
CANADIAN ASSOCIATION OF GIFT PLANNERS

18TH Annual National CAGP Conference

Toronto – April 14, 2011

**ESSENTIAL CHARITY LAW UPDATE:
What Every Gift Planner Needs to Know**
(current to April 7, 2011)

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent

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A. INTRODUCTION

- Selected highlights of the following:
 - Federal Budget 2011
 - Other recent legislative initiatives under the *Income Tax Act* ("ITA")
 - Recent publications from Canada Revenue Agency ("CRA")
 - Changes to corporate law
 - Anti-Terrorism law update
 - Provincial legislative update
 - Recent case law affecting charities
- For more details see Bulletins and Newsletters available at www.charitylaw.ca, www.carters.ca and www.antiterrorismlaw.ca

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B. FEDERAL BUDGET 2011 (see attached Bulletin)

- On March 22, 2011, the Federal Government released 2011 Budget (the "Budget")
- Due to the recent dissolution of Parliament, it will be important to carefully monitor its impact on the proposed provisions detailed in the Budget
- Since most of the proposals reflect technical amendments to the *Income Tax Act* ("ITA") which likely originated from within CRA or the Department of Finance, there is a good chance that most, if not all of the proposals, will reappear in a future federal budget or as part of a separate bill containing technical amendments to the ITA
- Not clear, though, on what date the Budget proposals may come into effect

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1. New Regulatory Regime For Qualified Donees

- “Qualified donees” is a term defined in the ITA to include various types of entities that may issue official donation receipts for gifts and receive gifts from registered charities
- The Budget proposes to extend to the following types of qualified donees certain regulatory requirements in the interest of fairness that currently apply only to registered charities
 - Registered Canadian amateur athletic associations (“RCAAs”)
 - Municipalities in Canada

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- Municipal and public bodies performing a function of government in Canada
- Housing corporations in Canada constituted exclusively to provide low-cost housing for the aged
- Prescribed universities outside of Canada, the student body of which ordinarily includes students from Canada
- Certain other charitable organizations outside of Canada that have received a gift from Her Majesty in right of Canada in the current or preceding year

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- The remaining qualified donees that are not impacted by the new rules include the following:
 - The Government of Canada
 - The provincial and territorial governments in Canada
 - The United Nations and its agencies
- Registered national arts service organizations are deemed to be “registered charities” and are therefore currently subject to the same requirements that apply to registered charities
- The effective date of these proposals is to be the later of January 1, 2012 and the date of Royal Assent for the enacting legislation

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- The requirements that are proposed to apply to certain qualified donees listed above on the previous slides are:
 - Qualified donees will be identified in a publicly available list maintained by CRA (The July 16, 2010 Technical Amendments already proposed this for RCAAAs)
 - If a qualified donee does not issue donation receipts in accordance with the ITA and its regulations, it may be subject to suspension of receiving privileges or revocation of qualified donee status
 - Monetary penalties associated with improper issuance of receipts that currently apply to registered charities will be extended to RCAAAs

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- Qualified donees will be required to maintain proper books and records and provide access to those books and records to CRA when requested
 - If a qualified donee fails to do so, CRA may suspend its receiving privileges or revoke its qualified donee status
- Monetary penalties associated with failing to file an information return that apply to registered charities will be extended to RCAAAs

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- The Budget proposes to extend the following additional regulatory requirements (which currently apply to registered charities) to RCAAAs:
 - The Budget proposes that RCAAAs be required to have the promotion of amateur athletics in Canada on a nation-wide basis as their *exclusive* purpose and *exclusive* function, rather than their primary purpose and primary function
 - The Budget proposes that if an RCAA provides an undue benefit to any person (e.g. excessive compensation to staff, professional fundraiser or any individual or company with whom it does business), it may be subject to monetary penalties, suspension of its receiving privileges, or revocation

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- The Budget proposes to authorize CRA to make available to the public certain information and documents in respect of RCAAAs, in the same manner as applies to registered charities, e.g. governing documents, annual information returns, applications for registration and the names of directors

2. New Governance Regime For Registered Charities And RCAAAs

- The Budget identifies a CRA concern that there is a recurring problem with applications for charitable status being submitted by individuals who have been involved with other charities and RCAAAs that have had their status revoked for serious non-compliance

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- Currently CRA does not have the ability to refuse to register or revoke the status of a registered charity or RCAA based upon any of these grounds
- The Budget gives CRA the discretion to refuse or to revoke the registration of a charity or a RCAA or to suspend its authority to issue official donation receipts, if a member of the board of directors, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity or RCAA:
 - Has been found guilty of a criminal offence in Canada or similar offence outside of Canada relating to financial dishonesty (including tax evasion, theft or fraud), or any other criminal offence that is relevant to the operation of the organization, for which he or she has not received a pardon ("relevant criminal offence")

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- Has been found guilty of an offence in Canada within the past five years (other than a "relevant criminal offence), or similar offence committed outside Canada within the past five years relating to financial dishonesty (including offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation) or any other offence that is relevant to the operation of the charity or RCAA ("relevant offence")

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- Has been a member of the board of directors, a trustee, officer or equivalent official, or an individual who otherwise controlled or managed the operation of a charity or RCAA during a period in which the organization engaged in serious non-compliance for which its registration has been revoked within the past five years
- Has been at any time a promoter of a gifting arrangement or other tax shelter in which a charity or RCAA participated and the registration the charity or RCAA has been revoked within the past five years for reasons that included or were related to its participation

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- All of these individuals are described in the Budget as "ineligible individuals"
- These measures are to be effective on the later date of January 1, 2012 and Royal Assent of the enacting legislation
- The Budget states that CRA will look at the "particular circumstances" of a charity or RCAA but does not state what those circumstances are
- The budget does state that CRA will take into account whether "appropriate safeguards have been instituted to address any potential concerns"
 - However, there is no explanation of what these safeguards might be

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- The practical question that arises is what sort of due diligence will a charity or a RCAA be required to undertake to ensure that an "ineligible individual" does not become involved or continue to be involved as a board member, trustee, officer or equivalent official, or one who controls or manages the organization
- Although the Budget states that a charity or a RCAA will not be required to conduct background checks, the issue that charities will need to address is whether a questionnaire is necessary and if so, how frequent is a questionnaire to be used and how broad should the questions be?

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3. Recovery Of Tax Assistance For Returned Gifts

- The Budget provides clarification with respect to what happens when a charity returns a donation as it relates to compliance with the ITA
- The Budget permits CRA to reassess a taxpayer outside the normal reassessment period and disallow a taxpayer's claim for a credit or deduction in any situation where the gifted property is returned to a donor in order to ensure "that tax assistance is not improperly retained"
- Where a qualified donee had issued an official donation receipt in respect of a gift of property and subsequently returns that property to the donor, if the value of that returned property is greater than \$50, the qualified donee must issue a revised donation receipt with prescribed information and file a copy with CRA

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- With respect to the return of donated property, the Budget provides rules which address various scenarios that could occur on the return of a gift
 - If the transfer of the original property was a gift, the person is deemed not to have made a gift of the original property nor to have disposed of the property at the time the gift was made
 - If the transfer of the original property was not a gift, for greater certainty, the person is considered not to have disposed of the original property at the time that it was provided to the qualified donee
 - If the returned property is identical to the original property, the returned property is deemed to be the original property

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- If the returned property is not the same property or identical property, the person is deemed to have disposed of the original property at the time that the person acquires the returned property
- These measures are to apply in respect of a gift of property returned on or after Budget Day

4. Gifts of Non-qualifying Securities

- Budget proposes modifications to the rules regarding donations by a taxpayer of a non-qualifying security ("NQS") to a registered charity
- A NQS is defined, generally, to include a share, a debt obligation, or other security issued by a taxpayer or by a person not dealing at arm's length with a taxpayer, but does not include publicly listed securities and deposit obligations of financial institutions

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- These rules previously applied only to donations of NQS to private foundations and other registered charities not at arm's length to the donor but have now been extended by the Budget to apply to all gifts of NQS to all registered charities
- Tax recognition will now be deferred until the recipient charity disposes of the NQS for consideration that is not another NQS of any person as opposed to another NQS of the donor as was previously the case
- If the NQS is not disposed of by the charity within the five-year period following the date of the gift, there will be no tax recognition of the gift

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- The Budget has also proposed new anti-avoidance rules to catch situations whereby, through a series of transactions, a donor avoids the application of the above NQS rules, but at the end of the series of transactions the charity receives a NQS
 - These measures are to apply in respect of securities disposed of by donees on or after the Budget Day
5. Granting Of Options To Qualified Donees
- The Budget proposes to delay the recognition of a gift to a qualified donee of an option to acquire property
 - Previously, where a donor granted an option to purchase property to a qualified donee, the gift was recognized on the date of the gift for the fair market value of the option and a receipt could be issued immediately

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- The Budget proposes to delay this until the option is exercised by the qualified donee, e.g. the property is purchased
- The taxpayer will be allowed a credit or deduction at the time of acquisition by the donee based on the amount by which the fair market value of the property at that time exceeds the total of amounts, if any, paid by the donee for the option and the property
- The new rules are designed to coincide with the proposed split-receipting rules, in particular the proposed rule providing that where an advantage associated with a gift exceeds 80 per cent of the value of the property transferred, there is no gift
- These measures are to apply in respect of options granted on or after Budget Day

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C. RECENT LEGISLATIVE INITIATIVES UNDER THE INCOME TAX ACT (“ITA”)

1. Update on Disbursement Quota Reform under Federal Budget 2010
 - a) Background
 - Disbursement quota (DQ) is prescribed amount that registered charities must disburse each year in order to maintain charitable registration
 - Purposes of DQ
 - Curtail fundraising costs
 - Limit administration costs
 - Limit capital accumulation
 - Ensure significant resources devoted to charitable activities

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- DQ first introduced in 1976
- Rules reformed by 2004 Budget – but made much more complex
- b) Pre 2010 Budget 80% DQ and 3.5% DQ Rules
 - A charity had to spend each year on charitable activities (including gifts to other charities) an amount that was at least equal to 80% DQ + 3.5% DQ
 - Failure to meet DQ was and continues to be grounds for revocation
- c) Recent History of DQ Reform
 - 2010 Budget released March 4, 2010
 - Amending legislation proposed August 27, 2010
 - Notice of Ways and Means Motion on September 28, 2010 made amendments to draft legislation of August 27, 2010

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- Bill C-47 reflected the wording of the September 28, 2010 Ways and Means Motion and received Royal Assent on December 15, 2010
- d) Overview of DQ Reform Rules
 - Repealed 80% DQ and related concepts
 - Enduring property (including ten-year gifts)
 - Capital gains pool
 - Specified gifts
 - Increased threshold for 3.5% DQ to \$100,000 for charitable organizations (but remains at \$25,000 for foundations)

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- Expanded anti-avoidance provisions for undue delay or avoidance (para. 149.1(4.1)(a + b))
 - Registered charity status can be revoked if a registered charity has entered into a transaction (including a gift to another registered charity) and it may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities
 - The charitable status of the recipient charity can also be revoked
 - The charity entering into the transaction is also liable to a penalty equal to 110% of the amount of expenditure avoided or delayed (ss.188.1(11))
 - In the case of a gift to another registered charity, both charities will be jointly and severally liable, or solidarity liable (ss.188.1(11))

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- Not clear what entering into a “transaction” means
 - Does it include the transfer of an existing endowment between charities?
 - Does it include an inter-charity transfer subject to time restrictions?
 - Does it include the acceptance by a charity of an endowment from a donor?
 - Does it include a charity internally setting aside funds for future expenditure?
- Also, not clear what “avoid or delay unduly” an expenditure means

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- Inter-charity anti-avoidance provisions (para. 149.1(4.1)(d))
 - Registered charity status can be revoked if a registered charity received a gift of property (other than a designated gift) from another registered charity with which it does not deal at arm’s length and it has expended, before the end of the next taxation year, in addition to its disbursement quota for each of those taxation years, an amount that is less than the fair market value of the property (determined at the time the gift) on charitable activities carried on by it or by way of gifts made to qualified donees with which it deals at arm’s length

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- The charity is also liable to a penalty equal to 110% of the amount of by which the fair market value of the property exceeds the total of such amounts expended (ss. 188.1(12))
- However, if the donor charity chooses to make the gift a "designated gift" to the non-arm's length receiving charity, the anti-avoidance rule with respect to expending an amount equal to the FMV of the property received from a non-arm's length charity will not apply
- The designation is made by the donor charity on Form T1236 or its T3010
- If donor charity elects the gift to be a "designated gift" in its T3010
 - No 100% expenditure requirement on recipient charity applies

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- However, donor charity cannot use the gift to meet its own 3.5% DQ
- But if recipient charity does not use the gift in its activities or administration or does not gift such property to another qualified donee, then it will become subject to the 3.5% DQ
- The inter-charity anti-avoidance provisions in effect creates a new 100% expenditure requirement
- Not clear whether the requirement to "expend an amount" includes using the property in question for a charitable activity
- Introduction of the concept of "arm's length" charities has introduced uncertainty with regards to inter-charity transfers, i.e. charities with similar objects, overlapping boards, or overlapping membership

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- The option of using designated gifts can only be used with transfers of property between non-arm's length charities, not transfers between any charity
- Accumulation of property
 - Charities can apply to CRA to accumulate property
 - Old rules - property accumulated (and income earned) with CRA approval is deemed to have been spent on charitable activities
 - New rules - accumulated property is excluded from 3.5% DQ asset base calculation
 - Accumulation permitted for particular purposes (such as a building project)

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- e) General implications Of New DQ Rules
 - Welcome change
 - Simplicity of DQ calculation
 - No need to track receipted and non-receipted gifts
 - Eases administrative burden for charities (especially small and rural charities)
 - No need to spend scarce resources allocating expenses between charitable vs administrative expenses for 80% DQ
 - Increase of \$100,000 threshold for charitable organizations allows them greater ability to maintain reserves to deal with contingencies

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- A charity must still pursue its charitable purpose
- A charity must still comply with CRA's Fundraising Guidance
- Need to consider using "designated gift" option with transfers between non-arm's length charities in order to avoid 100% expenditure requirement for the recipient charity
- What to do with existing endowment funds, long-term gifts and ten-year gifts?
 - Can capital be encroached?
 - Still need to track 10-year period?
- Need to review all existing gift and endowment agreement provisions in this regard

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2. July 2010 Draft Amendments

- On July 16, 2010, Finance released draft legislative proposals to implement outstanding income tax technical measures (the "July 2010 Amendments")
- Many of the proposed changes included in the July 2010 Amendments were first introduced by Finance on December 20, 2002 and in numerous amendments since then
- Included within the July 2010 Amendments are proposed changes that will substantially impact the operations of registered charities in Canada, including split-receipting provisions and new definitions of charitable organizations and public foundations
- Although these proposed changes have yet to be enacted into law, many have already been implemented by CRA in their administrative policies

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- The following is a list of some of the key amendments relating to charities in the July 2010 Amendments:
 - The split-receipting rules allow a donor to receive a limited advantage in respect of a gift having been made with only the “eligible amount” of a gift to be receipted
 - The broad definition of “advantage” reduces the eligible amount of a charitable receipt where the donor received an advantage
 - Complicated rules to curtail abusive donation tax shelter schemes based on a receipt for a deemed fair market value of cost (or adjusted cost base) for certain types of transactions

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- New definitions of charitable organization and public foundation replace the contribution test with the control test, permitting a charity to receive contributions of more than 50% of its capital from a donor, provided that the donor does not control the charity or represent more than 50% of the directors and trustees of the charity
- Gifts made by a charity to a non qualified donee are cause for revocation of the charity’s status
- CRA would be able to release the name, registration number and other relevant information with respect to registered Canadian amateur athletic associations (new provision)

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3. Bill C-470, Private Members’ Bill

- Received Third Reading in the House of Commons on March 8, 2011
- Received First Reading in Senate on March 9, 2011
- Bill C-470 introduced a disclosure obligation requiring registered charities to disclose the name, job title, and annual compensation of all executives or employees of a charity who receive \$100,000 or more in compensation from a charity, including both taxable and non-taxable income
- Imposed mandatory obligation for the Minister to make compensation disclosures available to the public unless “it is otherwise justified”

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- Prior to Third Reading the Bill was substantially amended by the Standing Committee on Finance, which presented its report to the House of Commons on December 10, 2010
- Bill C-470 would have given CRA the discretion to revoke charitable status of a charity if it pays a single executive or employee annual compensation over \$250,000.00
- As a result of the dissolution of Parliament on March 26, 2011, Bill C-470 died on the order paper
- Now that Bill C-470 has died, it is not clear whether the Bill will be re-introduced in the next Parliament, since Bill C-470 had had its genesis as a private member's bill
- The charity sector will need to carefully monitor what happens in this regard following the election

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D. RECENT PUBLICATIONS FROM CRA

1. Fundraising Guidance
 - From the media's perspective this is the number one compliance issue for charities
 - With repeal of 80/20 DQ, emphasis will now be on monitoring fundraising expenses
 - While the CRA accepts that charities can have fundraising costs, its expectation is that these expenses be reasonable and proportionate to the charitable activity being conducted

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- CPS-028, *Fundraising by Registered Charities* ("Guidance") available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-028-eng.html>
 - The Guidance was released in June 2009 but is still not widely understood by charities and therefore often not complied with by charities
 - Focus on the calculation of fundraising ratio, i.e. the ratio of fundraising costs compared to fundraising revenue on an annual basis

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- The ratio will place a charity in 1 of 3 categories:
 - Under 35%: Unlikely to generate questions or concerns by CRA
 - 35% to 70%: CRA will examine the average ratio over recent years to determine if there is a trend of high fundraising costs requiring a more detailed assessment of expenditures
 - Above 70%: This will raise concerns with CRA and the charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable

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- Seven best practice indicators that will decrease the risk of CRA finding unacceptable fundraising
 1. Prudent planning processes
 2. Appropriate procurement processes
 3. Good staffing processes
 4. Ongoing management and supervision of fundraising practice
 5. Adequate evaluation processes
 6. Use made of volunteer time and volunteered services or resources
 7. Disclosure of fundraising costs, revenues and practice

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- Corporate sponsorship income can generally be included as part of fundraising income to improve the overall fundraising ratio
- There remains confusion concerning how to track income and expenses involving charitable gaming and lotteries
- The use of a separate NPO may be of help in addressing expenses of a fundraising dinner
- A charity's board will need to review the T3010 before filing, as the T3010 contains all the information upon which the fundraising ratio is calculated and will be accessible by the public
- See also Office of the Public Guardian and Trustee, *Charitable Fundraising: Tips for Directors and Trustees*
<http://www.attorneygeneral.ius.gov.on.ca/english/family/pqt/charbullet/bulletin-8.asp>

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2. CRA Guidance: Upholding Human Rights and Charitable Registration

- On May 17, 2010, CRA released *Upholding Human Rights and Charitable Registration* ("Guidance") available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rqhts-eng.html>
- According to the Guidance, "upholding 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

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- It does not include advocating for the establishment of new legal rights
- 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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3. CRA Guidance on Charities Carrying on Activities Outside Canada

- July 8, 2010, CRA released Guidance entitled *Canadian Registered Charities Carrying on Activities Outside of Canada* ("Guidance") available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>
- Updates and replaces the previous CRA publication on foreign activities entitled *Registered Charities: Operating Outside Canada* RC4106 and Registered Charities Newsletter No. 20

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- Two means available under the ITA by which a registered charity can pursue its charitable purposes
 - a) The charity can make gifts to qualified donees (generally other registered charities)
 - b) The charity can carry out its own charitable activities, which in turn would require that the charity must control all of its activities and resources (referred to as the "own activities test")

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- The key consideration that a charity must have when carrying on activities abroad is whether it meets the "own activities" test
- Defined in the Guidance as activities *"which are directly under the charity's control and supervision, and for which it can account for any funds expended."*
- Charities cannot act as a passive funding body or conduit for a non-qualified donee
- One part of the "own activities" test is the control and direction that the charity exercises over its resources
- A charity should always have an agreement in place with any intermediaries that it works with

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- Six "measures of control" to assist in meeting the "own activities test"
 - 1) Written agreements
 - 2) Description of activities
 - 3) Monitoring and supervision
 - 4) Ongoing instruction
 - 5) Segregated funds (if agency)
 - 6) Periodic transfers

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- Additional issues addressed by Guidance
 - Compliance with local laws
 - Activities that put people at risk
 - Disclosure of names of recipients
 - Anti-terrorism considerations
 - Foreign activities and the disbursement quota
 - CRA treatment of funding from CIDA

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4. Proposed Guidance for The Promotion of Animal Welfare and Charitable Registration
 - On February 4, 2011, CRA released its proposed Guidance for consultation with feedback accepted until March 31, 2011
 - The document sets out draft guidelines on promoting the welfare of animals and charitable registration
 - Focus at common law is on what is for the benefit of humans rather than what is for the benefit of animals
 - The proposed Guidance can be found online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnsittns/pwcr-eng.html>

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5. Technical Interpretation Concerning Claims to Charitable Donations by the Spouse of a Deceased Person
 - On October 26, 2010, CRA released a technical interpretation confirming that the spouse of a deceased person can claim a tax credit for a charitable donation made by his/her deceased spouse's will in the year in which the spouse died, provided that:
 - A spousal or common-law relationship existed at the time of death
 - The donation qualifies as a gift under the ITA
 - The donation is made in accordance with the terms of a deceased's will

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E. CORPORATE UPDATE

1. New *Canada Not-For-Profit Corporations Act* (CNCA)
 - There have been several attempts at legislative reform to the *Canada Corporations Act* ("CCA")
 - On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("CNCA") received Royal Assent, but not yet proclaimed in force
 - Regulations were published by Industry Canada on February 26, 2011 in the Canada Gazette, which are nearly identical to the draft regulations published on June 25, 2010
 - Estimated that CNCA will likely come into force in the fall of 2011

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- Overview of the Key Elements of the CNCA
 - Simplified process of incorporation
 - A corporation has the capacity and rights of a natural person
 - Concept of a corporation's activities being *ultra vires* now eliminated once and for all
 - Objective standard of care as opposed to subjective standard of care
 - Due diligence defence available
 - Significant enhanced member's rights and remedies

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- Special exemption from remedies for religious corporations
- Introduces complicated concept of soliciting and non-soliciting corporations
- Graduated audit requirements are introduced
- All existing CCA corporations will be required to continue under the new Act within 3 years of it coming into force (or face possibility of dissolution)
- If the corporation is a charity and there is a change of objects, it would be advisable to obtain CRA approval in advance

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- Ongoing Concerns with the CNCA
 - Definition of soliciting corporation [\$10,000] threshold is too low
 - Directors must be elected. There is no provision for ex-officio directors
 - Non-profits that are soliciting face a predicament on dissolution (i.e. need to transfer to "qualified donees")
 - Different approval requirements (i.e. simple v. 2/3 majority) for by-laws may be difficult to administer

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- Non-voting members have a right to vote to approve certain fundamental changes
- Filing of financial statements by soliciting corporations with The Director and the level of financial review imposes an increased burden on soliciting corporations
- CRA to develop policy on requirements for charities continuing under CNCA (current estimated number of 7,600 federally incorporated charities)

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2. *New Ontario Not-For-Profit Corporations Act (ONCA)*

- The Ontario *Corporation Act* ("OCA") has not been substantively amended since 1953
- Bill 65 introduced the new Ontario *Not-For-Profit Corporations Act* ("ONCA")
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- However, ONCA not expected to be proclaimed in force until sometime in 2012
- Regulations have not yet been released

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- Overview of the Key Elements of the ONCA
 - Incorporation as of right
 - Capacity, rights and powers of a natural person
 - Minimum of 3 directors required
 - *Ex officio* directors permitted
 - Objective standard of care instead of subjective standard of care
 - Due diligence defence available
 - Enhanced membership rights
 - Some enhanced members remedies, but not as much as the CNCA

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- Definition of “charitable corporation” is now common law definition
- Public benefit corporation is concept similar to soliciting corporation in *CNCA*
- Graduated audit requirements
- For existing non share capital corporations once the Act is enacted, there will be a period of up to 3 years to continue but this is not expected until sometime in 2012

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- Ongoing Concerns with the ONCA
 - Definition of Public Benefit Corporation [\$10,000] threshold is too low
 - Non-voting members rights to vote on fundamental changes may lead to problems with other large membership based organizations
 - Weak liability protection, as the government rejected the recommendation to include a partial liability shield for directors. Due diligence defence by itself not adequate
 - Mandatory provision requiring solicitation of proxies instead of allowing a corporation to structure its own decision making process on absentee voting (i.e. allowing an option to vote by secret mail in or by electronic ballot)

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H. PROVINCIAL LEGISLATIVE UPDATE

- 1. Bill 168: *The Occupational Health and Safety Amendment Act*
 - The *Occupational Health and Safety Amendment Act, (Violence and Harassment in the Workplace), 2009* came into force on June 15, 2010
 - The legislation designates workplace violence and harassment as occupational health and safety hazards under the OHS Act
 - Establishes new obligations for employers with respect to workplace violence and harassment prevention

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- The new legislation will require employers with more than 5 employees to:
 - Develop and communicate workplace violence and harassment prevention policies and programs to workers
 - Assess the risks of workplace violence, and take reasonable precautions to protect workers from possible domestic violence in the workplace
 - Allow workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence

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- 2. Bill 122: *The Broader Public Sector Accountability Act*
 - Received Royal Assent on December 8, 2010
 - Statutory amendments by Bill 122 concerning the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), and others, come into force on January 1, 2012
 - The remainder of the Bill 122 will come into force on a date to be proclaimed by the Lieutenant Governor
 - Bill 122 was created to increase the financial accountability of organizations in the broader public sector
 - Bill 122 introduces new rules and higher accountability standards for "broader public sector organizations," which are defined as "designated broader public sector organizations" and "publicly funded organizations"

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- “Designated broader public sector organizations” include:
 - Hospitals
 - School boards
 - Universities and colleges
 - Children’s aid societies
 - Community care access corporations
 - Corporations controlled by a designated broader public sector organization
 - Public sector organizations that have receive more than \$10 million in funding from the provincial government in the previous fiscal year

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- “Publicly funded organization” is broadly defined in the Act to include every authority, board, commission, committee, corporation, council, foundation or organization that received public funds in the previous fiscal year from the Government of Ontario, but excludes certain entities, such as a ministry of the provincial government or a municipality
- Bill 122 prohibits “designated broader public sector organizations”, as well as hydro authorities, from using public funds or revenue generated by the organization to engage lobbyists
- Local health integrated networks (“LHINs”) and hospitals must prepare reports concerning the use of consultants and post information on their public website concerning the expense claims of designated individuals

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- Part VIII of the Bill 122 includes amendments to *Freedom of Information and Protection of Privacy Act* (“FIPPA”) so that it will now apply to hospitals
- Certain types of hospital records will be excluded from the application of FIPPA, for example, records that relate to charitable donations made to a hospital
- Hospitals and “associated foundations” should be aware of the provisions within FIPPA concerning the use and disclosure of personal information that will now apply to them
- *Personal Health Information Protection Act* will continue to apply to a hospitals collection, use and disclosure of personal health information

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I. RECENT CASE LAW AFFECTING CHARITIES

1. *Innovative Gifting Inc. (IGI) v. House Of Good Shepherd et al.* [2010] O.J. 2210

- Ontario Superior Court Decision released on May 18, 2010
- A fundraiser (IGI) charged exorbitant commissions and misrepresented legality of fundraising activities
- Arrangement was that if shares and non-cash gifted, 40% commission to be paid, but if cash gifted then commission would be 90%
- Court ordered fundraiser to pay back commissions it received from four charities

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2. *Pandher v. Ontario Khalsa Darbar* [2010] O.J. No. 1471

- Ontario Court of Appeal reversed a lower court judgment holding the defeated directors of a charity personally responsible for costs which arose from litigation between two factions of the same board
- Affirmed the common law position that absent a finding of the directors pursuing their own interests ahead of those of the corporation, the court should not award costs against the directors on a personal basis
- Reiterated that the primary purpose of indemnification is to provide assurance to those who become directors that they will be compensated for adverse consequences that ensue from well-intentioned acts taken on behalf of the corporation

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3. *Paterson v. CRA*, 2010 FC 644

- Federal Court Decision released on June 15, 2010
- CRA denied the applicant, a tax preparer, permission to file his clients' income tax returns electronically
- For a fee of \$25, he assisted his clients in obtaining donation tax receipts for amounts in excess of the amounts actually donated
- The Court indicated that ignorance of the charitable receipting rules was no excuse for the applicant's participation in the scheme

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4. *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 2182 (April 13, 2010)

- Affirms that directors of charitable organizations have fiduciary duties toward the charity
- Also emphasizes that with these enhanced duties comes an enhanced power of the courts to monitor and regulate charities
- This authority extends so far as to provide the court with the authority to order the destruction of charitable property

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