or the use of equipment or facilities provided by the Department of Fisheries and Oceans to any equipment or facilities provided by the Department to any person with respect to fishing industry infrastructure, fisheries resource development, fisheries enhancement and protection, fisheries and aquaculture support, inspections, charts and navigation, oceanographic and marine science, laboratories, vessels and hatcheries.”

⁹⁷ See section 3 of the *National Parks of Canada Businesses Regulations*, SOR/98-455.

⁹⁸ See section 1 of the *National Parks of Canada Businesses Regulations*, SOR/98-455.

⁹⁹ S.O. 2009, c. 10, para. 2(2)8.

¹⁰⁰ See, for example, s. 11.8 of the *City of Greater Sudbury Act, 1999*, S.O. 1999, c. 14, Sched. A, which authorizes the City of Sudbury to collaborate with charities in relation to the construction, operation and maintenance of group living homes for persons with developmental disabilities.