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CHARITY LAW BULLETIN NO. 304

FEBRUARY 27, 2013

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CHARITY LAW 2012 – YEAR IN REVIEW

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A. INTRODUCTION

During 2012, Canada's charitable sector experienced a number of important regulatory and common law developments at the federal and provincial level that will significantly impact how charities operating in Canada and abroad. The purpose of this *Charity Law Bulletin* is to provide a brief overview of some of the more important developments in the last year, including changes to the *Income Tax Act* ("ITA"), new publications from the Charities Directorate of the Canada Revenue Agency ("CRA"), corporate updates under the *Canada Not-for-Profit Corporations Act* and the Ontario *Not-for-Profit Corporations Act*, and court decisions.

B. HIGHLIGHTS OF THE FEDERAL BUDGET 2012

Budget 2012 was introduced on March 29, 2012. Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*[1] ("Budget 2012") received Royal Assent on June 29, 2012. Budget 2012 does not include any new tax incentives to encourage charitable donations, such as the charitable donation tax credit proposed by Imagine Canada. Instead, Budget 2012 focuses on the perceived lack of transparency and accountability concerning charities that engage in political activities, as well as a number of other ad hoc charity issues, including gifts to foreign charitable organizations.

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[1] Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5686008&file=4>.

1. New Rules and Sanctions Involving Political Activities

With the recent spotlight by the federal government on foreign funding of political activities by Canadian charities in the 2012 Budget, registered charities may be reluctant to become or stay involved in political activities. While Budget 2012 does somewhat affect the rules regarding political activity, the basic regime for political activities by charities remains largely unchanged. In this regard, Budget 2012 revises the definition of "political activity" in the ITA,[2] creates new sanctions, increases disclosure requirements concerning political activities and enhances enforcement measures. The remaining rules, and therefore current CRA policy, related to the conduct of political activities by registered charities[3] remain the same.

Registered charities should not necessarily let the changes arising from Budget 2012 deter them from engaging in political activities if they wish to. Charities may become involved in or continue to be involved in political activities as long as they carefully study and follow the applicable rules, as well as carefully document all of their involvement in political activities in order to be able to effectively respond to an audit by CRA.

a) *Revised Definition of Political Activity*

Budget 2012 amends the ITA by revising the definition of "political activity" under subsection 149.1(1) as follows: "…includes the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee".[4] The focus of this change to the definition of political activities is on the intent of the donor charity as opposed to that of the recipient qualified donee. The amendment will result in a double counting within the allowable limit on resources for political activities, once by the donor charity if the amendment applies and once by the recipient qualified donee when the funds received are eventually expended on permitted political activities. During her speech to the CBA/OBA National

[2] R.S.C., 1985, c. 1 (5th Supp.).
[3] Canada Revenue Agency, Policy Statement, CPS-022, "Political Activities", online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>. Canada Revenue Agency, Advisory on Partisan Political Activities, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/dvsry-eng.html>. Canada Revenue Agency, Policy Commentary, CPC-007, "Political Party's Use of Charity's Premises", online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-007-eng.html>.
[4] *Supra* note 1, s. 7(3).

Charity Law Symposium, the Director General of the Charities Directorate,[5] Cathy Hawara emphasized that the allowable limit on non-partisan political activities of 10% of resources remains unchanged. However, in light of the proposed changes to the definition of "political activity," a charity that funds another qualified donee for the purpose of enabling political activities will be required to count that donation against its own 10% limit.

Without further details, the meaning of the phrase "can reasonably be considered" in the proposed definition of political activity is ambiguous. As such, it is likely best for a charity making a gift to a qualified donee to designate in writing that the gift is not to be used for political activities. As well, it is likely prudent for charities to avoid multi-purpose gifts, because Budget 2012 refers to "a purpose" as opposed to "the purpose." The lack of any details exposes charities to the risk that any political purpose for any part of the gift could possibly taint the whole gift.

b) *New Intermediate Sanctions*

Budget 2012 introduces new intermediate sanctions for excessive or unreported political activities. Where a registered charity exceeds the limits in the ITA for political activities (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receipting privileges (in addition to revocation).[6] As well, if a registered charity fails to report any information (not just information on political activities) that is required to be included on a T3010 annual return, CRA can suspend its tax receipting privileges until CRA notifies the charity that it has received the required information.[7] Presently, the only sanction provided by the ITA for non-compliance in the context of political activities is revocation. According to the Director General, these proposed intermediate sanctions will provide the Charities Directorate with an additional tool to encourage compliance with existing legal requirements.[8]

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[5] Canada Revenue Agency, "Director General's Speech at the National Charity Law symposium", presented at the National Charity Law Symposium (4 May 2010) online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdgts/2012/dgspch-eng.html>.
[6] *Supra* note 1, s. 13(1).
[7] *Ibid*., s. 13(2).
[8] Canada Revenue Agency, "Director General's Speech at the National Charity Law symposium", presented at the National Charity Law Symposium (4 May 2010) online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdgts/2012/dgspch-eng.html>.

c) *Increased Disclosure Obligations*

Budget 2012 states that more disclosure will be required concerning political activities. This requirement is reflected in the new T3010 E (13) Annual Information Return (including funding from foreign donors) for charities with fiscal periods ending on or after January 1, 2013.[9].

d) *Increased Enforcement Measures*

Budget 2012 will affect charities and registered Canadian amateur athletic associations through increased enforcement measures. In Budget 2012, $8 million was committed to enforcement by the CRA, which includes audits and educational initiatives. In her speech, the Director General outlined CRA's enforcement plans. The existing compliance continuum of education and outreach, monitoring, and verification and audit activities, which has traditionally been used by CRA in respect of all enforcement activities, will be applied to the issue of political activities. Simple and practical self-assessment tools will be developed by CRA to assist charities in better understanding the rules relating to political activities. More proactive monitoring of charities' political activities will occur, and where such monitoring raises concerns, CRA will use its existing enforcement tools. In addition, CRA will be conducting more restricted books and records audits.[10]

2. <u>Gifts to Foreign Charitable Organizations</u>

Prior to Budget 2012, the ITA recognized as qualified donees certain registered foreign charitable organizations outside Canada that had received a gift from Her Majesty in right of Canada.[11] However, Budget 2012 modified the rules for the registration of foreign charitable organizations that have received gifts from the Government of Canada, by replacing charitable organizations outside of Canada that have received a gift from Her Majesty in right of Canada with designated foreign organizations. In this regard, Budget 2012 changes the rules such that foreign charitable organizations that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities:

[9] Available online at: <http://www.cra-arc.gc.ca/E/pbg/tf/t3010/>.
[10] *Supra* note 8. For more information, see Terrance S. Carter and Karen J. Cooper, "Playing by the Rules: Political Activities Fair Game for Charities" in Charity Law Bulletin No. 286 (June 28, 2012) online: http://www.carters.ca/pub/bulletin/charity/2012/chylb286.htm.
[11] A listing of these organizations is maintained by the Charities Directorate at http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/qd-lstngs/gftsfrmhrmjsty-lst-eng.html.

- related to disaster relief or urgent humanitarian aid; or
- in the national interest of Canada.

In addition, the Minister of National Revenue will have the discretionary power, after consultation with the Minister of Finance, to grant qualified donee status to foreign charitable organizations that meet the above criteria. CRA has released on its website some questions and answers on these measures.[12] These measures apply to applications made by foreign charitable organizations on or after January 1, 2013.

C. OTHER RECENT FEDERAL AND PROVINCIAL INITIATIVES

1. Notice of Ways and Means Motion to Amend ITA Released

On October 24, 2012, the Department of Finance released draft legislative proposals to implement outstanding income tax technical measures.[13] The news release indicates that the release of these amendments is intended to clear the backlog of outstanding amendments to the ITA and related legislation. Included are proposed changes that will substantially impact the operations of registered charities in Canada, including changes to the definition of "gift," split-receipting, designation of charitable organizations and public foundations, revocation of charitable registrations, etc. These proposed changes were first introduced by Finance on December 20, 2002, which then underwent various incarnations over the years. Although these proposed changes have yet to be enacted into law, the split-receipting rules have already been implemented by CRA in their administrative policies.

2. B.C. Introduces Bill to Create Community Contribution Companies

On May 15, 2012, the British Columbia's Bill 23, *Finance Statutes Amendment Act, 2012* received Royal Assent. The Act amends, among other things, the B.C. *Business Corporations Act* to provide for a new type of company called a "community contribution company" ("CCC"). According to the Honourable Kevin Falcon, who introduced the Bill, CCCs are a hybrid vehicle intended to promote social enterprise by allowing the for-profit sector to tap into the emerging demand for socially focused investment options. CCCs combine socially beneficial purposes with a restricted ability to distribute

[12] Available at : http://www.cra-arc.gc.ca/gncy/bdgt/2011/qa20-eng.html#_Toc288650878a.
[13] Available at: http://www.fin.gc.ca/drleg-apl/nwmm-amvm-1012-eng.asp. Currently in second reading in the House of Commons.

profits to shareholders. CCCs permit an alternative business model that is not available through for-profit companies.

With regard to the creation and operation of these companies, CCCs are incorporated with the same flexibility and certainty accorded to for-profit companies, but the governing legislation ensures that they primarily benefit the community. Measures in this regard include restrictions on corporate reorganizations to avoid the circumvention of payout restrictions and an "asset lock" that caps dividends on company shares to ensure that profits are retained by the company or directed to the community benefit. These companies are subject to a higher degree of accountability than an ordinary company and are required to publish an annual report detailing their social spending.

3. Nova Scotia Passes *Community Interest Companies Act*

On December 6, 2012, Nova Scotia's Community Interest Companies Act, Bill No. 153[14] received Royal Assent, allowing businesses to seek designation as a "community interest company" ("CIC"). This legislation is aimed at supporting social entrepreneurism initiatives. According to John MacDonell, Minister of Service Nova Scotia and Municipal Relations, CICs will "benefit the economy and create employment, while contributing to a social good".[15] Nova Scotia follows British Columbia, which passed similar legislation in April, 2012.

To qualify for the CIC designation, a company must have a "community purpose," which the Act defines as "a purpose beneficial to society at large, or a segment of society that is broader than the group of persons who are related to the community interest company". A CIC must have at least three directors, all of whom must act in accordance with the company's community purpose when exercising their powers and performing their functions. CICs are restricted in their ability to pay dividends and distribute assets on dissolution or otherwise and they must file a community interest report each year. The legislation does not change the ITA, so CICs must either comply with the rules for not-for-profit organizations or pay tax as a for-profit corporation.

[14] Online: <http://nslegislature.ca/legc/bills/61st_4th/1st_read/b153.htm>.
[15] Service Nova Scotia and Municipal Relations press release (28 November 2012). online: <http://novascotia.ca/news/release/?id=20121128010.>.

D. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

1. Revised Fundraising Guidance

CRA released its much anticipated new *Fundraising by Registered Charities Guidance: CG-013*[16] ("Revised Guidance") on April 20, 2012. While the Revised Guidance is much more readable and practical than the previous guidance, it remains a complex document that will require careful reading.

CRA has advised that the Revised Guidance does not represent a new policy position of CRA, but rather provides information on the current treatment of fundraising under the ITA and the common law. As such, the Revised Guidance will have a significant impact on current CRA audits, not just future audits. As well, the Revised Guidance applies to both receipted and non-receipted fundraising.

The Revised Guidance is intended to provide general advice for charities to follow and is based on the legal principle, established by case law, that fundraising must be seen as a necessary means-to-an-end for a charitable purpose, rather than an end-in-itself. In this regard, it is possible for a charity to engage in fundraising activities, provided that the fundraising is ancillary and incidental to the primary purpose of achieving the charity's purposes.

In addition to complying with the Revised Guidance, charities must continue to meet all other requirements of the ITA, including the 3.5% disbursement quota. The fundraising ratio referenced in the Revised Guidance results from data that is included in a charity's T3010 which is made available to the public on CRA's website. As such, it will be important for the board to review and approve the charity's T3010 before it is filed with CRA, given that the information contained in it can later be scrutinized by donors, and the press, as well as members of the public.

2. New Guidance on Community Economic Development

On July 26, 2012, CRA released Guidance CG-014, *Community Economic Development Activities and Charitable Registration* ("New Guidance").[17] The New Guidance provides parameters in which registered charities may conduct "community economic development" ("CED") activities that

[16] Canada Revenue Agency, *Fundraising by Registered Charities Guidance: CG-013* (20 April 2012) online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/fndrsng-eng.html>.
[17] Canada Revenue Agency, Guidance CG-014, *Community Economic Development Activities and Charitable Registration*, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cmtycnmcdvpmt-eng.html>.

"improv[e] economic opportunities and social conditions of an identified community." The New Guidance is a welcome improvement over the Former Guidance, expanding the types of CED activities that charities may engage in, especially in the area of program-related investments.

The New Guidance points out that the law in Canada does not recognize CED in and of itself to be a charitable purpose. Therefore, in order to be considered "charitable", CED activities must directly further a charitable purpose.[18] In this regard, the New Guidance states that CED activities may potentially further the following heads of charitable purposes, namely relief of poverty, advancement of education and benefit the community in other ways the law regards as charitable.[19] It would therefore imply (although not explicitly stated in the New Guidance) a CED activity cannot be conducted for the advancement of religion. Therefore, religious charities that want to engage in social programs must carefully review whether those programs are within the parameters of practical manifestation of their faith. Also, to be charitable, the New Guidance states that CED activities must meet the "public benefit test", which includes not providing any private benefit that is more than incidental. This means any private benefit must be necessary, reasonable, and not disproportionate to the public benefit.[20]

The New Guidance states that CED activities "generally" fall into the following five categories: activities that relieve unemployment; grants and loans; program-related investments; social businesses for individuals with disabilities; and community land trusts.[21] The New Guidance also sets out parameters for CED activities that promote commerce or industry or improve socio-economic conditions for the public benefit in an area of social and economic deprivation.[22]

One of the most significant expansions of CRA's policy set out in the New Guidance is the broader context in which registered charities may engage in program-related investments (PRIs). A PRI is not an investment in the conventional financial sense because while PRIs may generate a financial return, they are not made for that reason. As such, a PRI is not required to generate a return, or potential return, of capital (funds or property) for the charity, or to yield additional revenue (such as interest) for

[18] *Ibid*., paras. 6 and 8.
[19] *Ibid*., para. 11.
[20] *Ibid*., para. 10.
[21] *Ibid*., para. 14.
[22] *Ibid*., para. 84.

the charity at or above market rate.[23] Under the New Guidance, CRA accepts that charities can engage in PRIs that involve loans, loan guarantees, share purchase and leases of land or buildings involving non-qualified donees.

The New Guidance stipulates that, when making a PRI in a non-qualified donee, the PRI must be used for a program over which the investor charity maintains ongoing direction and control, so that the program is the investor charity's own activity (*i.e.,* this is the same as the "own activity" test that must be met when charities conduct activities through third party intermediaries).

3. CRA Guidance on Arts Activities and Charitable Registration Released

On December 14, 2012, the Canada Revenue Agency released the *Arts Activities and Charitable Registration* Guidance CG-018[24] ("New Guidance"), which replaced Summary Policy CSP-A08, *Arts,* and Summary Policy CSP-A24, *Artists.* The New Guidance is similar in substance to the draft *Guidance on Arts Organizations and Charitable Registration*, which was released on November 1, 2011 for public consultation.[25] The New Guidance explains CRA's interpretation of the relevant common law and the ITA, describing the factors CRA uses to determine whether an organization is furthering a charitable purpose through arts activities and thus potentially eligible for registration as a charity under the Act.

E. CORPORATE UPDATE

1. New *Canada Not-for-profit Corporations Act*

As is generally known, the *Canada Not-for-profit Corporations Act*[26] ("CNCA") was proclaimed into force on October 17, 2011, succeeding the *Canada Corporations Act*[27] ("CCA") as the legislation governing Canadian charitable and not-for-profit corporations that are federally incorporated. Existing CCA corporations have until October 17, 2014 to continue under the CNCA or face dissolution. As part of the continuance process under the CNCA, existing CCA corporations will need to bring their

[23] *Ibid*., para. 40.
[24] Available at: http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/rts-ctvts-eng.html.
[25] A *Charity Law Bulletin* Theresa L.M. Man on the draft Guidance can be found at: http://www.carters.ca/pub/bulletin/charity/2011/chylb271.htm.
[26] S.C. 2009, c. 23.
[27] R.S.C. 1970, c. C-32.

bylaws up to date to meet the requirements of the CNCA. As well, charities must obtain CRA's approval if they are planning to make any change to their charitable objects.

Corporations with multiple membership classes, including non-voting members, may want to consider whether they want to continue with a multi-class structure. This is because, under the CNCA, members of all classes, including non-voting members, will have a right of veto over certain fundamental changes, including continuance. Corporations may therefore wish to change their membership structure in advance of continuing under the CNCA so that there is only one class of members. In this regard, one option is to restructure secondary membership classes into "supporters", "associates", "fellows" or other similar terminology in order to avoid classifying them as members.

2. New Ontario *Not-for-Profit Corporations Act* 2010

The Ontario *Not-for-Profit Corporations Act*[28] ("ONCA") received Royal Assent on October 25, 2010 and is expected to be proclaimed on July 1, 2013.

Once the ONCA is proclaimed into force, it will automatically apply to all non-share capital corporations incorporated under Part III of the Ontario *Corporations Act*[29] ("OCA"). As such, OCA corporations do not need to take any specific action in order to come under the ONCA. However, if there are any provisions in a corporation's letters patent, supplementary letters patent, by-laws or special resolution that are inconsistent with the provisions in the ONCA, these documents will be deemed, at the end of three years after proclamation, to be amended to comply with the ONCA.[30] The problem that will occur is that it will become difficult to determine what provisions are deemed to be amended and in what way.

In order to avoid such uncertainty from arising, the ONCA permits Part III OCA corporations to "transition" into the ONCA during the three-year period by amending, by articles of amendment, any

[28] S.O. 2010, c. 15.
[29] R.S.O. 1990, c. C.38.
[30] *Supra* note 3 at ss. 207(2).

provision in its letters patent, supplementary letters patent, by-laws or special resolution that are not consistent with the requirements of the ONCA.[31]

F. RECENT CASE LAW

1. Robinson v. Rochester Financial Limited

In *Robinson v. Rochester Financial Limited*,[32] Ontario Superior court approved an $11 million settlement on February 7, 2012 of the class action relating to the “Banyan Tree” tax shelter. The scheme involved small donations purportedly increased through a “loan” to the donor. The complex schemes often left little money in the recipient registered charity or amateur athletic association compared with the fees paid to the promoters, lawyers and others involved. CRA disallowed the donors’ tax credits because the “donations” were not gifts. The defendant was a law firm which provided a legal opinion that the tax shelter complied with applicable tax legislation and that the tax receipts issued by the tax shelter should be recognized by CRA.

2. Adams v. Association of Professional Engineer

In *Adams v. Association of Professional Engineer* [33], a member of Council for the Association of Professional Engineers of Ontario ("PEO") submitted a resignation by email to the other Council members indicating that he had resigned. The following day he sent a further email to the Council of PEO indicating that his resignation would be effective at the next annual general meeting of PEO. Ten days after sending this resignation the Council member sent a further email indicating that he was revoking his resignation. However, the remaining Council members subsequently voted to accept the resignation.

The court was left to decide when the resignation of a director of a non-share capital corporation becomes effective and whether or not it can be withdrawn by the director without the consent of the remaining directors. PEO was created by an act of legislature under the *Professional Engineers Act* and was therefore governed by that act, its regulations, the *Canada Corporations Act*, and PEO’s own by-laws. The by-laws of PEO did not address the resignation of a director. The court examined the

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[31] *Ibid*., ss, 150(1)(b).
[32] 2012 ONSC 911
[33] 2012 ONSC 3850 (CanLII). View online at: http://canlii.ca/t/frvhg

Canada Corporations Act and determined that the statute was also silent on the matter of a director's resignation. However, the court consulted the Ontario *Business Corporations Act*, as well as the *Canada Not-for-profit Corporations Act* ("CNCA"), which provide that a resignation is effective at the time the resignation is received by the corporation or at the time specified in the resignation, whichever is later.

Adams argued that directors of non-share capital corporations should not be subject to the standards of for-profit corporations under the *Ontario Business Corporations Act*. The court, however, found that there was no principled reason to treat directors of non-share capital corporations differently from other directors. In this regard, the court noted that the rational that directors of for-profit corporations should be able to effectively resign without having their resignation accepted applied equally to directors of non-share capital corporations. The court adopted the rationale of not requiring the acceptance of a director's resignation by the remaining directors concerning for-profit corporations, and stated as follows:

First, to create certainty for the director as to when any liability he or she has might end and second, because absent some special contractual arrangement or special provision in the articles of incorporation, the corporation is not in a position to refuse the director's resignation and force him or her to stay on. Similarly, if effective resignations could be delivered and then revoked at will by the director, this could create uncertainty and confusion for the corporation and its remaining directors.

Having found that the resignation was unequivocal, the court found that the resigning director could not thereafter revoke his resignation without the consent of the other directors.

3. <u>*Guindon v. The Queen*</u>

On October 2, 2012, the Tax Court of Canada (TCC) released its decision in *Guindon.*[34] The case dealt with whether the third party penalties provided under section 163.2 of the ITA could be assessed against the appellant. The basic purpose of s. 163.2 is to provide for monetary penalties assessable against third parties who knowingly, or in circumstances amounting to gross negligence, participate in,

promote, or assist conduct that results in another taxpayer making a false statement or omission in a tax return.

In a decision that bodes enormous implications for the future of s. 163.2, Justice Bédard concluded that the provision creates a criminal sanction that can only be prosecuted in provincial court in accordance with criminal procedure and *Charter* protections. This *Charity Law Bulletin* reviews the decision and its implications for charities.

G. CONCLUSION

The complexity and variety of topics discussed in this article underscores the importance of keeping abreast of developments in the law as they affect registered charities in Canada.

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