




Healthcare Philanthropy: Checkup 2010
Toronto – June 10, 2010

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Healthcare Philanthropy: Checkup 2010
Charity Law Update: The Year in Review

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A. Introduction

- This presentation provides a brief overview of recent developments in charity law over the past year, including:
 - Federal and Provincial Legislation Affecting Charities and NPOs
 - New Canada Revenue Agency ("CRA") Guidance, Commentaries and Other Publications
 - Recent Developments, Technical Interpretations and Decisions under the *Income Tax Act* ("ITA")

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B. Current Overview Of The Charitable Sector

- As of 2007 there were over 83,000 registered charities in Canada, over 85,000 in 2009
- Over 81,000 not-for-profit organizations
- In 2006, charities spent \$111.8 billion in carrying out their charitable programs
- Over 2 million full time workers or 7.29% of Canadian working population
- 40% of charities fell under the head of advancement of religion for their charitable purposes

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Current Overview (Con't)

- In 2007, 84% of the population made a financial donation to a charitable or non-profit organization
- Total amount donated in 2004 was \$8.9 billion, which increased by 12% in 2007 to \$10 billion, although expected to decrease by about 10% in 2008
- Religious organizations accounted for 46% of the total dollar value of donations
- In 2007, 46% of the population volunteered 2.1 billion volunteer hours
- 77% of Canadians not only trust charities, but also the leaders of charities

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C. Legislative Developments Affecting Charities

1. Bill C-10 Proposed amendments to ITA affecting charities (split receipting)
 - Bill C-10 amended and consolidated earlier proposed amendments.
 - Sept 7, 2008, Bill C-10 died on Order Paper as a result of dissolution of Parliament
 - CRA applying provisions as if enacted
 - Dept of Finance indicated that will likely re-introduce sometime in the future.

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Canada Not-for-profit Corporations Act

- On June 23, 2009, Bill C-4, the *Canada Not-for-profit Corporations Act* received its third reading in the Senate and received Royal Assent on the same day
- Intended to replace Parts II and III of the current *Canada Corporations Act*, a statute first enacted in 1917 and substantively unchanged since that time, which Parts govern federal non-share capital corporations

Canada Not-for-profit Corporations Act

- Provisions of the new Act will only come into force on a day or days still to be fixed by order of the Governor in Council
- The order is not expected until the regulations proposed by Industry Canada have been approved
- The new Act is similar in substance to Bill C-21 from 2004, with certain exceptions
- Every federal corporation under Part II of the *Canada Corporations Act* will need to continue under the new Act within 3 years of the new Act coming into force

Ontario Corporate Updates

- Ontario Corporate Update
- In the spring of 2007, the Ontario Ministry of Government and Consumer Services announced that it was undertaking a project to review and revise the *Ontario Corporations Act* (the "OCA")
 - OCA provides the statutory framework governing the creation, governance, and dissolution of non-share capital corporations, including charitable corporations in Ontario

Ontario Corporate Updates (Con't)

- Many of its provisions are very outdated and are no longer relevant to the not-for-profit sector in Ontario
- On May 17, 2010, Bill 65, The *Ontario Not-for-profit Corporations Act* ("ONCA" or the "Bill"), was debated at Second Reading. (First reading was on May 12, 2010). Will likely be referred to Standing Committee for review in near future. OBA and others expect to have opportunity to consult re amendments
- Press release issued May 12, 2010 by Minister of Consumer Affairs indicated Bill 65 will provide Ontario's 46,000 NFPs with a "modern legal framework to enhance corporate governance and accountability, simplify the incorporation process, give more rights to members and better protect directors and officers from personal liability

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Highlights Of Bill 65

- Incorporation as of right
- Capacity, rights and powers of a natural person
- Minimum of 3 directors at least 2/3 must be members; ex officio directors permitted; objective standard of care
- Concept similar to soliciting corporation in *Federal Act* and similarly provides non-voting members with voting rights in certain circumstances
- For existing non share capital corporations incorporated in Ontario, once the Act is enacted there will be a period of up to 5 years to continue under new Act

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Good Government Act, 2009

On December 15, 2009, the *Good Government Act, 2009* ("the Act") received Royal Assent.

- The Act contains significant reforms for the charitable sector in the province of Ontario
 - a) Repeal of the *Charitable Gifts Act*, which limited the ability of charities in Ontario to own more than a 10% interest in a business or undertake business activities

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Good Government Act, 2009 (Con't)

- the Act amends *Charities Accounting Act*
- Expands power of the Ontario Public Guardian and Trustee ("OPGT") to require documents and make inquiries where an executor or trustee holds a substantial interest in an entity (i.e. more than 20%)
- New section 8 provides that a person who holds an interest in real or personal property for a charitable purpose must use the property for the charitable purpose (old section 8 permitted OPGT to vest real property in its name if the property had not been used for charitable purposes within 3 years)

Good Government Act, 2009 (Con't)

- b) *Accumulations Act* amended to the effect that the common law and statutory rules regarding accumulations do not and are deemed to have never applied to a charitable purpose trust
- c) *Religious Organizations' Lands Act* amended so that the 40 year term limit for which a religious organization may lease land is repealed

PGT Advice On Fundraising

- The PGT released a bulletin in July 2009 entitled "Charitable Fundraising: Tips for Directors and Trustees" available at <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/chartbullet/bulletin-8.asp>
- Provides helpful information to directors and trustees of charities in Ontario on conducting charitable fundraising
- Reminds charities that they cannot conduct fundraising activities as a charitable purpose in their own right
- Needs to be read in conjunction with CRA Guidance on Fundraising

Proposed Consumer Product Safety Act

- Bill C-6, the *Canada Consumer Product Safety Act*, passed by the House of Commons on June 12, 2009 and is currently being debated by the Senate
- The bill has the objective of protecting the public by addressing dangers to human health or safety that are posed by consumer products
- Intends to establish a regulatory "trace-back" requirement for anyone who sells or gives away a consumer product to document certain aspects of the transaction

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Proposed Consumer Product Safety Act (Con't)

- Record-keeping requirements include:
 - Documenting the identity and address of the person from whom they obtained the product
 - Location where and the period during which they sold the product
- There is no exemption for charities or not-for-profit organizations
- Requirements are raising concerns within the charitable sector regarding the ability of charities, such as those who run thrift stores or other types of donation programs, to comply
- Not yet law, so still possible for changes to the Bill

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Disbursement Quota Reform

- Disbursement Quota Reform
- DQ requirements overly complex and arbitrary, creating difficulties, especially for smaller charities that depend mainly on donor funds as opposed to grants from the government
- Examples of problems with the DQ include difficult terminology, such as "enduring property", "specified property" and "capital gains pool", which do not have clear definitions or application

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Disbursement Quota Reform (Con't)

- The National Charity and Not-For-Profit Law Section of the Canadian Bar Association submitted a Concept Paper on July 20, 2009 to the Department of Finance and CRA concerning reform of the disbursement quota ("DQ")
- The Concept Paper recommended alternative mechanisms to the current DQ regime
- Concept Paper supported by Imagine Canada, CAGP and other organizations in the charitable sector
- Federal Budget 2010 proposed dramatic changes to DQ rules and will have application for fiscal periods ending on and after March 4, 2010
- Other reform efforts: CRA Fundraising Guidance released June 11, 2009-- to regulate fundraising costs and fundraising practices

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Proposed Wage Restraint Legislation - Federal

- Bill C-470 Private Members' Bill introduced by Albina Guarnieri, MP Mississauga East. Would give CRA the discretion to revoke charitable status of a charity when it pays a single executive or employee annual compensation over \$250,000. Would also allow CRA to publish name, job title and annual compensation of each charity's five highest paid employees and executives. If passed, to be effective 2011 onward.
- No consultation with public, charitable sector as this was a private bill

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Proposed Wage Restraint Legislation - Federal (Con't)

- Generally not a problem for charities as directors are usually unpaid volunteers. They are also fiduciaries and have responsibility to ensure charity's funds expended reasonably including the oversight of salaries paid to employees. Proposed consultation cap raises problems for certain charities that may need to break existing employment contracts, split responsibilities of existing jobs into several jobs to attract qualified people?
- With respect to disclosure of salaries, transparency exists in T3010B Charity information Return which requires charities to indicate pay range of 10 highest paid employees

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Proposed Wage Restraint Legislation (Con't)

- Public Sector Compensation Restraint to Protect Public Services Act 2010 (Wage Restraint Legislation) has passed second reading in the legislature.
- Would apply to every employer that received at least \$1,000,000 funding from Ontario Govt in 2009 and DN carry on activities for purpose of gain or profit to members/shareholders, Universities and Colleges, Crown, Hospitals, School Boards, Hydro One, Ontario Power Generation and boards of health under Health Protection and Promotion Act.

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Proposed Wage Restraint Legislation (Con't)

- DNA to municipalities and other organizations subject to municipal oversight or employees who bargain collectively
- Part of larger piece of legislation (Creating the Foundation for Jobs and Growth Act, 2010) which will implement the 2010 Budget. It proposes the following (subject to certain exceptions)
 - a) freeze compensation and benefits from March 24, 2010 to March 31, 2012
 - b) prescribe parameters and restrictions re new hires, promotions, contract renewals
 - c) employees subject to legislation to file reports to demonstrate compliance
 - d) create Public Sector Compensation Restraint Board
- Not enacted and subject to change.

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Land Transfer Tax

- Ontario Budget 2010 proposes regulatory amendments to *Ontario Land Transfer Tax Act* to exempt certain transfers of land to registered charities from provincial land transfer tax.
- Will facilitate reorganizations of charities
- Transfers of land after March 25, 2010 from trustees to a non share capital corporation or between two no share capital corporations will be eligible for exemption if
 - The no share capital corporation will be continuing the same charitable purposes for the same members
- no consideration is paid other than the assumption of any existing liabilities registered on the land

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Land Transfer Tax (Con't)

- March 26, 2010 Ontario Minister of Revenue released policy stating that LTT must be paid until new regulation is filed
- City of Toronto municipal land transfer tax provides that no tax will be exigible if LTT not exigible
- Once LTT regulation is filed, qualifying transfers of land located in Toronto will also be exempt from municipal land transfer tax.

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D. CRA Guidance, Commentaries And Other Publications

- New T2050 Application Form for Charitable Status
- In December 2008, CRA released a revised Form T2050, application for charitable status plus revised guide T4063 re how to complete T2050
- Form T2050 requires more detailed information to be provided in order to allow CRA to make a determination in light of various policies put in place since last version of T2050 in 2001

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T2050

- Some of the more detailed areas of inquiry include:
- Questions on fundraising activities associated costs
- Questions on source of revenue from major donors
- Detailed questions on activities outside of Canada
- Questions on revenue from sources outside of Canada
- Questions on ownership of more than 2% of a class of shares

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T3010B

- New T3010B Annual Information Return
- On February 20, 2009, the CRA released the new form T3010B, which is the new annual information return for registered charities
- New T3010B is to be used when filing annual information returns for fiscal periods ending on or after January 1, 2009
- The new T3010B is now comprised of a simple core form with topic-related schedules
 - T3010B (09), Registered Charity Information Return
 - T1235 (09), Directors/Trustees and Like Officials Worksheet
 - T1236 (09), Qualified Donees Worksheet/Amounts Provided to Other Organizations

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T3010B (Con't)

- New form will generally benefit smaller charities (income under \$100,000), the form is also designed to require additional information
- Concerns about having to name donors making gifts in excess of \$10,000 who are not residents of Canada, subject to certain exceptions
- Concerns about public disclosure of third party intermediaries outside of Canada that receive resources of the charity

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T3010B (Con't)

- The T3010B is made public on the CRA website and could be used by CRA on future audits and by the media and/or watchdog organizations
- It is therefore important that the T3010B is reviewed and approved by the board of the charity along with the audited financial statement of the charity
- It may be necessary to also include a legal review of the T3010B

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Further Changes to T3010B

- March 31, 2010: As result of 2010 Federal budget proposals to repeal DQ and enact other changes to simplify DQ rules, CRA released a Message from Director General advising that CRA will revise T3010B but in short term will include instruction page
- April 27, 2010 Instruction sheet released
- <http://www.cra-arc.gc.ca/gncy/bdgt/2010/chrt-eng.html>

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Checklist On Avoiding Terrorist Abuse

- On April 16, 2009, CRA released the Checklist on Avoiding Terrorist Abuse intended to help registered charities focus on areas that might expose them to the risk of being abused by terrorists or other criminals
- The House of Commons Subcommittee on the Review of the Anti-Terrorism Act recommended that CRA consult with the charitable sector to develop "made in Canada" best practice guidelines that incorporates general policies and checklists that could be administered by applicants and registered charities in carrying out their due diligence assessments

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Checklist On Avoiding Terrorist Abuse (Con't)

- The checklist is comprised of a number of questions to ask and provides a number of links to websites and international guidelines for more information
- Concerns about the usefulness of the checklist:
 - Not sufficient context for charities
 - Potential undue sense of simplicity
 - Continued delegation to foreign governments and quasi-governmental bodies
 - Excessive nature of recommendations

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Combating Terrorism Act

- Bill C-17 Combating Terrorism Act received first reading in House of Commons April 23, 2010
- Bill C-17 proposes to reintroduce Criminal Code provisions relating to investigative hearings and recognizance which first came into force with Bill C-36 Anti Terrorism Act Dec 2001
- Act set to expire on March 1, 2007 and was not extended
- Bill C-17 also contains sunset provision: 15th sitting day of Parliament after 5th anniversary of coming into force of the Bill unless Parliament extends

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Combating Terrorism Act (Cont'd)

- Investigative hearings, ability to compel individuals to attend before judge for hearing if person may have information about a terrorism offence
- Preventative detention: if belief terrorist act will be carried out
- Introduction of Bill shows trend by Federal Govt to revert to more draconian provisions originally contained in Anti-Terrorism Act

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Guidance On Sports And Charitable Registration

- Guidance on Sports and Charitable Registration
- On April 30, 2009, CRA released the final form of guidance on sports to clarify the ways in which organizations carrying out activities that include sport can potentially qualify for charitable registration
- Although the promotion of sport is not recognized as charitable, there are circumstances in which sports activities can be used to further a charitable purpose

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Guidance On Sports And Charitable Registration (Con't)

- For an organization to be registered, the sport activities an organization pursues should:
 - Relate to and support its charitable purpose(s) and be a reasonable way to do so, such as:
 - Promotion of health
 - Advancement of education
 - Advancement of religion
 - Relieving conditions associated with disabilities
 - Be incidental in nature
- Whether or not a sports activity will be acceptable will depend on the facts of each case and the charitable purpose to be achieved

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Guidance On The Upholding Of Human Rights And Charitable Registration

- Final Guidance on the Upholding of Human Rights and Charitable Registration
- On May 17, 2010, CRA released a final guidance for consultation regarding human rights charities ("Guidance")
- According to the Guidance, "protecting human rights" refers to activities that seek to encourage, support, and uphold human rights that have been secured by law, internationally or domestically, such as the Canadian *Charter of Rights and Freedoms*, or U.N. Conventions
- It does not include advocating for the establishment of new legal rights

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Guidance On The Upholding Of Human Rights And Charitable Registration

- The Guidance indicates that CRA recognizes that the protection of human rights can further all four heads of charity
- Human rights charities often work outside existing legal and political structures but must ensure that their purposes are not political in nature, which is not charitable, e.g. to investigate and report violations of specified human rights instruments is not political in nature
- However, it would be unacceptable to focus on one particular country and pressure its legislature or government to sign an international human rights convention

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Guidance On The Upholding Of Human Rights And Charitable Registration (Con't)

- Final Guidance adds additional information with respect to political activities and anti-terrorism issues as well as helpful Appendix containing questions and answers for both applicants and registered charities that wish to pursue charitable purposes that uphold human rights or those already involved in such activities

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Draft Guidance On Charities Operating Outside Of Canada

- Draft Guidance on Charities Operating Outside Canada
- On June 30, 2009, CRA released its much anticipated draft consultation paper entitled Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities ("Proposed Guidance")

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Recent Technical Interpretations And Decisions

- Commercial Activities and Other Issues Involving Non-Profit Organizations
 - On November 5, 2009, CRA released a technical interpretation clarifying its position on various issues involving NPOs, such as whether NPOs can earn a profit or engage in commercial activities, and whether CRA maintains a list of NPOs
 - CRA stated that the Income Tax Act does not prohibit an NPO from engaging in certain types of activities, including commercial activities, and therefore it is permissible for NPOs to compete against taxable entities

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NPO's

- CRA's view is that an NPO can earn a profit, provided that it is unanticipated and incidental to carrying out the NPO's exclusively not-for-profit purposes
- CRA also expressed its view that incorporation under federal or provincial not-for-profit corporate legislation does not necessarily mean that such corporation would qualify to be an NPO under the ITA, because the requirements under the corporate legislation and the ITA are different
- CRA indicated that it does not maintain a list of NPOs, since they are not required to register with CRA

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NPO's (Con't)

- Payments to Members on Winding Up of Non-Profit Organization
- CRA issued two technical interpretations, dated August 14, 2009 and August 25, 2009, clarifying how amounts distributed to members of a NPO upon winding up are to be treated for income tax purposes
- The treatment of the amount received by the member for income tax purposes differs depending on whether the NPO is organized as a share capital corporation, non-share capital corporation or an unincorporated association

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NPO's (Con't)

- If the NPO is a share capital corporation, the amount received by the member in excess of paid-up capital would be deemed to be a dividend
- If the NPO is a non-share capital corporation or if it is an unincorporated entity, the membership interest would likely be a capital property to the member and therefore the disposition of the member's interest would result in either a capital gain or loss depending on the adjusted cost base of the interest

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NPO's (Con't)

- When determining a member's adjusted cost base, only the amount initially paid by a member would be included. Any yearly fees paid by the members would be viewed as fees for services
- Where "members" of a non-share capital corporation have rights and obligations similar to "shareholders" as defined in subsection 248(1) of the *Income Tax Act*, the members may be considered to have received a dividend upon winding up even though the NPO does not have shares

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Cases - Use Of Cottage

Donating the Temporary Use of a Cottage is Not a Gift

- In a technical interpretation dated November 12, 2008, CRA confirmed its position that the gratuitous loan of property, including money or a cottage, is not a gift for purposes of sections 110.1 and 118.1 of the ITA since a loan does not constitute a transfer of property
- However, it is possible for a charity to pay rent or interest on a loan of property and later accept the return of all or a portion of the payment as a gift, provided the return of the funds is voluntary

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Cases - Cemetery Plots

Split Receipting for Cemetery Plots

- CRA issued a technical interpretation dated November 24, 2008, which deals with the issuance of charitable donation receipts in a situation where a member-donor is entitled to pay less for a cemetery plot than a non-member
- CRA stated that in applying the proposed split-receipting amendments, the "eligible amount" of the gift will be reduced by the value of the "advantage" provided to the members, which would include the right to purchase a cemetery plot at a discount

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Cases - Operating A Hostel

Federal Court of Appeal Decides Operating a Hostel is Not Charitable

- In a December 2008 decision, the Federal Court of Appeal upheld the Minister of National Revenue's (the "Minister") decision to revoke the charitable status of Hostelling International Canada – Ontario East Region
- The Court held that simply providing an opportunity for people to educate themselves by making available tourist accommodation is not sufficient for the activity to be charitable

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Cases - Gift Of Capital Property By Will

Gift of Capital Property by Will

- In a technical interpretation dated February 4, 2009, regarding gifts of capital property by will, CRA confirmed that proposed subsections 118.1(5.4) and (6) contained in Bill C-10 will override the application of paragraph 70(5)(a) of the ITA
- As such, where a Canadian resident dies making a bequest of a capital property by his will to a registered charity and the FMV of the capital property immediately before the individual's death exceeds its ACB, the legal representative can designate an amount between the FMV and ACB which will be deemed to be the individual's disposition of property

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Cases - CRA Withdraws Compliance Agreement

- *Christ Apostolic Church of God Mission Intl. v. The Queen* – Federal Court of Appeal, (May 30, 2009):
- Church appealed the decision to revoke its charitable status
- Church's principle argument was that a "compliance agreement" it signed during an audit could not be unilaterally withdrawn by the Minister
- The court held that it was open to the Minister to conclude that the church's non-compliance could not have been remedied by promise made by the church in the agreement
- Appears that compliance agreements are therefore not binding on CRA

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Cases - Leveraged Donation

- The issue in *Maréchaux v. The Queen*, 2009 TCC 587 (November 2009) was whether a charitable donation tax credit was available in respect of a payment made under an arrangement known as the 2001 Donation Program for Medical Science and Technology (the "Program")
- The participants in the program each donated a minimum of \$100,000 to a registered charity, the majority of the donation being financed by a non-interest bearing 20-year loan

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Cases - Leveraged Donation (Con't)

- The appellant contributed \$30K of his own funds and received an \$80K interest free loan, \$70K of which went to the charity for a total of 100K, \$10K went to the lender for fees, security deposit and insurance
- The Tax Court of Canada ruled that the \$100K payment was not eligible for a tax credit because it was not a gift to the charity
- The interest-free loan, coupled with favourable repayment terms, constituted a substantial benefit received by the appellant in return for his donation
- Note that the donation was made before the split-receipting amendments were proposed

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Cases - *Lockie v. The Queen*

- TCC considered appropriate determination of FM of certain items donated pursuant to a donation arrangement (bulk purchase of gel pens, toothbrushes and school packs) bought for about \$2,800 and for which a receipt was issued for \$15,000
- Court held that taxpayer motivated by desire to obtain a return on investment as result of the donation. Gift had to be valid. However value of gift limited to price paid for the items.
- Another example of why charities and donors should be highly cautious before participating in any donation tax shelter arrangements. CRA auditing tax shelter involvement aggressively to deny tax credits and revoke charities which participate.

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Cases - Israelite Church Of Christ Canada v. The Queen

- Deals with correct procedure when responding to a notice of intention to revoke charitable registration. In case in question charity responded by immediately commencing an appeal to the Federal Court of Appeal.
- Court held that charity has to file objection with Appeals Directorate of CRA within 90 days of receiving the notice of intention, CRA has to confirm its intention to revoke or fail to respond to objection after 90 days and therefore Charity could not appeal to FCA.

Cases - Revocations Of Charities Participating In Tax Shelters Continue

- Henvey Inlet First Nation Community Support Organization. Issued over \$44 Million in donation receipts and only retained 1% for its charitable purposes
- Destiny Health and Wellness Foundation issued \$42 Million in receipts and only retained \$840,000
- See also Orion Foundation and Liberty Wellness Initiative.
- All four charities revoked as they were operating for non charitable purpose of promoting a tax shelter arrangement.

Cases - Innovative Gifting Inc. (Igi) v. House Of Good Shepherd Et Al.

In matters concerning charities, Courts will intervene to protect public interest. In this case a fundraiser (IGI) charged exorbitant commissions and misrepresented legality of fundraising activities. Arrangement was if shares and cash gifted, 40% commission to be paid but if cash gifted then commission would be 90%. Charities believed shares would always be part of the gift. Shares were part of the gift but not in all cases and when shares were gifted they turned out to be worthless. Charities got suspicious and refused to pay all the commissions and IGI sued for the commission and charities countersued. Court ordered fundraiser to pay back commissions it received from four charities.

F. Newsletter - Connection

- April 2010 CRA released Charities Connection No.1 which is a new CRA newsletter that will be published more frequently and will replace Registered Charities Newsletter. Useful discussion re operation within scope of a charity's objects.
- Where charity carrying out new activities, suggestion is charity confirm the activity is charitable and falls within scope of objects. Suggests discussing new activities with CRA in advance of carrying them out

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Questions?

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