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## **CRA DRAFT GUIDANCE ON ARTS ORGANIZATIONS AND CHARITABLE REGISTRATION**

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*By Theresa L.M. Man\**

### **A. INTRODUCTION**

On November 1, 2011, Canada Revenue Agency (“CRA”) released a draft *Guidance on Arts Organizations and Charitable Registration* (the “Draft Guidance”)<sup>1</sup> for public consultation. The Draft Guidance is intended to be an interpretation of the applicable common law and clarifies the position and practice of CRA’s Charities Directorate for the purpose of determining whether an arts organization is eligible for initial and on-going registration as a charity. As such, the Draft Guidance is relevant to arts organizations that are considering charitable registration and existing charities that are arts organizations. Comments or questions for inclusion in the Questions and Answers to supplement the Draft Guidance must be submitted to CRA by January 13, 2012.

Once finalized, the Draft Guidance will replace CRA’s Summary Policy CSP-A08 and Summary Policy CSP-A24. It should be noted that the Draft Guidance does not apply to National Arts Service Organizations.<sup>2</sup> These organizations are non-profit entities that promote arts in Canada on a nation-wide basis and designated as such by the Minister of Canadian Heritage. They may also qualify for registration as a Registered National Arts Service Organization under the *Income Tax Act* if they meet other criteria applicable to registered

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\* Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M., is a partner at Carters Professional Corporation, practicing in the area of charity and not-for-profit law. The author would like to thank Christine Kellowan, B.A. (Hons), J.D., Student-at-Law, for assisting in the preparation of this bulletin.

<sup>1</sup> Canada Revenue Agency, draft *Guidance on Arts Organizations and Charitable Registration* (1 November 2011), online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnsltns/rts-eng.html>>.

<sup>2</sup> *Supra* note 1 at para. 9.

charitable organizations.<sup>3</sup> As well, the Draft Guidance does not apply to organizations that seek to advance other charitable purposes through arts programs or activities.<sup>4</sup> An example would be organizations that use art as a therapy to relieve conditions associated with illness or disability.

## **B. OVERVIEW OF BASIS FOR CHARITABLE REGISTRATION**

Organizations that seek to become registered charities must have purposes that are considered to be charitable at law. At common law, it has been established that there are four categories, known as the four heads of charity, under which an organization's purpose must fall, i.e., relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community in a way the law regards as charitable.<sup>5</sup>

The Draft Guidance states that arts organizations can be registered charities if their purposes fall under the advancement of education (the second head) or other purposes beneficial to the community in a way the law regards as charitable (the fourth head). As well, an arts organization under the fourth head must either advance the public's appreciation of the arts or promote the commerce or industry of the arts. In addition, all arts organizations must also show that they operate for the public benefit. These requirements are reviewed in more detail below.

## **C. THE SECOND HEAD: ADVANCEMENT OF EDUCATION**

Arts organizations are eligible for charitable status under the second charitable head of advancing education. Based on the Supreme Court of Canada decision in *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue*,<sup>6</sup> the Draft Guidance requires that activities that further the advancement of education must be sufficiently structured. This means that they must contain a teaching or learning component and involve a legitimate, targeted attempt to educate.<sup>7</sup>

Appendix A of the Draft Guidance sets out a table summarizing the key characteristics of the main charitable purpose categories described in the Draft Guidance. According to the table, CRA clarifies that the focus of

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<sup>3</sup> Canadian Heritage, "National Arts Service Organization Designation", <http://www.pch.gc.ca/pgm/osna-naso/index-eng.cfm>.

<sup>4</sup> *Supra* note 1 at para. 9.

<sup>5</sup> *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.).

<sup>6</sup> [1999] 1 S.C.R. 10.

<sup>7</sup> *Supra* note 1 at para. 34.

an arts organization must be on developing or increasing the skills of artists through training courses, classes, workshops etc.<sup>8</sup> While performance may be part of the training process, it cannot be the primary means of training. As well, organizations must show sufficiently structured, non-optional programs with a teaching or learning component. However, simply providing an opportunity for people to educate themselves by making materials available would not meet this threshold.

To help provide clarity to CRA's requirements, examples of acceptable charitable purposes that advance education are included in Appendix B of the Draft Guidance.<sup>9</sup> Examples include operating a public art schools, providing scholarships for arts students, operating a resource library for the arts, conducting research on best practices related to the arts, etc.<sup>10</sup> In addition, the Draft Guidance also provides additional helpful examples of acceptable charitable activities, such as organizing and delivering workshops, seminars, and classroom training or instruction on an art form/style, or on a related topic such as marketing; providing opportunities for students or young or emerging artists to exhibit, present, or perform their works or develop their crafts or skills before the public, as long as they are part of a broader educational program.<sup>11</sup>

#### **D. THE FOURTH HEAD: OTHER PURPOSES BENEFICIAL TO THE COMMUNITY**

The Draft Guidance states that arts organizations under the fourth head must either advance the public's appreciation of the arts or promote the commerce or industry of the arts.

##### **1. Advancing the public's appreciation of the arts**

The Draft Guidance indicates that while it may be difficult for arts organizations that advance the public's appreciation of the arts by exhibiting, presenting, or performing artistic works to fall within the second charitable head, these activities have been recognized by the courts as falling within the fourth head.<sup>12</sup> In this regard, arts organizations may be eligible for registration as advancing the public's appreciation of the arts, if they are focused on exhibiting, presenting, or performing artistic works in a way that satisfies the public benefit requirements set out in the Draft Guidance.<sup>13</sup> Helpful examples of acceptable charitable purposes that

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, Appendix B.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 36.

<sup>12</sup> *Ibid.*, para. 15.

<sup>13</sup> *Ibid.*, para. 37.

advance education are included in Appendix B of the Draft Guidance.<sup>14</sup> Examples include providing high-quality public performance of chorale works, providing free performance for an audience that cannot afford the regular performance, producing public art exhibitions, and curating exhibitions and managing a public gallery for the display of a particular art form and style. The Draft Guidance also gives examples of acceptable activities, such as producing and presenting high-quality public dance performances, as well as curating and exhibiting high-quality public art exhibitions.<sup>15</sup>

## 2. Promoting the commerce or industry of the arts

Arts organizations may also be eligible for registration as promoting the commerce or industry of the arts if they are focused on enhancing an art form and style within the arts industry as a whole for the benefit of the public, as opposed to advancing the interests of those engaged in the industry. The Draft Guidance defines this to mean striving for improvement and promoting excellence and, accordingly, preserving and promoting excellence and high standards are essential features.<sup>16</sup>

Helpful examples of acceptable charitable purposes that advance education are included in Appendix B of the Draft Guidance.<sup>17</sup> Examples include promoting excellence in a particular art form and style industry in Canada by researching best practices and disseminating the results of the research to the public, or by establishing and maintaining best practices and standards of workmanship and design through the development and institution of an apprenticeship program. The Draft Guidance also gives examples of acceptable activities, such as offering merit-based awards and prizes for theatre productions or offering workshop facilities and tools for public use.<sup>18</sup>

## E. PUBLIC BENEFIT

In addition to meeting the above requirements, all arts organizations must show that they operate for the public benefit. To satisfy the public benefit requirement, a benefit must be delivered to the public or a sufficient segment of the public. The benefit must be tangible or objectively measurable and socially useful benefit. The benefit should generally be delivered to the public as a direct result of the organization's

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<sup>14</sup> *Ibid.*, Appendix B.

<sup>15</sup> *Ibid.*, para. 39.

<sup>16</sup> *Ibid.*, para. 40.

<sup>17</sup> *Ibid.*, Appendix B.

<sup>18</sup> *Ibid.*, para. 43.

activities, and therefore must be reasonably attainable, and not too remote. Therefore, a charity cannot limit its eligible beneficiaries based on criteria that are not justifiable in relation to the charitable purposes or provide non-incidental private benefits.<sup>19</sup>

A benefit is presumed to exist in relation to the second head, absent evidence to the contrary. There is no such presumption under the fourth head, and therefore evidence must be shown that a benefit is delivered to the public.<sup>20</sup>

All fourth head arts organizations must establish public benefit by meeting two criteria: (i) art form and style; and (ii) artistic merit. In this regard, an arts organization that advances the public's appreciation of the arts must show that its activities meet both the art form and style criterion and artistic merit criterion. However, an arts organization that promotes the commerce or industry of the arts must meet the art form and style criterion outlined in the Draft Guidance. If the arts organization's purposes and activities include exhibitions, presentations, or performances, the organization must also show that these activities meet the artistic merit criterion outlined in the Draft Guidance. In all cases, the organization must show that its purpose and activities enhance the identified art form(s) and style(s) within the arts industry.<sup>21</sup>

## 1. Art form and style criterion

To satisfy the art form and style criterion, an arts organization must establish a common or widespread acceptance of both the form and style of art within the Canadian arts community by providing sufficient information to CRA for this determination.<sup>22</sup> Art form generally refers to the field or the medium in which an artist works. However, for purposes of the Draft Guidance, art form refers to the broader categories of art, such as literature, dance, visual arts, theatre and music. Style refers to the different disciplines or methods of expression within each art form. For example, ballet, modern, jazz, and tap are different styles within the art form of dance; classical, choral, chamber, or jazz are different styles within the art form of music, etc.<sup>23</sup>

Appendix C of the Draft Guidance contains a list of art forms and styles that are generally presumed to meet this standard. For all other art forms and styles that are not include in Appendix C, an arts organization

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<sup>19</sup> *Ibid.*, para. 23, 24, 26.

<sup>20</sup> *Ibid.*, para. 25.

<sup>21</sup> *Ibid.*, para. 46.

<sup>22</sup> *Ibid.*, para. 48.

<sup>23</sup> *Ibid.*, para. 47.

would have to provide CRA with sufficient objective evidence to establish common or widespread acceptance.<sup>24</sup> Examples of such evidence could include:

- the art form and style is taught or studied at accredited Canadian institutions of higher learning such as colleges, universities, or comparable schools, by providing copies of course curricula and/or syllabi to CRA;
- the art form and style has been recognized (i.e., funded or exhibited, presented, or performed) by national or provincial arts bodies in Canada, such as Canadian Heritage, national or provincial arts centres, museums or galleries, or national or provincial arts councils by providing supporting documents to CRA; and
- the art form and style is recognized by established Canadian academic arts journals or arts publications by providing articles from these publications to CRA. [However, for a journal or publication to be considered “established”, CRA requires these criteria be met: a) a production history of at least one year is necessary; and b) the contributors and editors must have a relevant background in the arts (educational or professional experience). A short description of the qualification or experience of the contributors and editors should accompany the documents submitted.<sup>25</sup>].<sup>26</sup>

## 2. Artistic merit

Artistic merit refers to the quality of the exhibition, presentation or performance.<sup>27</sup> To satisfy the artistic merit criterion, an arts organization must demonstrate that its exhibition, presentation or performance are of sufficient quality to be considered to deliver a charitable benefit.<sup>28</sup>

Depending on the art form and style in question, the artistic merit criterion may apply to different aspects of an exhibition, presentation, or performance. To illustrate this concept, the Draft Guidance gives the following example: in the case of theatrical performances, an arts organization must select or develop

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<sup>24</sup> *Ibid.*, paras. 49-50.

<sup>25</sup> *Ibid.*, footnote 23.

<sup>26</sup> *Ibid.*, paras. 50-51.

<sup>27</sup> *Ibid.*, para. 53.

<sup>28</sup> *Ibid.*, para. 54.

theatrical works that have artistic merit and those works must be presented in a way that also meets the artistic merit criterion test; but no further artistic merit enquiry is generally necessary in relation to an arts organization that simply exhibits artistic works such as paintings or photographs that are shown to meet the artistic merit criterion in their own right.<sup>29</sup>

Due to the subjective nature of artistic merit, CRA would apply the standard which the courts have referred to as “an accepted canon of taste” assessed through objective evidence.<sup>30</sup> In the case of *In re Pinion*, the court stated that it was not qualified to judge artistic merit and that there was “an accepted canon of taste” that could be established by expert evidence.<sup>31</sup> In applying this test, the Draft Guidance provides that an arts organization is expected to provide or be able to provide both of the following in order to show artistic merit:

- a comprehensive description of the artistic works, and how each will be exhibited, presented, or performed; and
- objective evidence to show the required quality of each exhibition, presentation, or performance, unless a common or widespread acceptance of artistic merit clearly or “obviously” exists.<sup>32</sup>

CRA expects that objective evidence would normally include both of the following aspects:

- Documents showing that the selection of artistic works and artists is, and will continue to be, controlled through open, unbiased adjudication/audition processes, which apply predetermined quality standards. These documents should be in the form of records of audition or selection processes, consisting of calls for auditions (where applicable); lists of the artists or works considered during the process (subject to privacy legislation); the names and qualifications of decision-makers; and the standards and procedures that were applied in the process.
- Two or more of the following to demonstrate the objectivity of the evidence, such as materials from impartial sources, submissions from independent experts, certification by professional organizations, etc.<sup>33</sup>

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<sup>29</sup> *Ibid.*, para. 55.

<sup>30</sup> *Ibid.*, para. 56.

<sup>31</sup> [1965] Ch. 85 Ch (English) at 107. *Ibid.*, footnote 27.

<sup>32</sup> *Ibid.*, para. 57.

The Draft Guidance states that whether the evidence submitted is sufficient would be assessed on a case by case basis, according to the facts of each case, taking into account the arts organization's location, size, nature, and other relevant circumstances.<sup>34</sup>

## F. NO PRIVATE BENEFIT

The public benefit test requires that the benefit delivered to the public must be reasonably attainable, and not too remote. Therefore, a charity cannot limit its eligible beneficiaries based on criteria that are not justifiable in relation to the charitable purposes or provide non-incidental private benefits.<sup>35</sup>

As such, arts organizations must ensure that a benefit is delivered to the public at large or a sufficient segment of the public. Examples of arts organizations that fail to meet this requirement include limiting a musical performance to employees of a particular company, or limiting eligible scholarship recipients to art students who are children of employees of a particular company.

Arts organizations are also prohibited from providing non-incidental private benefit. In this regard, a private benefit is a benefit that is provided to a non-charitable beneficiary or to a charitable beneficiary that exceeds the bounds of the charity. Usually, an unacceptable private benefit will be one that is not incidental to achieving a charitable purpose (i.e., the private benefit is not necessary, reasonable or proportionate to the public benefit achieved). Examples of non-incidental private benefit are given in the Draft Guidance to provide clarity.<sup>36</sup>

## G. USE OF INTERMEDIARIES

The Draft Guidance also provides helpful comments on how arts organizations may utilize intermediary organization in conducting their activities. In this regard, the Draft Guidance states that in these situations, arts organization must maintain direction and control over its resources (including its funds), and over the activities conducted with its resources, using intermediaries requires appropriately structured and documented arrangements. It also stresses the importance of compliance with the application CRA guidance: Guidance CG-002, *Canadian Registered Charities Carrying Out Activities Outside Canada* and Guidance

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<sup>33</sup> *Ibid.*, para. 58.

<sup>34</sup> *Ibid.*, para. 62.

<sup>35</sup> *Ibid.*, para. 23, 24, 26, 63.

<sup>36</sup> *Ibid.*, para. 63-68.



CG-004, on *Using an Intermediary to Carry out a Charity's Activities within Canada*. Helpful examples of acceptable and unacceptable use of intermediaries are also given in the Draft Guidance.<sup>37</sup>

## H. SPECIFIC ARTS ORGANIZATIONS

Specific comments on the application of the Draft Guidance on a few types of arts organization are also mentioned in the Draft Guidance. These include cultural organizations, arts councils, museums, art galleries, and performance venues.<sup>38</sup>

## I. CONCLUSION

The Draft Guidance is in general a helpful tool for arts organizations that are considering seeking charitable registration, and arts organizations that are currently registered to ensure that their charitable registration is not jeopardized. The comparison table on the key characteristics set out in Appendix A is also very helpful. Examples of charitable objects set out in Appendix B is helping in providing better clarification of the requirements set out in the Draft Guidance. Once the Draft Guidance has been finalized, it would be helpful for these sample objects be cross referenced in CRA's model objects as well. Other examples given in the Draft Guidance also help provide better understanding of the requirements of the Draft Guidance.

However, it is anticipated that a number of the requirements and comments in the Draft Guidance would be of concern to the arts sector. The level of evidence required to demonstrate artistic merit appears to be extensive and may be overwhelming and prohibitive for small start-up arts organizations. Although the Draft Guidance states that art forms or styles not contained in the table in Appendix C may also be eligible for registration, subject to the provision of sufficient evidence to establish a common or widespread acceptance of both the form and style of art within the Canadian arts community, again the level of evidence required may be too onerous for small arts organizations to meet. What evidence would be "sufficient" is a very subjective determination and more clarity is needed from CRA.

Furthermore, artistic art form and style in the creative realm of the arts sector is fluid and is constantly evolving, and therefore listing the "acceptable" art forms and styles in a table in Appendix C may at times be counter-productive, thus leading to a general unwillingness to accept new art forms and/or styles. As well,

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<sup>37</sup> *Ibid.*, para. 69-72.

<sup>38</sup> *Ibid.*, para. 73-82.

the requirement that art forms and styles must have a common or widespread acceptance within the Canadian arts community may make it very difficult for new art forms and styles of arts to be recognized and performed by arts organizations in Canada. This requirement may also make it very difficult for art forms and styles with an ethnic origin to break into the Canadian arts scene, because arts organizations that want to seek or maintain charitable registration would be reluctant to showcase them since they are not charitable by virtue of the lack of common or widespread acceptance within the Canadian arts community.

It will remain to be seen if the Draft Guidance will be revised before it is finalized, and whether any of these concerns will be addressed. However, both existing and potential registered charities that engage the arts are encouraged to review the Draft Guidance and provide CRA with feedback before the submission deadline. It is important that arts organization charities and their advisors become familiar with the Draft Guidance in order to ensure compliance once the Guidance has been finalized.



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