
**ASSOCIATION OF FUNDRAISING PROFESSIONALS (AFP)
CONGRESS 2005**

**YOUR EXTREME MAKEOVER FUNDRAISING
EDITION**

Toronto – December 1, 2005

**Recent Changes in the Law That You
Need to Know**

By **M. Elena Hoffstein, M.A., LL.B. – Fasken Martineau
& Terrance S. Carter, B.A., LL.B.**
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AGENDA

9:00 a.m.	The New Disbursement Quota Rules and Their Impact on Fundraising	Elena Hoffstein
9:45 a.m.	The Proposed New Rules on Split-Receipting, Reasonable Enquiry and Private Foundations (as of November 21, 2005)	Terrance S. Carter
10:30 a.m.	Update on Privacy Legislation for Charities	Terrance S. Carter
10:40 a.m.	Coffee	
11:00 a.m.	Audit, Sanctions, Penalties, Appeals and Undue Benefit Provisions	Elena Hoffstein
11:30 a.m.	Uniform Law Conference of Canada Proposed New <i>Uniform Charitable Fundraising Act</i>	Terrance S. Carter
12:00 noon	Returning a Gift – What are the Options?	Terrance S. Carter & Elena Hoffstein
12:30 p.m.	Program Ends	

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Recent Changes in the Law
That You Need to Know
**The New Disbursement Quota Rules
and Their Impact on Fundraising**

By M. Elena Hoffstein, B.A., M.A., LL.B

RESOURCE MATERIALS

- This power point presentation consists of excerpts from:
- A paper entitled “New Disbursement Quota Rules Under Bill C-33” dated May 6, 2005
- Charity Law Bulletins #54, #55, #56, #59, #67 and #69
- all available at www.charitylaw.ca

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**OVERVIEW OF RECENT CHANGES TO
THE *INCOME TAX ACT***

Proposed Technical Amendments:


- December 20, 2002 - Draft Amendments
- December 24, 2002 - Income Tax Technical News No. 26
- February 28, 2003 - Federal Budget
- December 5, 2003 - Draft Amendments
- February 27, 2004 - Revised Draft Technical Amendments
- July 18, 2005 Special Release – Legislative Proposals Relating to Income Tax

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New DQ formula enacted on May 13, 2005

- The 4.5% disbursement quota is reduced to 3.5%
- The 3.5% disbursement quota is extended to charitable organizations
- Inter-charity transfers to charitable organizations are now subject to the 80% disbursement quota
- The 80% disbursement quota can be delayed through utilizing "enduring property" including ten year gifts
- Inter-charity transfers have become complicated


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INTRODUCTION

- What is DQ?
 - A prescribed amount that registered charities must disburse each year in order to maintain their charitable registration
- Purpose
 - To ensure charities use charitable funds on charitable/activities
 - To discourage charities from spending excessive amounts on fundraising and from accumulating excessive funds

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- Importance of DQ
 - For charities, donors, advisors
 - Inter-charity transfers
 - Nature of property gifted
 - Nature of restrictions imposed
 - Source of the gift
 - Nature of the proposed recipient charity

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DQ RULES PRIOR TO THE PROPOSED AMENDMENTS

Charitable organizations

- 80% of receipted donations in preceding year, except:
 - i. gifts of capital received as bequest or inheritance
 - ii. ten-year gifts
 - iii. gifts received from other registered charities
- 80% of amounts previously excluded under (i) and (ii) but which are spent in the year

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PUBLIC AND PRIVATE FOUNDATIONS

- 80% of receipted donations in preceding year, except:
 - i. gifts of capital received as bequest or inheritance
 - ii. ten-year gifts
- 80% of amounts previously excluded under (i) and (ii) but which are spent in the year
- 80% of gifts received from other charities, other than specified gifts (100% for private foundations)
- 4.5% of average value of investment property

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NEW DQ FORMULA

- Prior to Bill C-33:
 $A + A.1 + B + \{C \times 0.045 [D - (E + F)]\} + 365 + G$
- September 2004:
 $A + A.1 + A.2 + B + \{C \times 0.035 [D - (E + F)]\} / 365$
- December 2004 / Bill C-33:
 $A + A.1 + B + B.1$
 $B.1 = C \times 0.035 [D - (E + F)] / 365$


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NEW FORMULA A + A.1 + B + B.1

- A = 80% of prior year received donations (excluding enduring property and gifts from other charities)
- A.1 = amount by which
 - a) sum of
 - (i) 80% enduring property expended in year (except for specified gift, pre-1994 bequests or inheritances and property described in (ii) plus
 - (ii) total enduring property gifts transferred to qualified donees (except specified gift)
 Exceeds
 - b) amount claimed by charity that may not exceed lesser of 3.5% of investment assets and capital gains pool for year


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- B = 100% of gifts from other charities if private foundation and 80% if charitable organization or public foundation (except specified gifts and enduring property)
- $B.1 = \frac{C \times .035 [D - (E + F)]}{365}$
- (3.5% of capital is the "D" amount, and D must be greater than \$25,000)

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REDUCTION OF DQ RATE

- Public and private foundations had been subject to a 4.5% DQ on capital assets not used in charitable activities or administration
- 4.5% DQ reduced to 3.5%
- Based on the current real rate of return minus 20% attributable to administrative costs
- More representative of historical long-term real rates of return earned
- Rate to be reviewed periodically
- Applies to taxation years that begin after March 22, 2004

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EXTENSION OF 3.5% DQ TO CHARITABLE ORGANIZATIONS

- Only public and private foundations had been subject to the 4.5% DQ
- The reduced 3.5% DQ will now apply to charitable organizations as well
- Because charitable organizations can also hold capital endowments from which investment income is generated
- For charitable organizations registered after March 22, 2004, the 3.5% DQ will apply to their taxation years that begin after March 22, 2004
- For charitable organizations registered before March 23, 2004, the 3.5% DQ will apply to their taxation years that begin after 2008
- Removes a key difference between charitable organizations and foundations

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DE MINIMUS THRESHOLD ON THE APPLICATION OF THE 3.5% DQ

- 3.5 % DQ only applies to registered charities if they hold investment assets greater than \$25,000
- To provide relief to small charities

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NEW CONCEPT OF “ENDURING PROPERTY”


- New term “enduring property” includes 4 types of property
 - Gifts by way of bequest or inheritance
 - Inter-charity gifts received by an arm’s length charitable organization to be expended in the next 5 years or less on its charitable activities
 - Ten-year gifts
 - Inter-charity transfer of ten-year gifts and gifts by way of bequest or inheritance

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1. Gifts by way of bequest or inheritance


- Where an individual has designated a charity as a direct beneficiary of an RRSP, RRIF or life insurance policy, the May 2005 amendments treat such gifts as enduring property for the purposes of the disbursement quota rules
- This will mean that direct designation of RRSP, RRIF and life insurance proceeds will be subject only to the 3.5% disbursement quota while they are held as capital and then subject to the 80% disbursement quota in the year in which they are disbursed

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- "Applies in respect of deaths after 1998, which retroactivity may lead to hardship for charities that relied on the earlier position of CRA that such direct designations would not be included in the charities' DQ from 2000 to the present
- These gifts will no longer be limited to "gifts of capital received by way of bequests or inheritance", therefore a testamentary income interest received by a charity would be included

2. Inter-charity gifts received by a charitable organization to be expended in the next 5 years or less in its charitable activities

- Gift received by a charitable organization from another registered charity


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- More than 50% of the directors of the donor deal at arm's length with each director of the donee charitable organization
- The gift must be subject to a trust or direction requiring that the gift be utilized over a period not exceeding five years
 - (i) in the course of a program of charitable activities that could not reasonably be completed in the first year
 - (ii) for the purpose of acquiring a capital property of the charitable organization to be used directly in its charitable activities or administration

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3. Ten-year gifts

- A gift from a donor to a registered charity subject to a trust or a direction that the gift is to be held for a at least ten years
- A ten year gift now permits the original recipient charity or a transferee charity to expend the capital gains on the ten year gift before the end of 10 years to the extent permitted under the definition for DQ in order to meet the DQ requirement

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4. Inter-charity transfer of ten-year gifts and gifts by way of bequest or inheritance

- Gifts by way of bequest or inheritance and ten-year gifts (but not 5-year gifts) from either an original recipient charity or another transferee charity
- Provided that if the gift is a ten-year gift, the gift is subject to the same terms and conditions under the trust or direction


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ENCROACHMENT ON ENDURING PROPERTY

- New concept introduced of a “capital gains pool”, which is a notional account to keep track of the amount of capital gains realized by a charity from the disposition of “enduring property”
- Charities are now able to encroach on the capital gains from enduring property, provided that the terms of the gift permit such encroachment, but only up to the lesser of the amount of the 3.5% disbursement quota and the amount in the “capital gains pool”


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- Charities will need to decide how much to claim within the permitted encroachment limit of the capital gains pool
- Charities should track their capital gains pool each year on their T3010A
- Anything above the permitted encroachment limit will be added back into the 80% disbursement quota for the charity and therefore will have limited benefit in meeting the 3.5% disbursement quota
- The combination of the yearly tracking requirement for the “capital gains pool” and the determination of what is a capital gain will make the calculation of the disbursement quota challenging for charities to comply with


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INTER-CHARITY TRANSFERS

- Gifts transferred to charitable organizations
- Three categories of property transfers
- How to categorize property transfers
- Transfer as a result of penalty

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1. Gifts transferred to charitable organizations
 - Previously, only transfers from registered charities to public and private foundations are subject to the 80% DQ
 - i.e. transfers from registered charities to charitable organizations are exempt from the 80% DQ
 - Now, all transfers of funds from one registered charity to another, including transfers to a charitable organization (but excluding transfers of enduring property) will be subject to the 80% disbursement obligation, i.e. 80% of the gift must be expended in the following taxation year
 - Exception for a “specified gift” will continue to apply

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- Apply to transfers received by charitable organizations in taxation years that begin after March 22, 2004


2. Three categories of property transfers

- Ordinary gifts (i.e. not specified gifts, not enduring property)
- Specified gifts
- Enduring property that has not been designated as specified gifts by the transferor charity

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Transfer of ordinary gifts

- i.e., neither specified gifts, nor enduring property
- For the transferor charity, the transfer can be used to satisfy its DQ obligation
- For the transferee charity, there will be an obligation to expend the gift in the following year (because of variable B in DQ formula)
- If the transferee charity is either a charitable organization or a public foundation, the DQ obligation is 80% of the gift

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- If the transferee charity is a private foundation, the DQ obligation is 100% of the gift
- For example: \$100 ordinary gift transferred from Charity A to Charity B


	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	N/A	\$100 expended can be used to satisfy its DQ obligations of Charity A in year 1	<ul style="list-style-type: none"> •Charitable organizations and public foundations have to expend \$80 in year 2 •Private foundations have to expend \$100 in year 2 	N/A

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- When Charity B expends the ordinary gift in the following year, Charity B can use the expenditure to satisfy its DQ obligation in year 2 mentioned above

	Transferee Charity B	
	DQ obligation	DQ satisfaction
Year 2	N/A	The \$ expended can be used to satisfy DQ obligation in year 2


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4. Transfer of specified gifts

- For the transferor charity, the transfer cannot be used to satisfy its DQ obligation
- For the transferee charity, there is no obligation to expend the specified gift in the following year


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- For example: \$100 specified gift transferred from Charity A to Charity B

	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	N/A	--- Charity A cannot use the \$100 to satisfy its DQ obligation in year 1	--- Charity B is not obligated to expend any of the \$100 in year 2	N/A

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- When Charity B expends the specified gift in a subsequent year, Charity B can use the expenditure to satisfy its DQ obligations in that year

	Transferee Charity B	
	DQ obligation	DQ satisfaction
Subsequent Year	N/A	\$100 expended can be used to satisfy DQ obligations in that year

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5. Transfer of enduring property

- The following rules do not apply to enduring property received as specified gifts
- For the transferor charity, there will be a DQ obligation to expend the enduring property in the year
- The DQ obligation is met by the transfer itself
- For the transferee charity, there is no obligation to expend the enduring property in the following year
- For example: \$100 enduring property transferred from Charity A to Charity B

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	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	Charity A will be obligated to expend 100% of the fmv of the enduring property in year 1	The DQ obligation created by the transfer is met by the transfer itself	--- no effect on DQ (b/c enduring property is exempt from B in DQ formula)	--- no effect on DQ until Charity B expends the gift

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- When Charity B expends the enduring property in a subsequent year, Charity B will be obligated to expend at least 80% of the enduring property
- The DQ obligation for that year would be met by the expenditure of the enduring property


	Transferee Charity B	
	DQ obligation	DQ satisfaction
Subsequent Year	Charity B will be obligated to expend at least 80% in the year	The \$ expended can be used to satisfy DQ obligation in the year

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- However, if Charity A designates the enduring property as a specified gift, then Charity A would not be able to use the expenditure to satisfy its DQ obligation in the year of transfer
- Charity B would receive the enduring property as a specified gift, which would not create any DQ obligation to expend the specified gift
- When Charity B expends the gift in a subsequent year, Charity B would be able to use the expenditure to satisfy its other DQ obligations in that year
- Limited reasons for the transferor charity to agree to transfer the enduring property as a specified gift

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	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	Charity A will be obligated to expend \$100 in year 1	Charity A cannot use the \$100 to satisfy its DQ obligation in year 1	Charity B is not obligated to expend any of the \$100 in the following year	N/A
Subsequent Year	N/A	N/A	N/A	\$100 expended can be used to satisfy other DQ obligations in that year


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6. Transfer as a result of penalty

- A transfer to another registered charity under Part V does not qualify as an expenditure for the purposes of calculating the transferor's DQ
- Applies in respect of notices of intention to revoke the registration of a charity and to notices of assessment issued by the Minister after the day that is 30 days after Royal Assent


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CONCLUSION

- Attempt by the Department of Finance to address a number of problems facing charities involving DQ
- Very complex new DQ rules - difficult, if not impossible, for the average charity to understand, let alone comply with
- Concerns about removing key differences between charitable organizations and public foundations

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Your Extreme Makeover Fundraising Edition
Toronto – December 1, 2005

Recent Changes in the Law That You Need to Know
The Proposed New Rules on
Split-Receipting, Reasonable Enquiry and
Private Foundations
(as of November 21, 2005)

By Terrance S. Carter, B.A., LL.B.
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RESOURCE MATERIALS

This power point presentation consists of excerpts from:

- A paper entitled “Recent Changes to the *Income Tax Act* Affecting Charities and Gift Planning” dated March 16, 2005
- Charity Law Bulletins #76, #77 and #80 all available at www.charitylaw.ca

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Summary of July/2005 Proposed Amendments

- A gift will permit some consideration to be received by the donor
- New split receipting rules will apply
- New broader definition of “advantage” may reduce the amount of a charitable receipt
- New broader definition of a charitable organization and public foundation will apply

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- **Complicated new rules to curtail tax shelter schemes may result in reduction of charitable receipts for gifts in kind**
- **Charities will need to make “reasonable inquiries” of donors for all gifts over \$5,000.00, whether gifts in kind or cash**
- **New expanded basis for revocation of a charity will apply**
- **Different proposed changes have different effective dates, some are retroactive**

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- History of the July 2005 Proposed Amendments :**
- **December 20, 2002 - Amendments**
 - **December 5, 2003 - Amendments**
 - **February 27, 2004 - Amendments**
 - **March 23, 2004 - Federal Budget**
 - **May 13, 2005 - Passage of Bill C-33 (May 2005 Amendments**
 - **July 18, 2005 Special Release – Legislative Proposals Relating to Income Tax**

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- HIGHLIGHTS OF THE JULY 2005 PROPOSED AMENDMENTS**
- 1. Meaning of Gift**
- **The traditional common law definition of a gift requires:**
 - **the donor must have an intention to give**
 - **there must be a transfer of property**
 - **the transfer must be made voluntarily without contractual obligation; and**
 - **no consideration or advantage can be received by the donor**

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- July 2005 draft amendments to the *Income Tax Act* create a new concept of “gift” for tax purposes which permits a donor to receive benefit, provided that the value of the property donated exceeds the benefit received by the donor
- Concept is commonly referred to as “split-receipting”

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- The July 2005 draft amendments reflect an importation of the civil law concept of gift which permits a benefit back to the donor
- While a gift with an advantage may be deemed a gift under the *Income Tax Act*, it will not necessarily be a gift at common law and therefore should not be identified as a gift in order to avoid subsequent challenges to the validity of the transfer

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2. New Split Receipting Rules:

- Charitable donation receipts must now reflect the following formula:

$$\begin{array}{rcl} \text{Eligible Amount} & = & \text{Fair Market} \\ \text{of Gift} & & \text{Value of the} \\ & & \text{Property} \\ & & \text{Donated} \end{array} \quad - \quad \begin{array}{r} \text{Advantage} \\ \text{Received by} \\ \text{Donor} \end{array}$$

- (1) Must be voluntary transfer of property with a clearly ascertainable value

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(2) Donative intent required

- **Must have a clear donative intent by the donor to benefit the charity**
- **Donative intent will generally be presumed if the fair market value of the advantage does not exceed 80% of the value of the gift**

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(3) Advantage

- **Broad definition - includes:**
 - **the total value of all property, services, compensation, use or other benefits,**
 - **to which the donor, or a person not dealing at arms length with the donor,**
 - **has received or obtained or is entitled to receive (either immediately or in the future),**
 - **as partial consideration for or in gratitude for the gift or that is in any other way related to the gift**

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- **The advantage must be clearly identified and its value ascertainable**
- **Value of advantage is the total value of any “property, service, compensation, use or other benefit” in question**
- **Timing of valuation is the time when the gift is made**
- **The advantage can be received prior to, at the same time as, or subsequent to the making of the gift**
- **Does not require a causal relationship between the making of the gift and the receiving of the advantage, as long as the advantage is related to the gift**

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- The advantage can be provided to the donor or to a person or partnership not dealing at arm's length with the donor
- It is not necessary that the advantage be received from the charity that received the gift, i.e. the advantage could be provided by third parties unbeknownst to the charity, which fact will necessitate that charities make inquiries of donors to determine if they have received a related benefit from anyone
- CRA's administrative exemption applies where there is a token advantage of the lesser of 10% of the value of the gift and \$75 (*de minimis* threshold)

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- (4) The "deemed fair market value" rules arising from donation tax shelter schemes
- The proposed "deemed fair market value" rules for a gift are the result of the government's attempt to curtail abusive tax shelter donation schemes by severely restricting the tax benefits from donations made under these schemes

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- These donation programs usually involve the item in question being purchased at a substantially lower price than its purported much higher fair market value, and that a donation receipt being issued by a registered charity for the fair market value when the item is donated
- The proposed amendments also curtail the use of limited recourse debt, which is a form of tax shelter in which the tax-payer incurs a debt for which recourse is limited and which can reasonably be considered to be related to a charitable gifting arrangement

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(5)Details of the “deemed fair market value” rules

- Valuation of fair market value (FMV) of donated property
- FMV of donated property will be deemed to be the lesser of
 - the fair market value of the property and
 - the cost (or the adjusted cost base where applicable) of the property to the tax-payer immediately before the gift is made

in the following three situations:

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- (i) If the donor acquired the property through a “gifting arrangement” i.e. a donation tax shelter scheme
- (ii) If the donor acquired the property less than 3 years before making the gift
- (iii) If the donor acquired the property less than 10 years before making the gift, if it was reasonable to conclude that when the donor acquired the property one of the main reasons for the acquisition was to make a gift (donor must prove that the donor did not have an expectation to make a gift when the property was acquired)

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- New provision also requires a “look-back” to see if the property had been acquired within the 3 or 10 years by a non arm’s length person and if so then the “deemed fair market value” applies to the person
- The deeming provision does not apply to inventory, real property or an immovable situated in Canada, certified cultural property, publicly traded shares and ecological gifts

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- **The deeming provision also does not apply**
 - where the gift is made as a consequence of the donor’s death
 - a shareholder has transferred property to a controlled corporation in exchange for shares and the shares are donated, or a rollover transaction to a corporation for the same purpose of donating shares

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- **New rules to prevent a donor from avoiding the deeming provision by disposing of property to a charity and then donating the proceeds of disposition, rather than the donor donating the property directly to the charity (“substantive gifts”)**

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3. New Reasonable Inquiry Rules

- **The Rule: Charities issuing a receipt with an eligible amount in excess of \$5,000 will now be required to make “reasonable inquiry” of the donor**

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(a) What is involved?

- The charity must make reasonable inquiry
- The donor must provide the requested information to the charity
- The information on the receipt must be accurate and reflects the fmv (or deemed fmv where applicable) of the donated property, the advantage and the eligible amount of the gift

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(b) When to ask?

- If the receipt reflects an eligible amount in excess of \$5,000, the legislation imposes a positive obligation on the charity to ask questions
- If the receipt is less than \$5,000, although the legislation does not impose a positive obligation on the charity to make reasonable inquiry, the charity still has to make sure that the amounts shown on the receipt is accurate and the charity would still need to make inquiry regarding the gift for due diligence purposes

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- The reasonable inquiry must be made *before* issuing the receipt, not afterwards
- Reasonable inquiry must be made regardless of the type of donated property, including cash and gifts in kind
- The obligation to make reasonable inquiries applies to gifts made after 2005, i.e. starting January 1, 2006

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(c) What to ask?

- **What is the due diligence required to determine what is reasonable?**
- **Must inquire as to the existence of any circumstances in respect of which the new split-receipting or tax shelter rules might apply to cause the eligible amount to be less than the perceived fair market value of the property or cash donated**

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– Very broad, includes

- **When was the property acquired?**
- **What was the cost of acquisition?**
- **Was there any advantage related to the gift?**
- **What was the value of the advantage?**
- **Does the donor have any obligation in relation to any limited recourse debt in making the gift?**
- **Was the donated property acquired through a donation tax shelter gifting arrangement?**

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- **Was the property acquired in the last 3 years, if so, what is the donor's cost amount?**
- **Was the property acquired in the last 10 years where the donor had an expectation to make a gift at the time when the donor acquired the property, if so, what is the donor's cost amount?**
- **Did any non arm's length person acquired the property in the past 3 or 10 years prior to making the gift?**

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(d) How to comply with the obligation to make reasonable inquiry?

- Understand what is “reasonable”
- Understand the split-receipting rules and what information is required, e.g.
 - A charity has to understand what is a “donation tax shelter gifting arrangement” in order to ask the donor whether the donated property was acquired through such an arrangement

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- A charity has to understand what “arm’s length” means in order to ask the donor whether any non arm’s length person acquired the property in the past 3 or 10 years prior to making the gift
- A charity has to understand what would constitute an “advantage” in order to ask the donor whether there was any advantage related to the gift

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- Develop and use questionnaires and due diligence checklists
- Request written confirmation from the donors (signed? sworn?)
- Develop gift acceptance policies
- Ensure detailed documentation in gift agreements
- Issue donation receipts for each gift received, where possible, rather than issuing one receipt at the end of the year for all gifts received

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- **Ensure staff of the charity is aware of the split-receipting rules, e.g.**
 - **Accounting staff because they receive gifts and issue receipts**
 - **Fundraising and gift planning staff because they contact donors to solicit donations**
 - **Public relation, marketing and publication staff who prepare fundraising and other promotional materials that makes representation to donors**

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(e) What happens if the donor fails to give information to the charity?

- **If a donor fails to provide any of this information, whether or not the charity has made reasonable inquiries, the eligible amount of the receipt will be deemed to be nil, i.e. no credit or deduction in respect of the gift**

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(f) What happens if the Charity fails to ask questions?

- **If a charity fails to make reasonable inquiry, this will likely result in an incorrect receipt and could trigger the imposition of intermediate sanctions**
- **Disgruntled donors could take legal action**
- **The charitable status of the charity that issued the receipt may also be revoked**
- **It remains unclear whether the intermediate sanction/penalty will be applied to a charity if it has made reasonable inquiries but the donor has not provided the required information**

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- If the receipt is less than \$5,000, although the legislation does not impose a positive obligation on the charity to make reasonable inquiry, the charity still has to make sure that the amounts shown on the receipt is accurate, otherwise the charity may still risk facing intermediate sanctions

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4. New Definitions of Charitable Organizations and Public Foundations

- The definitions of charitable organizations and public foundations have been amended by replacing the “contribution” test with a “control” test
- The rationale for amending the definitions is to permit charitable organizations and public foundations to receive large gifts from donors without concern that they may be deemed to be a private foundation

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- The previous “contribution” test meant that where more than 50% of the capital of a charity was contributed from one donor or donor group then the charity would be deemed to be a private foundation subject to more stringent activity and disbursement obligations
- The new “control” test means that while a donor may donate more than 50% of the capital of a charity, the donor or donor group cannot exercise control directly or indirectly in any manner over the charity or be in a non-arm’s length relationship with 50% or more of the directors or trustees of the charity

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- As a result of the introduction of a “control” test, the convoluted business rules in relation to “control” will become applicable as a result of the phrase “controlled directly or indirectly in any manner whatever”
- Charities will now need to be careful that they do not unwittingly become designated as a private foundation instead of either a charitable organization or public foundation

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5. Expanded Basis for Revocation of Registration of Charities

- Proposed amendments will permit the revocation of the charitable status of a charity if it “*makes a disbursement by way of a gift*” which is not a gift made “*in the course of charitable activities carried on by it*” or not a gift “*to a donee that is a qualified donee*” at the time of the gift
- All gifts made by a charity must be made in the course of furthering its charitable activities, transferred in accordance with an authorized agency/joint venture/partnership agreement, or transferred to qualified donees (i.e. generally other registered charities)

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6. Charitable Annuities:

- CRA indicated in Technical News No. 26 in December 2002 that the previous administrative position with regard to charitable annuities has no basis in law and cannot be continued as a consequence of the amendment to subsection 248(33) of the *Income Tax Act*
- Instead, a new administrative policy has been proposed which provides for a charitable receipt based on the difference between the cost of the annuity and the gift, rather than the difference between the anticipated annuity payments and the amount of the gift

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7. Additional Qualified Donee

- **The 2005 amendments propose to expand “qualified donees” to include a municipal or public body performing a function of a government in Canada**
- **This amendment is in response to the Quebec Court of Appeal decision in *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec*, 2001 D.T.C. 5144**

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ASSOCIATION OF FUNDRAISING PROFESSIONALS (AFP)
CONGRESS 2005

Your Extreme Makeover Fundraising Edition
Toronto – December 1, 2005

Recent Changes in the Law That You Need to Know
Update on Privacy Legislation for Charities

By Terrance S. Carter, B.A., LL.B.
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**PERSONAL INFORMATION PROTECTION
AND ELECTRONIC DOCUMENTS ACT
(PIPEDA)**

- On January 1, 2001, PIPEDA applied to organizations involved in the operation of a federal work, undertaking, or business
- On January 1, 2004, PIPEDA applied to all other organizations engaged in the collection, use and disclosure of personal information in relation to commercial activities

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- PIPEDA contains the following important definitions

“Organization”

- Includes an association, partnership, person, corporation, or a trade union

“Personal Information”

- Information about an identifiable individual but does not include the name, title or business address or telephone number of an employee of an organization

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– Only information which can be ascribed to an identifiable individual and does not include general databases which do not allow for the identification of individuals

“Commercial Activity”

– Any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists

– Includes any transfer of personal information for profit

4

• Charities and not-for-profit organizations may be caught by the act if they engage in “commercial activities”

• Examples of “commercial activities”

- Charitable golf tournament
- Sale of books, hymnals, magazines
- Sale of promotional items

5

• There are no exceptions in the application of PIPEDA based upon the size of the organization

- i.e., A small convenience store will be forced to comply with PIPEDA in relation to personal information about clients who rent its movies

• Compliance with PIPEDA will impose onerous, expensive and time consuming administrative requirements on organizations which collect, use or disclose personal information

• Failure to comply will lead to sanctions under PIPEDA

6

APPLICATION OF PIPEDA TO CHARITABLE AND NON-PROFIT ORGANIZATIONS

- On March 31, 2004, the Office of the Privacy Commissioner of Canada (“Privacy Commission”) released a fact sheet which clarifies the application of PIPEDA to charities and non-profits
- The fact sheet states, “The bottom line is that non-profit status does not automatically exempt an organization from the application of the Act”

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- On September 8, 2004, an Ontario Court released *Rodgers v. Calvert*, the first court decision in Canada to analyze the meaning of “commercial activity” under PIPEDA
- The decision states, “there must be something more than a ‘mere exchange of consideration’ to characterize an activity as commercial.”

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- Whether a charitable or not-for-profit organization will be subject to PIPEDA depends on whether the organization engages in the kind of commercial activities as defined by PIPEDA:

“The presence of commercial activity is the most important consideration of determining whether or not an organization is subject to the Act.

Section 2 of the Act defines “commercial activity” as any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.”

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- It is the position of the Privacy Commission that collecting membership fees, organizing club activities, compiling membership lists, mailing out newsletters, and fundraising are not considered commercial activities
- Some clubs, such as many golf clubs and athletic clubs, may be engaged in commercial activities which are subject to the Act
- Each charitable or not-for-profit organization must review its activities to determine whether or not it engages in commercial activities and it is subject to PIPEDA

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ONTARIO PERSONAL HEALTH INFORMATION PROTECTION ACT (PHIPA)

- Came into effect on November 1, 2004
- Governs how personal health information may be collected, used and disclosed by the health care system in Ontario
- Confirms a patient’s existing right to access one’s own personal health information
- Provides redress when privacy rights relating to personal health information are violated

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APPLICATION OF PHIPA

- Applies to health information custodians
- A health information custodian is a listed individual or organization under PHIPA that, as a result of its power or duties, has custody or control of personal health information
- Examples of health information custodians include:
 - Health care practitioners
 - Health care facilities
 - Long-term health care facilities
 - Health care service providers
 - Entities prescribed by regulations

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APPLICATION OF PHIPA TO FUNDRAISING AND MARKETING

- Fundraising is permitted with implied consent, if
 - It is restricted to collection, use or disclosure of individual’s name and mailing address
 - The fundraising relates to a charitable and philanthropic purpose related to the custodian’s functions
 - The custodian has notified the individual of the custodian’s intention to use or disclose the information for fundraising purposes, along with information on how to opt out

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- The individual has not opted out within 60 days of the notice
- All solicitations contain an easy opt-out from further solicitations
- No solicitations contain information about an individual’s health case or state of health
- Marketing is permitted only with express consent

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PHIPA AND PIPEDA

- The collection, use and disclosure of personal information within the commercial sector is regulated by PIPEDA
- Therefore, PIPEDA applies to all private sector organizations including pharmacies, laboratories, and health care providers that carry on “commercial activities”
- However, PIPEDA does not apply to personal information in provinces and territories that have “substantially similar” privacy legislation in place
- PHIPA is expected to be declared “substantially similar” to PIPEDA

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HOW CAN AN ORGANIZATION COMPLY WITH PIPEDA AND PHIPA?

- **The following are some basic recommendations to assist in complying with PIPEDA and PHIPA:**
 - **Appoint a compliance officer or officers who will be responsible for compliance by an organization**
 - **Carry out a privacy audit; review the impact of the privacy principles on a specific organization**

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- **Develop a privacy policy, ensure that individuals are aware of the policies and practices relating to an organization's management of personal information**
- **Revise your contracts; ensure that personal information that is transferred to thirds parties is protected by contractual means**
- **Ensure consent; the type of consent that an organization obtains will depend on the sensitivity of the information**
- **Develop appropriate security measures; both physical and technical security measures**
- **Maintain ongoing compliance; compliance with PIPEDA and PHIPA is not a one time occurrence**

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CONCLUDING COMMENTS

- **Once personal information is obtained, it is a valuable commodity**
- **PIPEDA and PHIPA are designed to ensure that no inappropriate use of such personal information is made**
- **Compliance with PIPEDA and PHIPA is mandatory**
- **Failure to comply will lead to possible sanctions and a loss of credibility**

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- Although a charity or not-for-profit organization may not be subject to PIPEDA or PHIPA, it is still important to adhere to the underlying privacy principles, as donors and members expect charities and not-for-profit organizations to recognize their right to privacy
- For these reasons, it is recommended that charities and not-for-profit organizations implement a privacy policy to provide all the safeguards as standardized in PIPEDA and PHIPA

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Recent Changes in the Law
That You Need to Know
**Audit, Sanctions, Penalties, Appeals
and Undue Benefit Provisions**
By M. Elena Hoffstein, B.A., M.A., LL.B

OVERVIEW

- Background
- Audit Process
- Intermediate Sanctions and Penalties
- Practical Considerations

For more information see article entitled "Regulatory
Regime - New rules seen as consistent with
recommendations of VSI" at
[http://www.canadianfundraiser.com/newsletter/article.as
p?ArticleID=1792](http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=1792)


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BACKGROUND

- New rules concerning the taxation and administration
of charities set out in the 2004 Federal Budget
received Royal Assent on May 13, 2005 and are now
in force:
 - New intermediate sanctions and penalties
 - New and more accessible appeals process
 - CRA's internal appeals process
 - Tax Court of Canada
 - Also new DQ rules and increased transparency

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• Previously, CRA had only one sanction – revocation

• Relatively few audits

• Audits usually reactive, not proactive


• Audits performed by Consulting and Audit Canada, not CRA

• Budget brought increased resources to the Charities Directorate at CRA

4 


AUDIT/APPEALS PROCESS

• CRA is gradually providing some guidance with respect to the process related to the implementation of the new rules which it believes is consistent with the graduated educative approach to compliance recommended by the Voluntary Sector Initiative’s Joint Regulatory Table report (“VSI report”)

5 


• CRA’s Progressive Approach:

1. Education (specific and general)
2. Compliance Agreements
3. Intermediate Sanctions
4. Revocation


6 

• Steps in the Audit/Appeals process:


1. Organization is identified for audit
 - Random selection
 - Legislative criteria/concerns
 - Follow-up on non-compliance or complaints
 - Audit of related organization
2. Office Audit - File is screened by Charities Directorate (entails a review of information on file with CRA and internet) and, if necessary, referred for a field audit

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3. Field Audit
 - On location
 - Single or a team
 - Examination of books and records relating to bank accounts, investments, expenses, contracts, annual reports, board minutes, and any other documents related to the charity's activities
 - Not only an examination of financial affairs, also an examination to determine compliance with legal obligations under the ITA and if operating for charitable purposes


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4. Audit Report is prepared
 - Quite often preliminary findings will be communicated in advance to the charity
 - Key document for the organization to obtain because it details the audit findings and the legal basis of any assessment of sanctions

9 


5. Letter to charity advising of results

- Education – minor non-compliance
- Compliance Agreement (formerly undertaking letter)
 - Corrective action required: agreement outlines non-compliance and remedial actions that the charity must undertake and includes a paragraph that advises the charity that a penalty and/or suspension could apply if the agreement is not upheld
 - Formal document signed and dated by both parties, includes a timeframe to make changes outlined in the agreement

10 


6. Follow-up

- CRA may bring file forward for automatic review to ensure compliance with the agreement
- May be by office or field audit
- If compliant, file likely closed
- If non-compliant, maybe application of interim sanctions

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7. Application of Interim Sanction/Penalty


- Sanction Assessment letter
- Make payment to CRA or an eligible donee (another arm's length charity) and return sign off form to CRA once payment has been made
- Appeal

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8. Revocation

- Still available for any offence at any time and can be applied with intermediate sanctions
- The charitable status of a charity may also be revoked if it obtained its charitable registration on the basis of false, misleading or omitted information


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9. Internal Appeal

- Must file a Notice of Objection with the Assistant Commissioner of CRA's Appeals Branch within 90 days of the date of the decision's mailing
- Notice of Objection should identify the decision objected to, the reasons for the objection and all relevant facts
- Reviewed by an officer in the Appeals Branch of CRA, separate from the Charities Directorate, and the officer will have the authority to maintain, vary or disagree with the original decision
- Notice of objection is required before an appeal may be brought to the Courts


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10. Court


- Tax Court: appeals of intermediate sanctions and penalties
- Federal Court of Appeal: application for judicial review of refusals to register, revocation, annulment, and charitable designation

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INTERMEDIATE SANCTIONS AND PENALTIES


- Purpose of Intermediate Sanctions
The May 2005 amendments establish a more responsive approach to the regulation of charities under the *Income Tax Act* by introducing sanctions that are more appropriate than revocation for relatively minor breaches of the *Income Tax Act*. The sanctions will apply in respect of taxation years that begin after March 22, 2004.

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Offence	First Infraction	Repeated Infraction (Within 5 years)
<ul style="list-style-type: none"> • Late filing or failure to file T3010A • Issuing incomplete receipts • Carrying on prohibited business activity <ul style="list-style-type: none"> • Private foundation - any business • Public foundation or charitable organization - unrelated business • Foundation acquiring control of corporation • Failure to comply with certain verification and enforcement requirements (e.g. keeping proper books and records) 	<ul style="list-style-type: none"> • \$500 penalty • Penalty of 5% of eligible amount stated on receipt • Tax of 5% on gross revenue from the offending activity • 5% tax on dividends paid to charity • Suspension of tax receiving privileges 	<ul style="list-style-type: none"> • \$500 penalty. • May lead to revocation • Penalty of 10% of eligible amount stated on receipt • Tax of 100% on gross revenue from the offending activity and suspension of receipt privileges • 100% tax on dividends paid to charity • Suspension of tax receiving privileges


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Offence	First Infraction	Repeated Infraction (Within 5 years)
<ul style="list-style-type: none"> • Issuing receipts in taxation year if there is no gift or if receipt contains false information • Transfer among charities to avoid disbursements quota (joint and several liability with recipient charity) • Undue personal benefit 	<ul style="list-style-type: none"> • 125% tax on eligible amount of receipts (suspension of tax receiving privilege of total penalties under 188.1(9) exceeds \$25,000 in a taxation year) • Tax of amount transferred and 10% of amount transferred • Penalty of 105% of benefit 	<ul style="list-style-type: none"> • 125% tax on eligible amount of receipts (suspension of tax receiving privilege of total penalties under 188.1(9) exceeds \$25,000 in a taxation year) • Tax of amount transferred and 10% of amount transferred • Penalty of 115% of benefit and suspension of tax receipt privileges

18 


PRACTICAL CONSIDERATIONS

- Perfection is not expected or required
- But need to exercise due diligence

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Audit Day

- The auditor is not your friend (or enemy)
- ITA 231.1 requires “all reasonable assistance”
- Disclose only required information
- Be responsive
- Make auditor comfortable
- Consider requesting written questions
- Document/demonstrate efforts to comply

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Books and Records

- Financial records
- Receipts and supporting documentation
- Records demonstrating charitable nature and that all activities have a charitable purpose
- Keep notes and copies of all documents and correspondence
- Privileged documents (communications related to obtaining legal advice, does not include accountants or consultants)

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Incomplete Receipts

- Income Tax Regulation 3501 requires:
 - Name, Registration # and address of charity
 - Serial # of receipt
 - Date and place of issue
 - Date of receipt of cash gift
 - Date of receipt and description of in-kind gift
 - Value of property received
 - Amount of advantage received by donor
 - CRA name and website URL
- See CRA Website for most recent requirements

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False Receipts

- Comply with new reasonable inquiry requirements
- Avoid one receipt at end of the year if multiple gifts
- Valuation issues: whose is it and can it be relied on – charity should obtain its own independent valuation
- Know your donors: Neither valuator nor charity should turn a blind eye to facts or circumstances which may give rise to concerns

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Undue Benefit

- Gifts other than to qualified donee
- The amount of any “rights, income, property or resources” paid, payable, assigned or otherwise made available to member or trustee of the charity, or a person who contributed more than 50% of the capital of the charity, or a non arms length person

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• **Exceptions**

- Reasonable remuneration or consideration for property acquired or services rendered
- Gift made or benefit conferred in course of charitable activities unless improper eligibility
- Gift to qualified donees Avoid excessive salaries
- Fundraising contractors and fees
- Grants to foreign charities – ensure appropriate agency agreements are in place


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Tax/Penalty

- Sanctioned charity can transfer the amount of tax or penalty to CRA or to another arm's length charity (eligible donee)
- Arm's length – more than 50% of directors deal at arms length with all directors of the sanctioned charity


Revocation

- Still available for any offence and can be applied with intermediate sanctions
- The charitable status of a charity may also be revoked if it obtained its charitable registration status on the basis of false, misleading or omitted information

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Annulment

- Where registration obtained in error or if charity ceases to be a charity because of changes in the law
 - No effect on issued receipts
 - No 100% Part V revocation tax or other penalty will be charged
- Useful tool – permits errors to be rectified without negative public notice which goes with notice of revocation

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Recent Changes in the Law That You Need to Know

Uniform Law Conference of Canada
Proposed New
Uniform Charitable Fundraising Act

Terrance S. Carter, B.A., LL.B.

Note: Materials based on a powerpoint presentation by Kenneth R. Goodman from office of the Public Guardian and Trustee of Ontario©

HISTORY OF UNIFORM LAW CONFERENCE OF CANADA *UNIFORM CHARITABLE FUNDRAISING ACT*

- **Uniform Law Conference of Canada (ULCC)** established to harmonize the law of the provinces and territories of Canada. Delegates are government policy lawyers, private lawyers and law reformers from across Canada
- **In 2003 the Ontario Commissioners** raised the possibility of a uniform Act dealing with charitable fundraising. The ULCC commissioned the preparation of a Report on the advisability of uniform legislation

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- **In 2004 the ULCC** considered the report and recommended the drafting of legislation.
- **In 2005 the ULCC** adopted the *Uniform Charitable Fundraising Act* and recommended it be adopted by the provinces and the territories.
- **A copy of the Act and the two reports** can be found online at: www.ulcc.ca/en/home

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OVERVIEW OF THE ACT (UCFA)

Goal of legislation

- **Curb fundraising abuses**
- **Provide donating public as much information as possible to make informed decisions about charitable giving**
- **Avoid where possible imposing burdensome regulatory regime upon charities**

4

- **Act applies only to charitable fundraising, not to fundraising by all not-for-profit organizations**
- **Act does not apply to solicitations made by a charity to a person who is a member of the charity at the time of solicitation or the spouse or child of a member**
- **Act also does not apply to any gaming activity**

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CONSUMER PROTECTION

- **The Act allows solicitation by telephone, in person at someone's home, or by fax only between the hours of 8 am – 9 pm in the time zone where the person is located**
- **Specified information is to be provided to donors to allow them to make informed decisions**

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- A cooling-off period (3 business days after making the contribution) is provided where the solicitation is made by telephone or in person at someone's home by a fundraising business; or where a fundraising business manages, facilitates or is responsible for the solicitation
- Receipt must be given for any contribution of ten dollars (\$10.00) or more
- All registered charities and fundraising businesses must comply with the standard of practice; the standard of practice is set out as a Regulation to be adopted by each jurisdiction

7

DO NOT CALL LIST

- A registered charity and a licensed fundraising business must use their best efforts to comply with a person's request that they not be solicited on behalf of a specified charity and to have their name removed from any donor list

8

- Donors have the right to apply to court where they allege their contributions were not used for the charitable purpose stated or implied in the solicitation
- Court can order the funds be used for the purpose, or paid to another charity, or if appropriate re-paid to the donor
- Caution: if the court finds that the application was frivolous or vexatious, court can require the applicant to pay the costs

9

REGISTRATION OF CHARITIES

- Only charities registered under the Act can solicit funds from members of the public. The legislation does not apply if anticipated annual amount of solicitations is below an established amount
- A registered charity under the *Income Tax Act* is registered for the purposes of this legislation
- Notwithstanding any exceptions noted in the legislation, no charity can use a fundraising business unless the charity is registered
- Some jurisdictions may not wish to require the registration of charities, therefore there is an option to adopt only part of the Act

10

FUNDRAISING BUSINESSES

- A fundraising business is required to obtain a license in order to solicit funds for a charity
- The Act sets out grounds for refusing a license or renewal, or to impose conditions on a license of a fundraising business
- If a charity wishes to retain the services of a fundraising business, there must be a written fundraising agreement that complies with the terms set out in the legislation

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DONORS LISTS

- Any list compiled by a fundraising business of the names of the contributors remains the property of the charity and is under the charity's exclusive control; a fundraising business can only use the list with the charity's written permission
- Contributions received by a fundraising business are held by the fundraising business in trust for the charity

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RETAIL INCENTIVE DONORS

- **A Retail Incentive Donor is a person who carries on business and offers goods and services for sale and as part of its overall operations, represents that purchasing the goods and services will benefit a charity or charitable purpose**
- **Retail Incentive Donors are not required to be licensed**

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- **Must provide information upon request from the Regulator and must maintain financial records for a six (6) year period**
- **One or more inspectors can be appointed under the Act to act on behalf of the enforcement authority**

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ENFORCEMENT

- **Legislation establishes an enforcement authority with administrative powers to deal with fundraising and fundraising abuses**
- **The enforcement authority can commence an investigation after receiving a complaint or on its own initiative**
- **Inspectors have broad powers to enter and inspect the premises of a charity, fundraising business, or Retail Incentive Donor**
- **Powers includes authority to remove or copy records found on the premises**

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- **A charity or fundraising business is required to maintain records and if the records are maintained in another jurisdiction, they have an obligation to ensure that their records are available for inspection in the enforcement authority's jurisdiction**
- **If entry is refused a warrant can be obtained without notice from a JP**

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- **Enforcement authority can:**
 - freeze funds at any time
 - apply to court for additional powers
 - apply to court for orders dealing with charitable property and those who manage charitable property
- **Legislation sets up a mechanism to suspend, cancel, or impose conditions on a registration, deemed registration, or a license**

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- **If registration or license is suspended, all fundraising must cease immediately**
- **Persons affected by decisions under the legislation can appeal any decision to the Superior Court of Justice**
- **Decisions concerning suspension, cancellation, or conditions attached to a registration or license can only be appealed after the internal appeal mechanism is used**

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PROVINCIAL OFFENCES

- The Act sets up a number of provincial offences for failure to comply with the legislation
- Upon conviction the person is subject to:
 - Fine not less than \$1,000, not greater than \$100,000 or 3 times the amount of money the defendant obtained as a result of the offence
 - Possibility of imprisonment of not more than 2 years
- If there is a conviction any aggrieved person can bring an application for repayment of funds

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DISCLOSURE OF INFORMATION

- The Act allows for disclosure of information obtained under the Act
- This information can be made available to the public to assist them in making informed decisions
- Allows disclosure to enforcement agencies to allow coordinated enforcement and sharing of information

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SUMMARY OF UCFA

There are 5 key elements to the UCFA:

1. Registration and deemed registration of charitable organizations is a condition to charitable fundraising
2. Licensing of fundraising businesses and requirement of a written fundraising agreement
3. Regulation of retail incentive donation schemes

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4. Consumer protection

5. Creation of regulatory body which has investigative and administrative enforcement powers along with the right to apply to court for remedial relief to prosecute breaches of the Act

- To date no province or territory has adopted the legislation

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TIPS FOR ORGANIZATIONS FUNDRAISING

Directors and trustees who wish to avoid complaints about a charity's fundraising practices and the use of charitable property should follow the guidelines set out below:

1. Know the governing documents.
2. Document all deliberations, actions and decisions regarding fundraising campaigns.

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3. Become familiar with fundraising best practices
4. Be knowledgeable about all aspect of any fundraising campaigns
5. Know if the charity has any restricted or special purpose funds
6. Keep full and complete financial records and ensure that special or restricted purpose funds are deposited and accounted for separately

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7. When soliciting special purpose funds, provide an alternate purpose in case the original purpose fails

8. Ensure that special purpose funds that are not immediately needed are invested (*Trustee Act, Charities Accounting Act* and Regulation, Bulletin #7)

9. Be an open and transparent organization

10. Know your duties, responsibilities, and powers as a director or trustee (Bulletin #3)

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CONTACT INFORMATION

- Ministry of the Attorney General
Office of the Public Guardian and Trustee
Charitable Property Program
(416) 326-1963 or toll-free 1-800-366-0335
www.attorneygeneral.jus.gov.on.ca/english/family/pgt
Investigates complaints about charities and protects the public's interest in how charities raise and use their money.

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- Charities Directorate
Canada Revenue Agency
1-800-267-2384
www.cra-arc.gc.ca/tax/charities/menu-e.html
Registers charities and monitors compliance with the *Income Tax Act*. Only charities that are registered with the Charities Directorate are eligible to issue charitable donation tax receipts.

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- **Association of Fundraising Professionals**
(613) 236-0658
www.afpnet.org/tier3_cd.cfm?content_item_id=1984&folder_id=1325
Maintains a Code of Ethical Principles and Standards of Professional Practice for fundraisers.
- **Canadian Association of Gift Planners**
(613) 232-7991 or toll-free 1-888-430-9494
www.cagp-acpdp.org/main_frame.htm
Maintains a Code of Ethics for gift planners that is overseen by an Ombudsman.

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- **Imagine Canada**
(416) 597-2293 or toll-free 1-800-263-1178
www.imaginecanada.ca
Maintains an Ethical Fundraising and Financial Accountability Code for charities.
- **Alcohol and Gaming Commission of Ontario**
(416) 326-8700 or toll-free 1-800-522-2876
www.agco.on.ca/en/h.home.html
Regulates the conduct charitable gaming events and lotteries.

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Recent Changes in the Law That You Need to Know
Returning a Gift – What are the Options?

By: Terrance S. Carter, B.A., LL.B.
& M. Elena Hoffstein, M.A., LL.B. - Fasken Martineau
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OVERVIEW

- Case Study: Radler/Queen's Gift
- Donee Obligations
- Possible Consequences of Returning a Gift
- Options

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CASE STUDY: RADLER/QUEEN'S GIFT

FACTS (from published reports):

- Pledge in May 2000 of \$1 million to Queen's University
- Donors include David Radler, Hollinger, and several Hollinger papers, including Kingston Whig-Standard
- \$915,180 received as of September 22, 2005
- Mr. Radler was a member of University Council

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- **Donation to be used for construction of a new business school called Goodes Hall, which opened in 2002**
- **Name on business office wing of the building and on the university’s “Benefactor Wall”**
- **Hollinger Board report indicates \$168,000 of company money was used for Radler’s part of donation**

4

- **September 21, 2005 – David Radler plead guilty to fraud charges in a U.S. District Court related to his role in a \$32 million fraud at Hollinger International Inc.**
- **Under a plea bargain, he has agreed to cooperate with a continuing criminal probe into Conrad Black and other executives at Hollinger**
- **He faces possibility of 29 months imprisonment and a \$250,000 (U.S.) fine**

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- **September 22, 2005 – Queen’s announced it is stripping Mr. Radler’s name from the wing and returning the donation**
- **“[T]he integrity of this gift to the university has been compromised... the best course of action was to return the money to the individuals and corporations that had given it”**
- **The university chose not to give the money to another charity**

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OTHER EXAMPLES

- **\$1.5 million gift to Mount Sinai from Mark Valentine (broker who pleaded guilty to securities fraud)**
- **\$5 million donation to Hospital for Sick Children from Conrad Black**
- **\$1.5 million gift to Ontario’s Ridley College by Patrick Lett, sanctioned by Ontario Securities Commission – College sued by American investors on the basis that he used money fraudulently obtained to make the donation**

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LEGAL OBLIGATIONS

A. Income Tax Act

1. Donee

- **Registered charities may face revocation of their registered charity status if they fail to spend funds equal to their disbursement quota on carrying on charitable activities or making gifts to qualified donees (subsections 149.1(2), (3) and (4))**

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- **Since returning a gift is not a gift to a qualified donee and is not likely to be considered an expenditure related to carrying on charitable activities, it cannot be considered in determining whether the organization has met its disbursement quota**
- **Such a situation is not one where CRA would likely grant relief pursuant to subsection 149.1(5)**

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- The definition of “charitable organization” requires that a charitable organization devote all of its resources to charitable activities carried on by the organization itself
- CRA statement: “Registered charities can only do two things with the money they receive: use it for their own good works or give it to another charity”

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- The only situation where CRA has published a position and considered the possibility of returning a gift is where the gift has not been completed because the charity could not satisfy the donor’s conditions - implied in the technical interpretation is a requirement that a Court order must be obtained (CRA Technical Interpretation #2005-0051761)

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- When considering the ITA implications of returning a gift, a distinction must be made between a completed gift for which a receipt has been issued and a pledge with respect to a conditional gift.
- Has the gift been completed in accordance with the law, e.g. was the gift subject to a condition precedent or a condition subsequent?
- Donee would likely be able to return the property if the gift was not complete.

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2. Donor

- **Has the gift been completed in accordance with the law, e.g. was the gift subject to a condition precedent or a condition subsequent?**
- **If the gift was not completed at the time the property was returned, CRA takes the position that it can reassess any claim for a donation deduction or credit**

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- **While each situation would be considered on a case-by-case basis, CRA has indicated that if the gift was completed it would not be entitled to reassess the donor's claim for a deduction or credit for the gift on the basis that the return of the funds would not constitute income to the donor**
- **Also, normal reassessment limitation period would apply (3 years)**

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B. Trust Law Obligations

1. Failure of the original gift?

- **There is no principle in trust law whereby a special purpose trust will fail for reasons such as those cited by the institutions.**
- **Usually, such an arrangement will come to an end if:**
 - **Restricted term becomes impossible or impractical**
 - **Limited interest in a determinable gift comes to an end**

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– **Condition precedent or subsequent is unfulfilled**

- **If condition precedent not fulfilled then gift fails**
- **If condition subsequent not fulfilled then will revert back to donor – does not appear to be the case here.**

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2. Obligations as Trustee

- **Duties of trustees / directors of charity are similar to those of ordinary trustee**
- **Directors /trustees must carry out charitable purpose in accordance with charitable objects and applicable restrictions**
- **Directors/trustees must ensure that gifts that are expended in accordance with the donor’s restrictions**

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- **Duty to secure effective use by seeking a court order to impose cy-près or administrative scheme**
- **Directors/trustees must protect and conserve trust property**
- **Must protect funds from the seizure of creditors**

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3. Breach of Trust

Examples include:

- Diverting funds intended for one charitable program for use in another charitable program
- Withholding a fund and not applying it to the charitable purpose intended by donor
- Encroaching upon the capital of endowment fund intended to be held in perpetuity
- Unilaterally attempting to alter terms of trust deed
- Using surplus funds for a different charitable purpose without court authorization
- Altering donor restriction without court approval

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- **Returning a completed gift to the donor or donors in the absence of a specific reversionary clause or gift-over would likely result in breach of trust**
- **May also result in breach of fiduciary obligations and breach of contract**

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POSSIBLE CONSEQUENCES

- **Personal liability for breach of trust**
 - **If in breach of special purpose trust for not having complied with terms then directors/trustees could be found jointly and severally liable**
 - **If found in breach of trust must compensate trust for the full amount of any loss suffered as a result of the failure to comply**

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- Remedies under the Charities Accounting Act:
 - PGT can require charity to submit accounts for formal passing s.3
 - PGT can obtain a court order to enforce directions established by donor s.4(d)
 - Member of public can complain to judge of the Ontario court who can order that the PGT conduct an inquiry. S.6(1)
 - Court can make order as “deems in the circumstances to be just” s.10

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- Income Tax Act
 - Donor may be reassessed to disallow credit/deduction in limited circumstances (would a windfall non-taxable gain be appropriate in these circumstances?)
 - Charity may face revocation

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OPTIONS

- Gift Agreement
 - Many large gift agreements contain default provisions which enable the donor to terminate unilaterally upon the happening of certain events
 - Consideration should be given to ensuring that a similar clause be included which provides the donee with the power to terminate unilaterally upon the happening of an event such as a criminal conviction, particularly if the agreement includes naming rights

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– Upon the happening of a material default, including situations such as the Radler conviction, provision could be made for a gift-over to another registered charity of qualified donee (such a provision is usually found in these agreements but always solely at the donor’s election)

– Are such agreements enforceable?

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• **Payment into Court**

– In the absence of specific provisions in a gift agreement, the money could be paid into Court and the donee could seek its guidance under Section 60 of the Trustee’s Act.

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• **Gift Acceptance Policy**

– include provisions dealing with such situations

• **Naming Policy**

– include strict criteria and requirements

– require removal of name in certain circumstances at the unilateral option of the institution

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