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BILL 212 BRINGS SIGNIFICANT REFORM TO THE REGULATION OF CHARITIES IN ONTARIO

By Terrance S. Carter[*]

A. INTRODUCTION

On Wednesday, October 27, 2009, the Attorney General for Ontario introduced Bill 212, the *Good Government Act*, 2009, ("Bill 212")[1] in the Ontario Legislature, which passed second reading on November 18, 2009. Bill 212 is currently before the Standing Committee on Finance and Economic Affairs, and it is expected to return before the House by November 30, 2009. If Bill 212 passes, it will mean significant reform to the regulation of charities in Ontario by overcoming limitations that have for decade's plagued charities operating in Ontario. Most of these changes are a direct result of an initiative by the Ontario Bar Association's Charity and Not-for-profit Section in calling for reform in this area.

B. OVERVIEW OF PROPOSED AMENDMENTS

1. Proposed Repeal of the *Charitable Gifts Act*

One of the more noticeable changes included in Bill 212 is the proposed repeal of the *Charitable Gifts Act* ("CGA").[2] The CGA was originally enacted in 1949 to ensure that charitable organizations did not carry on businesses themselves, as well as discouraging placing charitable funds at risk in capital

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[1] More information about Bill 212, its status and background information is available online at the Ontario Legislature website: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2235&detailPage=bills_detail_status&Intranet.
[2] *Charitable Gifts Act*, R.S.O. 1990, c. C.8.

markets.[3] Although not well known to those who practice outside the realm of charities, the CGA has long been criticized for unnecessarily limiting the ability of charities in Ontario to own an interest in a business. Currently, where a charity in Ontario owns more than a 10% interest in a business for longer than 7 years, the CGA requires that the charity must dispose of such interest.[4] In addition, where a charity owns more than a 50% interest in a business, annual financial statements of the business and other financial information must be filed with the Ontario Public Guardian and Trustee ("PGT") by March 31st of each year, and the amount of the profits to be distributed from the business must be determined jointly between the PGT and the charity by June 30th of each year.[5] The definition of what constitutes an "interest in a business" in the CGA is also ill defined, with little assistance from either case law or commentary on what it actually means.

These barriers have meant that charities in Ontario receiving an interest in, or wishing to acquire an interest in a business, have had to utilize complicated organizational structures, such as utilizing for-profit corporations, non-profit organizations, or business trusts to act as intermediaries in order to work around the restrictions of the CGA.[6] No other province in Canada has legislation similar to the CGA, and since the *Income Tax Act* ("ITA")[7] already imposes restrictions with regard to registered charities conducting business activities, the provisions of the CGA are both redundant and unnecessarily restrictive. As such, the repeal of the CGA will be a welcome relief for charities in Ontario wishing to acquire an interest in a business as an investment.

2. Proposed Amendments to the *Charities Accounting Act*

Bill 212 also proposes important changes to the *Charities Accounting Act* ("CAA").[8] Currently, section 8(1) of the CAA restricts ownership of real estate by a charity in Ontario by requiring that a charity that holds land for a charitable purpose can only hold such land for the purpose of its actual use or occupation for that charitable purpose. A charity which has held land for over three years, and during those three years has not used or occupied that property for the charitable purpose, nor is likely to do

[3] For more history and commentary regarding the CGA, see Donald J. Bourgeois "The Charitable Gifts Act – A Commentary" *Charity Law Bulletin* No. 179 (September 29, 2009) online: http://www.carters.ca/pub/bulletin/charity/2009/chylb174.htm.
[4] *Ibid.*, s. 2-3.
[5] *Ibid.*, s. 4.
[6] These structures were discussed in a previous paper by Terrance S. Carter and Theresa L.M Man at the National Centre on Philanthropy and the Law Annual Conference, on October 28, 2009, which is available at: http://www.carters.ca/pub/article/charity/2008/tsc1024.pdf.
[7] *Income Tax Act*, R.S.C. 1985 c.1 (5th Supplement).
[8] *Charities Accounting Act*, R.S.O. 1990 c.C.10.

so in the immediate future, faces the prospect of having the PGT vest that property in itself in order to sell it and use the proceeds for the charity's charitable purposes.[9] Bill 212 proposes that section 8 of the CAA be repealed and replaced with a far simpler provision that states only that a person who holds an interest in real or personal property for a charitable purpose must use that property for that charitable purpose. The PGT has clarified that the definition of "holds an interest" will be interpreted by its ordinary meaning, that is, an interest would include a beneficial interest or a legal interest.

The new language of section 8 would satisfy the Ministry of the Attorney General's goal of ensuring that property, whether real or personal, is to be used by the charity for its charitable purpose, while at the same time allowing the charity more flexibility in being able to invest such property, whether it be real or personal property in order to earn income. As long as the investments of the charity comply with the prudent investor standards under the *Trustee Act,*[10] a charity will be able to hold land or other investments, such as mutual funds, for any length of time so long as those investments are being used for its charitable purposes. Therefore, holding land for a charity will no longer be any different from holding any other type of investment.

Other proposed reforms to the CAA, specifically a new section 4.1, would enhance the powers of the PGT to be able to require that documents be produced and inquiries be made where an executor or trustee holds a "substantial interest" in an entity; for instance, where an executor or trustee owns, controls, or has direction over more than 20% of the voting rights or equity of the shares of a corporation. The amended provisions of the CAA would allow the PGT to apply to the Superior Court of Justice for an order to compel production of documents by the charity and to provide information regarding the management, operation, ownership or control of the entity. The proposed amendments would make it an offence, punishable by a fine of up to $25,000, to obstruct or interfere with such an inquiry by the PGT. This represents a much more appropriate scheme by which the PGT can oversee what is happening with charitable property in order to ensure it is being used for its intended purpose.

[9] *Ibid*., s. 8(2-4).
[10] *Trustee Act*, R.S.O. 1990 c.T.23.

3. <u>Technical Amendments to the *Accumulations Act* and *Religious Organization's Lands Act*</u>

More technical but still welcome changes include amendments to both the *Accumulations Act* ("AA")[11] and the *Religious Organizations' Lands Act* ("ROLA").[12] Currently, the AA is a concern for charities holding property in trust on terms that allow for the capitalization of income to be derived from the property. The AA provides for six possible accumulations periods,[13] where if the terms of the trust provide for the accumulation of income beyond one of these six periods, the AA directs the income to be distributed in a proscribed manner.[14] Bill 212 proposes to amend the AA so that the rules of law and statutory enactments relating to accumulations do not apply and shall be deemed never to have applied to trusts created for a charitable purpose.

As well, section 10(1) of the ROLA would be amended by striking out the limit of one term of forty years or for more than one term of not more than forty years for which the trustees of a religious organization may lease land held for the benefit of the religious organization.

C. CONCLUSION

The proposed changes for the charitable sector contained within Bill 212 represent a very important initiative by the Provincial government. The Attorney General of Ontario, through the PGT, is to be congratulated for spearheading this positive step in reforming the regulation of charities in Ontario, as well as the Ontario Bar Association Charity and Not-for-profit Section for engaging the Attorney General to institute these reforms. It is hoped that Bill 212 will find smooth passage in the legislature, as the Bill represents an important step towards reducing the regulatory burden placed on charities in Ontario.

[11] *Accumulations Act*, R.S.O. 1990 c.A.5.
[12] *Religious Organizations' Lands Act*, R.S.O. 1990 c. R.23
[13] *Supra*., note 11 at s. 1(1)
[14] *Ibid*., s. 1(6)

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