

CRA CHARITIES NEWSLETTER HIGHLIGHTS: FALL OF 2004 TO FALL OF 2005

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A. INTRODUCTION

This *Charity Law Bulletin* ("Bulletin") highlights the content of a number of Registered Charities Newsletters ("Newsletters") released by the Canada Revenue Agency ("CRA") over the last sixteen months. The Newsletters have addressed a wide range of issues relevant to registered charities, including disbursement quotas, amalgamations, fundraising, guidelines for Charities operating outside of Canada, and comments on relevant legislation and case law. The following sections provide a brief summary of these and other issues discussed in the Newsletters.

B. FALL 2004: REGISTERED CHARITIES NEWSLETTER NO. 20

With a reported 15% of registered charities carrying on programs outside of Canada, CRA's Fall 2004 Newsletter dealt with issues faced by charities that operate outside of Canada. A more extensive discussion of the issues can be found in CRA's guide *Registered Charities: Operating Outside Canada* (RC4106)). However, the newsletter provides a helpful summary, as discussed below:

1. Purposes and Activities

There is no limit on how much activity a charity can carry on outside Canada, but it must be established in and a resident of Canada in order to be a registered charity under the *Income Tax Act* ("ITA"). The charity must also be an active and controlling "actor" in the out of country program or project

achieving a charitable purpose. The charity may have its own employees/volunteers perform these activities, or it may opt to have intermediaries carry out such work, so long as the charity retains direction and control over the use of its resources through a formal structured arrangement.

Activities must always fulfil the Canadian definition of charity, and generally cannot conflict with the laws of the other country. Some activities accepted as charitable in Canada will not necessarily be charitable abroad, for example, reducing another country's debt or supporting its armed forces. CRA maintains that, although registered charities cannot directly benefit other countries' governments, they can be established to benefit a foreign community, so long as such a purpose is acknowledged in its governing documents and meets the Charities Directorate's requirements.

2. Building/Maintaining Facilities

Building and maintaining a public facility overseas, such as a library, bridge, or religious centre, can be considered charitable so long as it is only used for charitable purposes and the charity maintains title to the facility. Charities that face legal impediments in holding title to real property in a foreign jurisdiction are recommended to obtain a letter from the country's consulate or embassy to confirm that title will vest in a locally recognized charity or a government body, or that the facility will be used indefinitely for exclusively charitable purposes. The written agreement implementing such a project should include a clause stipulating the title-holding arrangements for each capital property undertaking.

3. Transfer of Property

The Newsletter makes it clear that a charity cannot transfer property to another organization unless the recipient is a qualified donee. Transfers of property to a non-qualified donee may be grounds for the de-registration of a charity. However, in some cases a charity may transfer property to a non-qualified donee where the nature of the property means that it can only be used for charitable purposes (i.e. Bibles, medical equipment, and student books). In some cases where it may be unreasonable to expect the charity to maintain control of assets, the Charities Directorate may also allow the transfer of property which could be used for something other than charitable purposes, but such situations will be considered on a case-by-case basis.

Similarly, the Newsletter indicates that payments to related organizations are only acceptable where the amount paid by the charity is proportional to the benefit it receives.

4. Working with others

A charity may work with agents and/or contractors. However, working with agents will require an agency agreement and may expose the charities to significant liability. CRA suggests that charities consider risk management procedures, such as indemnification provisions and insurance. Charities may also enter into joint ventures (in which they pool their resources with other organizations) or co-operative partnerships (where each partner holds responsibility for a certain aspect of the project). The Charities Directorate may allow other types of arrangements, so long as the charity's resources remain devoted to charitable purposes. Charities are advised to contact the Charities Directorate to ensure that any proposed arrangement meets their requirements.

5. Disbursement Quota

The 80% disbursement quota ("DQ") requirement is the same whether or not a charity carries on activities outside Canada. Calculating the amount may be more difficult, however, for charities working jointly with other organizations. One approach recommended by CRA is for the charity to assume a proportionate amount of overhead costs as is found in the project or program as a whole. (i.e. if a joint venture devoted 90% of its resources to charitable work and 10% to overhead, the charity would apply 90% of its contribution towards meeting the DQ).

6. Disasters

Charities that are established to deal with a particular disaster must fulfil the same registration requirements as other applicants. However, the Charities Directorate has designated an officer specifically to deal with such applications. Also, charities wishing to accumulate funds in preparation for immediate response when a disaster occurs may be granted permission to do so. This permission is for a limited period of time, but may be extended on request.

7. Anti-Terrorism

Charities are responsible for making sure their activities comply with legislation in other countries, including anti-terrorism laws. In Canada, the *Charities Registration (Security Information) Act*, S.C. 2001, c. 41, disqualifies an organization from charitable registration where there are reasonable grounds to believe that it makes its resources available to terrorist groups or activities. More information about Canada's Anti-Terrorism legislation and its impact on charities can be found at www.antiterrorism.ca.

C. WINTER 2005: REGISTERED CHARITIES NEWSLETTER NO. 21

1. Board Responsibilities

The Winter 2005 Newsletter dealt with issues relating to the good governance of charities, including the role of their boards. The ITA does not set a minimum requirement for the number of board meetings. However the Newsletter asserts that boards should not be passive. Directors and officials have a fiduciary responsibility to ensure the charity operates in the public interest. They also owe a duty of diligence to the charity to remain knowledgeable about its operations and ensure it and its assets are cared for properly. The Newsletter suggests that these duties involve meeting regularly as a board, and cautions that insufficient knowledge resulting from irregular meetings or lack of attendance will not absolve directors of legal responsibility.

2. Changes to governing documents

The Newsletter also discusses changes to a charity's governing documents (i.e. letters patent, articles of incorporation, trust documents, or constitutions). Such changes must be certified. For unincorporated bodies, this will entail at least two current directors/trustees signing and dating the document. For incorporated bodies, this will entail the document showing the effective date of the change and the stamp, seal, or signature of the government authority that issued the document. CRA also requires a detailed submission from the charity indicating how it will accomplish each of the new objects set out in the governing document, as well as copies of any new promotional material. CRA will use this information to determine whether the organization still meets the requirements for registered status.

3. Amalgamations

The Newsletter addressed the issue of amalgamations and acknowledged the confusion surrounding the use of this term and seemingly similar terms such as “merger” and “consolidation.” Distinguishing between them is important, as they mark the difference between an organization that continues to exist and one that ceases to exist and will need to apply for charitable registration as a new entity. CRA defines the terms as follows:

- **Amalgamation:** Two or more charities bring their membership, assets, and liabilities into the entity that emerges. The original charities continue their existence within the amalgamated charity.
- **Merger:** One entity winds up its affairs and transfers its assets to another.
- **Consolidation:** All original bodies dissolve and transfer their assets to a new charity.

The Newsletter suggests that, in determining whether a document (such as a statute) is referring to an amalgamation as defined by CRA, charities should look for the words “continue” or “continuance” (i.e. “any two or more companies may amalgamate and continue as one company”). Reference to assets being “transferred,” “transmitted” or “conveyed,” indicates something other than an amalgamation, as do references to a “new” corporation in an organization’s Letters Patent. The Newsletter contains a list of statutes that do and do not allow for amalgamations.

D. SPRING 2005: REGISTERED CHARITIES NEWSLETTER NO. 22

The Spring 2005 Newsletter dealt with issues faced by charities when they fundraise, principally when they do so for particular purposes. These issues are discussed in the following sections.

1. Permission to Accumulate Property

Subsection 149.1(8) of the ITA allows a registered charity to ask for written permission to accumulate property for a particular purpose. If such a request is granted, the property accumulated, including any income it earns, will be deemed to have been expended that year on charitable activities (so as not to

adversely affect the disbursement quota). The purpose of the provision is to allow charities to save funds for large and specific projects.

However, under subsection 149.1(9), if the property is not used within the agreed time or for the approved purpose, the amount accumulated, as well as its interest, will be treated as a receipted donation of the charity for the year in which the property was used for another purpose, or the year in which the charity was to have spent it for the purpose for which it was accumulated. Charities do not need special permission to spend funds that have already been accumulated to purchase property to be used for its charitable purposes.

2. Gifts for particular purposes

Charities cannot use funds donated for a specific purpose for another purpose, unless it is clearly indicated while soliciting that excess funds that cannot be used for the specified purpose may be used for another purpose. Absent such a clear indication while soliciting, the only recourse for the charity is to make a *cy-près* application to the court to have the excess funds applied to a similar but different purpose. A *cy-près* application is only possible where it is impossible or impracticable to carry out the donor's original intent. The charity or trustee cannot unilaterally change the purpose. Thus, charities are advised to educate donors about the difficulties surrounding gifts given for narrowly defined purposes and should carefully consider such issues before accepting a gift attached with conditions. The Newsletter notes that a donor may not direct that funds be given to specific individuals (who are not "qualified donees" under the ITA), unless the charity's mandate specifically involves supporting such individuals (i.e. victims of a flood). CRA also advises that a receipt should not be provided to a donor who directs that the donation be used to the donor's own benefit, or to the benefit of persons with whom the donor does not deal at arm's length (i.e. a donor cannot direct moneys donated to a university's endowment fund to be awarded to the donor's child).

3. Rent Free Accommodations

Charities cannot issue charitable receipts to landlords for providing rent-free accommodations. This is because a gift at law requires a voluntary transfer of property, and property is not transferred in rental

arrangements. However, if a charity pays rent to an individual and the individual later voluntarily returns all or part of the payment as a gift, the charity can then issue a receipt for tax purposes.

4. Advantages received by a donor

CRA is soliciting input on a policy with respect to the types and value of advantages received by a donor in order to enable charities to have a better understanding of when an advantage will reduce the eligible amount of a gift. CRA advised that where the advantage provided to business donors makes it impossible to consider the transfer of property a gift, donors may still benefit from the ability to write off the transfer as an advertising expense. However, where the donation can still be considered a gift, split-receipting rules may apply where the donor receives an advantage. With split-receipting, the donor will receive a tax receipt in the amount of the donation less the fair market value of the advantage received. Under these rules, the advantage generally cannot be more than 80% of the value of the payment.

E. SUMMER 2005: REGISTERED CHARITIES NEWSLETTER NO. 23

The Summer 2005 Newsletter provided a summary of Bill C-21, *An Act respecting not-for-profit corporations and other corporations without share capital*. More information about the Bill can be found in the paper "Life After Bill C-21: How Will it Affect Your Organization?", available at www.charitylaw.ca, as well as in *Charity Law Bulletin* No. 60, "New Canada Not-For-Profit Corporations Act and Its Impact on Charitable and Non-Profit Corporations," available at www.charitylaw.ca.

1. Clergy Residence Deduction

The Newsletter also discussed the clergy residence deduction provisions of the ITA, which allows clergy members to claim a deduction for his or her residence when calculating taxable income from employment. To qualify, applicants must fulfil both a status and a function test. The status test requires the person to be a member of the clergy; a member of the religious order; or a regular minister of a religious denomination.

This is determined on the basis of whether the person is set apart from other members of the religious body as a spiritual leader and may vary according to the particular church or religious denomination. There is no requirement that the individual be ordained or appointed by a higher authority, as it may be

done by the congregation itself, but there needs to be some formal or legitimate recognition of religious leadership within the organization.

To satisfy the function test, the person must also be employed in a “qualifying function,” in that he/she is in charge of, or ministering to, a diocese, parish, or congregation; or engaged exclusively in full-time administrative service by appointment of a religious order or religious denomination.

To apply for the deduction, the individual must fill out Form T1223, Clergy Residence Deduction, along with a representative of the employer to certify fulfilment of the status and function tests. For more information about the Clergy Residence Deduction, readers can consult CRA’s Interpretation Bulletin IT-141R (Consolidated), Clergy Residence Deduction, available at www.cra.gc.ca/E/pub/tp/it141r-consolid/it141r-consolid-e.html.

2. New Requirements for Official Donation Receipts

CRA has changed the requirements for official donation receipts, requiring the name “Canada Revenue Agency” and the website “www.cra.gc.ca/charities” to be printed on all receipts. Recognizing the need for a transition period, CRA will accept any reasonable means of including the name and website address on receipts for 2005. Receipts already issued prior to this announcement will still be honoured without the new information.

3. Revisions to Form T3010A

Due to ITA amendments affecting the DQ, CRA has revised Form T3010A, Registered Charity Information Return, for fiscal periods that begin after March 22, 2004.

F. LATE SUMMER 2005: REGISTERED CHARITIES NEWSLETTER NO. 24

The Charities Advisory Committee (“CAC”) published their annual report in the Late Summer 2005 newsletter. The CAC draws upon the experience of people from the charitable sector and members of the Charities Directorate to consider regulatory issues, while facilitating an improved charities regulatory system.¹

¹ Terrance Carter is a member of the CAC.

During 2004-05, the CAC considered many issues, resulting in a number of recommendations, including changes to the ITA.

This newsletter reviewed CRA's jurisdictional collaboration effort with its provincial and territorial counterparts. The collaboration covered five areas: joint education and public awareness; information sharing on charities between regulators; information sharing for compliance purposes; deceptive fundraising; and community-based and tripartite initiatives, all of which have received positive feedback.

Following the Quebec Court of Appeal's decision in *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec*, CRA and the Department of Finance proposed technical amendments to the ITA, which were released February 27, 2004. These amendments include "public bodies performing a function of government" within the category of qualified donees for the purposes of sections 110.1 and 118.1 of the ITA. Once these amendments are passed into law, CRA will again be able to formally recognize certain Indian bands as Canadian municipalities under the ITA. To qualify for such recognition, a band must be considered to be a public body performing a function of government.

CRA announced the release of its new policy on applicants assisting ethnocultural communities (CPS-023). This policy is discussed in detail in *Charity Law Bulletin* No. 74, "New CRA Policy on Applicants Assisting Ethnocultural Communities," available at www.charitylaw.ca.

G. FALL 2005: REGISTERED CHARITIES NEWSLETTER NO. 25

1. Newsletter Changes

In the Fall 2005 newsletter, the Director General discussed the changes to the newsletter format that have been implemented following comments from the CAC and the general public. These changes include: changing the PDF format to a single column; increasing the point size for easier readability; providing more links to other Charities Directorate documents in the HTML version; and providing a brief summary for longer articles in order to help readers decide whether the article is applicable to them. In 2006, CRA plans to increase the amount of information aimed at charities within the "Did you know?" section, as well as developing a new "experts" section, which will focus on the particular interests of lawyers and accountants that serve the needs of the charitable sector.

2. Reform of Application Process

The newsletter also reviewed the recommendations from the Joint Regulatory Table for reform of the application process through which organizations are considered for registered charity status. The recommended reforms include: keeping the identity of the applicant organization confidential until the regulator either accepts or denies the application; having the regulator publish on its website the reasons for all its decisions on applications; and, having the regulator establish a policy of denying applications where applicants do not respond within 90 days to communications from the regulator.

3. New Policy

CRA announced that the release of its new policy, *Guidelines for Registering a Charity: Meeting the Public Benefit Requirement*, will be available shortly. The draft policy on umbrella organizations was also released for review. CRA expects to have a new draft guidance on Research as a Charitable Activity and a new Guide for registering a charity available in the near future.

4. Volunteers

The Newsletter discussed a number of issues concerning volunteers, including issues of the volunteer's interaction with the charity and income tax implications.

a) Charitable purpose

CRA advised that they will register a charity that promotes volunteerism so long as the volunteerism is promoted in the community-at-large, and the charity only provides its services to organizations that are "qualified donees" and "non-profit organizations" as defined in the ITA. Providing services to other organizations, such as political parties, is not permitted. Further, volunteers must only be used for charitable activities or purposes. An exception is made for a charity's business that is unrelated to the objects of the charity when substantially all (i.e. 90%) of the individuals involved in the operation of the business are unpaid volunteers.

A person is considered to have been remunerated or paid for employment when the individual is given a salary, wage, allowance, or benefit because of an office or employment. An allowance

includes any periodic or other payment that an employee receives from a registered charity without having to account for its use. This is considered a taxable benefit under the ITA.

b) Income Tax Deductions

Any costs incurred by volunteers in the course of their work with the charity cannot be deducted for income tax purposes. However, the charity can issue a receipt for income tax purposes where the volunteer has incurred expenses on behalf of the charity for which they have a right to be reimbursed pursuant to an agreement between the volunteer and the charity, and where the charity issues a cheque for those expenses and the volunteer freely chooses to give some or all of the reimbursement monies back to the charity.

H. CASE COMMENTS

The Newsletters also offered commentary on several court decisions relevant to charities. Some of those cases (*Fuaran Foundation v. CCRA*; *Brantford General Hospital Foundation v. Marquis Estate*; *Lord's Evangelical Church of Deliverance and Prayer of Toronto*; and *Richert v. Stewards' Charitable Foundation*) have been the subject of previous *Bulletins*. Two further cases of interest are discussed here:

1. *Maréchal v. The Queen*

In *Maréchal*, the Tax Court of Canada dealt with the process for determining fair market value. The court held that it is not obliged to accept the highest figure in determining the fair market value of a property. Instead, it should weigh all the material presented and “apply its best judgment to arrive at a correct result.” CRA noted that this approach will result in different outcomes for different situations.

2. *Slobodrian v Canada (Minister of Revenue)*

In *Solobodrian*, the Federal Court of Appeal held that the provision of voluntary professional and research services was not a gift within section 118.1 of the ITA. *Slobodrian* was a retired professor who conducted research at a university without remuneration. He considered the services he rendered to be gifts and claimed charitable donation tax receipts, which were disallowed. The decision was affirmed by the Tax Court of Canada. On appeal to the Federal Court of Appeal, *Solobodrian's*

arguments were rejected, the court holding that a gift could be not a service because it did not involve the transfer of property.

I. CONCLUSION

Charities will find these six newsletters from CRA helpful in providing them with valuable guidance, particularly in the areas of operations outside of Canada and fundraising for particular purposes. Careful consideration should be given to CRA's advice in these areas, as well as those contained in previous CRA Newsletters, summaries of which are available at www.charitylaw.ca.