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# **WORLD VISION CANADA LAW DAY 2012**

**Mississauga – November 27, 2012**

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## **Essential Charity Law Update**

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**1. New Rules and Sanctions Involving Political Activities**

a) Putting The Budget 2012 In Context

- In the last year, there have been numerous allegations made against environmental charities, including:
  - Politicians questioning the appropriateness of foreign funding of environmental charities
  - Government “Strategy on Counter-Terrorism” equating environmentalism with white supremacy and the terrorist activities in Oklahoma City in 1995 and Norway in 2011
- This has had the unfortunate effect of creating a chill for charities becoming involved in political activities

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- Notwithstanding these concerns, Budget 2012 could have been worse for charities concerning political activities
- No significant changes to rules permitting political activities under the ITA
- No changes to the current CRA Policy on Political Activities
- As such, the changes in Budget 2012 discussed below do not stop charities from becoming involved in political activities
- However, charities will need to carefully understand the rules that do apply and be careful in documenting their involvement in political activities
- It is therefore essential to first understand what the rules are concerning political activities before discussing the impact of Budget 2012

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b) Key CRA Policies, Income Tax Act (“ITA”) Provisions and Resource Materials

- CRA Policy Statement (CPS – 022) “Political Activities” dated September 2, 2003
- CRA Advisory on Partisan Political Activities
- CRA Policy Commentary, Political Party Use of Charity Premises (CPC-0070)
- Speech by the Director General of the Charities Directorate on May 4, 2012
- These documents are available on the CRA website <http://www.cra-arc.gc.ca/chrts-gvng/chrts/policy/menu-eng.html> and provide information for registered charities on political activity and allowable limits under the ITA, as well as the common law

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c) Three Categories of Activities

- Currently, politically related activities undertaken by a registered charity can be separated into three categories:

(1) Charitable activities (permitted without limits)

- A charitable activity is an activity undertaken to achieve a charitable purpose
- If an activity is considered by CRA to be charitable, then it is permitted without limits
- Under certain circumstances, communication with a public official or the public can be a charitable activity (e.g. submission to a public official on a law or policy provided that it relates to and is subordinate to the charity's charitable purpose, is well reasoned, and does not contain information that is false, inaccurate or misleading)

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(2) Political Activities (Permitted Up To Prescribed Limits)

- An activity is presumed to be political if a charity
  - Explicitly communicates a call to political action, or to the public that the law, policy or decision of any level of government in Canada or a foreign country should be retained, opposed or changed, or
  - Explicitly indicates in its material that its activity is intended to incite, organize or pressure governments to retain, oppose or change the law, policy or decision of a government
- Political activities are permitted if they are: non-partisan, connected to and subordinate to charity's purpose, and falls within the general 10% of resource spending limit
- However, how resources (i.e., funds, property and people) is to be calculated is not clear

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(3) Prohibited Activities

- Prohibited activities are either illegal or involve partisan political activities and therefore are not permitted at all
- "Partisan political activity" involves the "direct or indirect support of, or opposition to, any political party or candidate for public office"
- CRA Advisory contains examples of prohibited partisan political activity, such as
  - Gifting charity funds to a political party that supports the charity's views on a given matter
  - Making public statements (written or oral) that endorse or denounce a candidate or political party



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- d) Impact of Budget 2012 on Political Activities
  - Budget 2012 impacts charities and RCAAs with regards to political activities in three ways
  - First, Budget 2012 expands the definition of political activities to include certain gifts to qualified donees
    - Budget 2012 expands the definition of "political activities" under subsection 149.1(1), to "include the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee" ("QDs")



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- The focus is on the intent of the donor charity, not the intent of the recipient QD
- This change would result in a double count of political activities, once by the donor charity and once by the recipient QD
- Three possible scenarios in determining "can reasonably be considered"
  - Written designation to use the gift for the political activities of the QD
  - Written designation to not use the gift for the political activities of the QD
  - No written designation, then look at other circumstances to see if there was "a purpose"

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- Likely best to avoid multi-purpose gifts, because Budget 2012 simply refers to "a purpose" so any political purpose for any part of the gift may taint the whole gift
- Funding charities that are caught by the new inclusion rules will have to track and report political activities the same way as charities directly involved in political activities
- As a result, funding charities that do not want to have to track political activities in their T3010 should designate in writing those gifts that are not to be used for political activities by the recipient QD

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- Second, Budget 2012 introduces new intermediate sanctions
  - Where a registered charity exceeds the limits in the ITA for political expenditures (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receipting privileges (in addition to revocation)
  - Where a registered charity fails to report any information (not just political activities) that is required to be included on a T3010 annual return, CRA can suspend its tax receipting privileges until CRA notifies the charity that it has received the required information



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- This second sanction emphasizes the importance of having the board, as well as having legal and accounting professionals, review and approve the T3010 annual return before filing it with CRA
- \$8 million committed to enforcement by CRA in Budget 2012, including educational initiatives and webinars

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- Third, Budget 2012 states there will be more disclosure required concerning political activities
  - More information about political activities will be required in the T3010, (including foreign donors) although details of what that involves were not addressed in Budget 2012
  - Focus is on disclosure of funding of political activities by foreign donor
  - Such funding does not have to be counted towards the 10% resource limit until it is actually expended on political activities
  - Director General's Speech in May 2012 explores the type of disclosure about political activities that will be required in the T3010 in the future

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- Charities involved in political activities will need to complete a new political activities schedule (revised from the 2002 version)
  - Will need to indicate the type of political activity that a charity has devoted resources to (financial, property or human)
  - Charity will need to explain the relationship between such political activities and its charitable purpose
- Charities will need to indicate the amount received from foreign sources for political activities
- However, there will be no need to identify the name of the foreign donor
- The revised T3010 should be available in early 2013

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e) Practical Implications for Charities

- Know the rules before becoming involved in political activities
- Ensure that activities are either “charitable activities” or are “permitted political activities”
- The decision to become involved in permitted political activities should be authorized by the board of directors of the charity
- Ensure that any permitted political activities undertaken fall within expenditure limit (i.e., generally within the 10% resource limit)



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- It is essential to keep careful books and records and do appropriate allocations of all expenditures with respect to permitted political activities
- Avoid any prohibited partisan political activities
- Gifts to QDs should generally include a written designation which states that the gift should not be used for the political activities of the recipient QD
- Have the board of directors, as well as accounting and legal professionals, review and approve the T3010 prior to filing, due to the imposition of new intermediate sanctions and greater public scrutiny
- For more information, see Charity Law Bulletin No. 286, “*Playing By the Rules: Political Activities Fair Game for Charities*” at [www.charitylaw.ca](http://www.charitylaw.ca)

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**2. Gifts to Foreign Charitable Organizations**

- Certain foreign charitable organizations that have received a gift from the Government of Canada in the previous 24 months are currently deemed to be QDs under the ITA, and may therefore issue donation receipts to Canadian donors and receive gifts from registered charities
- There are currently only 5 of these foreign charitable organizations, including The Rhodes Trust and Council for Canadian American Relations
- Budget 2012 provides that the Minister may register, in consultation with the Minister of Finance, a foreign organization for a 24-month period that includes the time at which Her Majesty in right of Canada has made a gift to the foreign organization, if:

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- (i) The foreign organization is a charitable organization that is not resident in Canada; and
- (ii) The Minister is satisfied that the organization is
  - Carrying on relief activities in response to a disaster;
  - Providing urgent humanitarian aid; or
  - Carrying on activities in the national interest of Canada
- Qualified donee status will be made public and will be granted for a 24 month period of time
- Measures will apply to registrations made after January 1, 2013

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**B. OTHER RECENT FEDERAL AND PROVINCIAL INITIATIVES**

**1. National Philanthropy Day Bill Receives Third Reading**

- On October 16, 2012, Senator Terry M. Mercer presented Bill S-201 - *An Act Respecting A National Philanthropy Day*, to the Standing Committee on Canadian Heritage
- Bill S-201 received its Third Reading in the House of Commons on November 5, 2012
- The proposed legislation will recognize November 15 as National Philanthropy Day
- Royal assent is expected in the coming weeks

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**2. Bill C-458 Supporting Canada's Charitable Sector Introduced**

- Peter Braid, Member of Parliament for Kitchener-Waterloo, introduced Private Member's Bill C-458 *Supporting Canada's Charitable Sector* on October 31, 2012
- Bill C-458 would extend the tax deadline for charitable donations to the end of February from December 31, 2012 and would establish the last week of February each year to be National Charities Week
- Postponing the deadline from the time of year when people are thinking about holidays until the time when people are strategizing about their finances may cause people to donate more

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**3. Notice of Ways and Means Motion to Amend Income Tax Act Released**

- On October 24, 2012, the Department of Finance released draft legislative proposals to implement outstanding income tax technical measures
- Included are proposed changes that will substantially impact the operations of registered charities in Canada, including changes to the definition of "gift," split-receipting, designation of charitable organizations and public foundations, revocation of charitable registrations, etc
- These changes were first introduced by Finance on December 20, 2002, which then underwent various incarnations over the years

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**4. Bill C-28 (Anti-spam Legislation)**

- Bill C-28 creates a new regulatory scheme for spam and unsolicited electronic messages
- Received Royal Assent on December 15, 2010
- Expected to come into force in 2013
- Charities and non-profit organizations that send "commercial electronic messages" will need to ensure that they comply with the Anti-spam Legislation
  - "commercial electronic messages" ("CEMs") are emails containing offers concerning goods, products or services, or that advertise or promote such opportunities as defined in the Anti-spam Legislation



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- Prohibition on sending CEMs without:
  - The express or implied consent of the recipient; and
  - Ensuring that certain form/ content requirements are met, including an unsubscribe mechanism
- Requests for express consent must contain certain information (e.g. purpose(s) for which consent is sought)
- Implied consent can arise from “existing non-business relationships” (e.g. a donation or gift to, membership in, and/or volunteering with a charity or non-profit organization) – subject to a two year limit
- Significant monetary penalties for non-compliance (e.g. maximum penalty is \$1 million (individuals) and \$10 million (any other person)) and private right of action is available for breach of the prohibition

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**5. Toby’s Act (Right to be Free from Discrimination and Harassment because of Gender Identity or Gender Expression), 2012**

- On June 13, 2012, the Ontario Legislature passed third reading of Bill 33
- Bill 33 will amend the Ontario Human Rights Code (the “Code”) to prohibit discrimination in Ontario on the basis of gender identity or expression
- The Code will provide that every person has the right to equal treatment without discrimination because of “gender identity” or “gender expression”
- Exemptions under the Code for bona fide occupational requirements and special interest groups (i.e., churches and religious organizations) will continue

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**C. NEW GOVERNANCE REGIME FOR REGISTERED CHARITIES AND RCAAAs (“INELIGIBLE INDIVIDUALS”)**

- The 2011 Federal Budget introduced the concept of “ineligible individuals”, which has become a new *de facto* eligibility requirement for directors of registered charities under the ITA
- CRA had been concerned that applications for charitable status were being submitted by individuals who had been involved with other charities and Registered Canadian Amateur Athletic Associations (RCAAA) that had their status revoked for serious non-compliance



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- In the past, CRA could not refuse to register or revoke the status of a registered charity or RCAA based on these concerns
- Budget 2011 now permits CRA to refuse or revoke the registration of a charity or a RCAA or suspend its ability 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 is an "ineligible individual"

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- An "ineligible individual" is a person who
  - Has a "relevant criminal offence" – convicted 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
  - Has a "relevant offence" – convicted of an offence in Canada in 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 or any other offence that is relevant to the operation of the charity or RCAA
    - Includes offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation

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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 of 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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- Why charities and RCAAs should be concerned
  - CRA has yet to make clear what the effect of having an “ineligible individual” on the board will be, but revocation is a statutory right of CRA
  - CRA has so far stated that they
    - Will look at the particular circumstances of a charity or RCAA
    - Will take into account whether appropriate safeguards have been instituted to address any potential concerns
  - Unfortunately, CRA has not stated what those circumstances are and no explanation of what the safeguards might be has been given

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- Charities need to be concerned about the due diligence required to ensure that an “ineligible individual” does not become involved or continue to be involved in the oversight or management of the charity
- Budget 2011 states that a charity will not be required to conduct background checks, but even if the charity wanted to review the information required to independently assess whether an individual is ineligible, it may not be publicly or easily available
  - Possible to search for relevant criminal offences in Canada, but abroad?
  - Many relevant offences (e.g., *Securities Act* convictions) are not tracked in publicly available databases in Canada, or unlikely abroad

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- Names of directors and like officials of revoked charities are not maintained in a single publicly available database
- Not likely that an individual who otherwise controlled or managed the operation of a charity would be identified in publicly available documents
  - likely information solely in CRA’s control
- Onus is now shifted to charities to comply in a situation where it is impossible to ensure 100% compliance because the necessary information is not available
- This new cause for revocation is similar to a strict liability offence – no due diligence defence is available in the legislation
- Charities will be required to undertake other forms of due diligence and hope CRA will excuse any inadvertent non-compliance

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- Charities must find a way to deal with a director that is an ineligible individual (generally only the members can remove a director)
  - Bylaws will now need to include a new requirement that the directors must not be an “ineligible individual” as defined under the ITA at the time that they become a director and during their tenure
- Removal of management staff that are “ineligible individuals” could have important employment law ramifications
  - For existing staff it may difficult to remove them
  - For new management staff it will be important to include this in an employment contract

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- Concerns about privacy
  - If CRA alleges that a person is an “ineligible individual”, who is to receive such information and how is the information to be protected once received?
  - Should the alleged “ineligible individual” be given an opportunity to rebut the allegation or is it to be left up to the charity to do so on the individual's behalf
  - If so, what personal information can be used to rebut the allegation?

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**D. HIGHLIGHTS OF RECENT CRA PUBLICATIONS**

**1. New Fundraising Guidance (Revised 2012)**

a) Introduction

- From the media’s perspective this is the number one compliance issue for charities
- Revised Fundraising Guidance released in April 2012
- The new Guidance is a significant improvement
- Although much improved, the new Guidance is still a complex document and will therefore require careful reading
- The Guidance will have impact on current CRA audits, not just future audits
- The Guidance will apply to all registered charities and to both receipted and non-receipted fundraising

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- The Guidance is more directive than previous versions of the Guidance
- Charities must still meet their other obligations, including the 3.5% disbursement quota
- An organization carrying out unacceptable fundraising may result in denial of charitable registration or, for registered charities, sanctions or even revocation of charitable status
- The fundraising ratio referenced in this Guidance forms part of a charity's T3010 that is made available to the public on the web
- Failure to correctly record fundraising revenues and expenditures can now result in suspension of receipting privileges
- It is therefore important for the board of a charity to review and approve the T3010 for a charity before it is filed with CRA

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b) What is Fundraising?

- In general, fundraising is any activity that includes solicitation of present or future donations of cash or gifts in kind, or the sale of goods or services to raise funds, whether explicit or implied
- For the purpose of the Guidance, fundraising does not include (i.e. to be excluded from revenue and expenses)
  - Seeking grants, gifts, contributions, or other funding from other charities or government
  - Recruiting volunteers (except for fundraising volunteers)
  - Related business activities

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- Examples of fundraising activities
  - The sale of goods or services
  - Donor stewardship
  - Membership programs
  - Cause-related marketing/social marketing ventures
  - Planning or researching fundraising activities
  - Donor recognition
- c) When is Fundraising not Acceptable?
  - The following conduct will be prohibited and will be grounds for revocation of a registered charity's status, imposition of sanctions or other compliance actions, or denial of charitable registration



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- Fundraising that is a purpose of the charity (a collateral non-charitable purpose)
- Fundraising that delivers more than an incidental private benefit
- Fundraising that is illegal or contrary to public policy
- Fundraising that is deceptive
- Fundraising that is an unrelated business

d) Allocating Fundraising Expenditures

- Registered charities must report fundraising expenditures (all costs related to any fundraising activity) on their annual T3010
- Where some fundraising activities include content that is not related to fundraising, some of these costs may be able to be allocated to charitable activities, management or administrative activities, or political activities

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- Onus is on the charity to explain and justify the allocation
- The following are CRA's guidelines for allocation
  - 100% allocation to fundraising
  - No allocation of costs to fundraising
  - Pro-rated allocation of costs

e) Evaluating a Charity's Fundraising

- Resources devoted to fundraising are disproportionate to resources devoted to charitable activities
- Fundraising without an identifiable use or need for the proceeds
- Inappropriate purchasing or staffing practices
- Fundraising activities where most of the gross revenues go to contracted third parties

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- Commission-based fundraiser remuneration or payment of fundraisers based on amount or number of donations
- Misrepresentations in fundraising solicitations or disclosure about fundraising costs, revenues, or practices
- Fundraising initiatives or arrangements that are not well documented
- High fundraising expense ratio
- It is important to note that a charity's fundraising ratio can serve as a general self-assessment tool, although its not determinative on its own
  - The fundraising ratio is the ratio of fundraising costs to fundraising revenue calculated on an annual basis
  - It is a global calculation for a fiscal period

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- However, a high fundraising ratio for an individual event may be an indicator of unacceptable fundraising
- It is totally distinct from the 3.5% disbursement quota, although elements of it overlap in the ratio
- Fundraising revenues include amounts reported in the T3010 on line 4500 (received donations, regardless of whether these amounts can be traced to fundraising activity) and line 4630 (all amounts for which a tax receipt was not issued and that were generated as a direct result of fundraising expenses)
- Fundraising expenditures will include all amounts reported on line 5020 as fundraising expenses in accordance with the Guidance

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- The fundraising ratio will place a charity into one of three categories
  - Under 35%: unlikely to generate questions or concerns by CRA
  - 35% and above: 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 level will raise concerns with CRA. The charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable
- See logic chart on next page (not by CRA)

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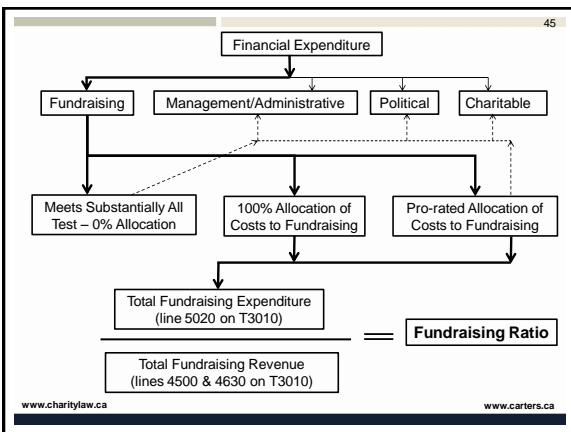
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f) Factors that May Influence CRA's Evaluation of a Charity's Fundraising

- CRA recognizes that the charitable sector is very diverse and fundraising efforts will vary between organizations
- CRA will look at a number of factors to evaluate a charitable fundraising activity that involves high fundraising costs
- Examples of relevant case-specific factors
  - The size of the charity, which may have an impact on fundraising efficiency (i.e. revenues under \$100,000)
  - Causes with limited appeal which could create particular fundraising challenges

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- Donor development programs where fundraising activities could result in financial returns only being realized in future years (long-term investments)
- Gaming activities, such as lotteries or bingos, where it's commonly considered acceptable to have cost to revenue ratios of 70% or higher

g) Best Practices for Managing Fundraising

- Adopting best practices may decrease the risk of CRA finding that a charity is engaging in unacceptable fundraising
- The Guidance describes the following best practices in further detail
  - Prudent planning processes
  - Adequate evaluation processes

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- Appropriate procurement and staffing processes
- Managing risks associated with hiring contracted (third party) fundraisers
- Ongoing management and supervision of fundraising
- Keeping complete and detailed records relating to fundraising activities
- Providing disclosures about fundraising costs, revenues, practices and arrangements
  - The 2012 Gour decision has complicated matters (see later case summary)
- Maintain a reserve fund policy and ensuring that fundraising is for an identified use or need

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## 2. Community Economic Development (CED)

- On July 26, 2012, CRA released Guidance CG-014, Community Economic Development Activities and Charitable Registration (the New Guidance)
- The Former Guidance had been in effect since 1999
- Whereas the Former Guidance was overly prescriptive, the New Guidance expands what charities can do, sets out clear boundaries and provides examples
  - As such, the New Guidance leaves charities to do what they do best: find innovative ways to achieve their charitable purpose



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a) What is CED?

- CED generally refers to activities that “improve the economic opportunities and social conditions of an identified community”
- CED activities are often referred to as “community capacity building”, “social enterprise” and “social finance”
- Common forms of CED include:
  - Activities that relieve unemployment
  - Grants and loans
  - Program-related investments
  - Social businesses for individuals with disabilities
  - Community land trusts

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b) Requirements of “Charitable” CEDs

- The law in Canada does not recognize CED as a charitable purpose in and of itself
  - Therefore, in order to be considered “charitable”, CED activities must directly further one of the four heads of charity
- Also, a CED activity must not provide any private benefit that is more than incidental if it is to be considered “charitable”
  - This means any private benefit must be necessary, reasonable, and not disproportionate to the public benefit
- Finally, CED activities must meet the requirements for “eligible beneficiaries” i.e. those in poverty or with disabilities

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c) Types of CED Include:

(1) Activities that Relieve Unemployment

- These activities are only charitable if they further a head of charity
- To pass the public benefit test, the emphasis of these activities must be helping beneficiaries find employment, not helping employers recruit employees
- On-the-job training programs must focus on providing training, not indefinite employment

(2) Social Businesses for Individuals with Disabilities

- Social businesses employ people with disabilities or support people with disabilities who are self-employed
- They seek to provide permanent employment for such individuals

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(3) Program-Related Investments (PRIs)

(i) Definition

- PRIs are investments that directly further the charitable purpose of the charity
- PRIs can take the form of:
  - Loans,
  - Loan guarantees,
  - Share purchases and
  - Leases of land or buildings
- The new Guidance greatly expands opportunities for charities to engage in PRIs
- CRA has recognized that a charity can achieve its charitable purpose by investing its capital instead of simply spending it



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(ii) Non-qualified donees may now be recipients

- Charities were previously restricted to making PRIs with qualified donees, which are primarily other registered charities, as well as municipalities, the UN and its agencies, etc.
- However, charities can now make PRIs with non-qualified donees so long as the charity maintains direction and control over the program to achieve the charitable purpose
- This requirement is identical to the "own activity" test required when conducting activities through third party intermediaries inside or outside of Canada

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(iii) Requirements of Charities Engaging in PRIs:

- Charities conducting PRIs must have:
  - A policy describing how the charity will make decisions regarding PRIs
  - Documentation explaining how each PRI furthers its charitable purpose
  - Exit mechanisms to withdraw from a PRI or convert it to a regular investment if it no longer meets the charity's charitable purpose
  - Evidence of direction and control over PRIs to non-qualified donees



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(iv) Commentary on PRIs

- A charity may only make a PRI with an arm's length corporation
- Although a charity is not required to include the value of its PRIs in calculating its 3.5% disbursement quota, a charity is not permitted to include the PRI as a charitable expenditure
- All types of charities can make PRIs in the form of share purchases, but public and private charitable foundations cannot acquire a controlling interest in a company
  - Furthermore, if a private foundation acquires more than 20% of any class of shares in a company, it may trigger divestment obligations and sanctions

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**3. Clergy Residence Deduction #2011-0413541E5**

- Clarification concerning the clergy residence deduction and whether a housing allowance from an employer should be included in determining the value of the deduction
- To be eligible for the clergy residence deduction, an individual must:
  - Be a member of the clergy / a member of a religious order or a regular minister of a religious denomination; and
  - Be in charge of, or ministering to, a diocese, parish or congregation, or engaged exclusively in full-time administrative service by appointment of a religious order or religious denomination

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- CRA clarified that where an individual satisfies the above conditions and rents accommodations, the amount of the deduction is calculated regardless of whether the individual received a housing allowance
- A housing allowance is a taxable benefit and should therefore be included in the individual's "remuneration for the year from the office or employment" for the purpose of computing the residence deduction

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**4. Split Receipting for Fundraising Dinner #2010-0391511E5**

- Mrs. A agrees to host a dinner to benefit a registered charity by hiring a caterer and donating some of her wine collection for the dinner
- Mrs. A requested a donation receipt for the wine and catering services
- CRA indicated that charity can reimburse an individual for expenses incurred on its behalf and accept the return of the payment as a gift if the amount is returned voluntarily



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- Provided that host is entitled to be reimbursed under terms of agreement with charity
- Guests would hypothetically pay a pre-determined amount to Mrs. A for the charity or purchase an auction ticket for the dinner
- CRA suggested the value of a comparable meal in a restaurant be used to determine receipt about for former, and the receipt should be the difference between the amount bid and the value of the right to attend the dinner for the latter, so long as the amount is ascertainable

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**E. CORPORATE UPDATE**

**1. New Canada Not-for-Profit Corporations Act ("CNCA")**

- *Canada Corporations Act* ("CCA") has not been substantively amended since 1917
- On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("CNCA") received Royal Assent
- CNCA was proclaimed into force on October 17, 2011
- The new rules do not apply automatically to CCA corporations
- Existing CCA corporations will have until October 17, 2014 to continue under the CNCA or face dissolution
- See various Charity Law Bulletins on "Countdown to the Canada Not-For-Profit Corporations Act - Practice Tips #1-9" at <http://www.carters.ca/nfp/index.htm>

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- Key considerations on continuance under the CNCA
  - Need to review current corporate documents to see what needs to be changed
    - Corporate objects
    - General operating bylaw and amendments
    - Special resolutions
  - Need to compare existing corporate documents to the provisions of the CNCA, and its regulations in order to determine what options are available
  - Need to determine if multiple membership classes are desirable and/or should be maintained, including non-voting members

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- May need to eliminate non-voting members and other membership classes prior to continuance in order to avoid them having class veto rights over the continuance process, as well as future fundamental changes and changes to membership classes
- May need to establish alternative terminology for non-voting members, such as "supporters", "constituents", "associates", "adherents"
- If the corporation is a charity, any changes to the charitable objects would require CRA approval
- Application for articles of continuance will need to be approved by both the board of directors and by the members

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**2. New Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA")**

- The Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- Now expected to be proclaimed in force on July 1, 2013
- It is expected that an outline of the proposed regulations will be released shortly
- See Charity Law Bulletin No.262 "The Nuts and Bolts of the Ontario Not-for-Profit Corporations Act, 2010 at <http://www.carters.ca/pub/bulletin/charity/2011/chylb262.pdf>

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- Ontario corporations under the OCA will have three years from the date of proclamation to complete their transition under the ONCA, as it will apply to all corporations on proclamation
- However, unlike the CNCA, an Ontario corporation under the OCA will not automatically be dissolved after the expiration of the three-year time frame
- Instead, its letters patent and general operating bylaw will be deemed to be amended to comply with the provisions of the ONCA after three years
- However, since deemed compliance would create considerable confusion, it will be important for Ontario corporations to transition under the ONCA within the three-year time limit

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**F. RECENT CASE LAW**

**1. *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728, November 22, 2011**

- Pastor was removed from office and brought an action for damages for constructive dismissal
- One of the exceptions to the general rule that the courts have jurisdiction to decide claims for wrongful dismissal is where the rules of a self-governing organization, especially a religious organization, provide an internal dispute resolution process



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- A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization
- The courts will only interfere in the internal affairs of a self-governing organization if the internal process is unfair or does not meet the rules of natural justice or where the complainant has exhausted the internal processes
- Subject to any enabling statutory provision, if the complainant has exhausted the internal processes, the Court will not consider the merits of the decision but only whether the organization's rules were followed and the decision made in accordance with natural justice

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**2. *Adams v. Association of Professional Engineers, 2012 ONSC 3850, June 28, 2012***

- In Adams, a member of Council for the Association of Professional Engineers of Ontario ("PEO") submitted a resignation by email to the other Council members indicating that he had resigned
- The following day he sent a further email to the Council of PEO indicating that his resignation would be effective at the next annual general meeting of PEO

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- Ten days after sending this resignation the Council member sent a further email indicating that he was revoking his resignation
- The court noted that the rationale that directors of for-profit corporations should be able to effectively resign without having their resignation accepted applied equally to directors of non-share capital corporations
- Having found that the resignation was unequivocal, the court found that the resigning director could not thereafter revoke his resignation without the consent of the other directors

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**3. *R v. Gour*, 2012 ONSC 4082, June 28, 2012**

- On November 2, 2012, Adam Gour was sentenced to 15 months in jail and nearly \$300,000 in fines after he was found guilty on June 28, 2012 for defrauding the public while operating a charity fundraiser scheme
- Gour's organization solicited funds under the guise of helping sick children, often using pictures of sick children from Ontario without consent from their parents
- He paid his employees commissions ranging from 14-35% and instructed them to keep their commission secret

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- McIsaac J. held that, when potential donors asked Gour's employees about their remuneration, most of the employees lied as instructed
- This misinformation was material, in that it would have affected the decision of a reasonable person
- McIsaac J. was required to determine whether failure to disclose a commission of 14-35% constitutes fraud in Canadian criminal law – he decided in the affirmative
- The severity of this decision is likely attributable to its egregious facts and is unlikely to be generally applied
- The decision is likely to be appealed

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**4. *Guindon v. The Queen*, 2012 TCC 287, October 2, 2012**

- The case dealt with third party penalties provided under section 163.2 of the *Income Tax Act*
- The basic purpose of s. 163.2 is to provide for monetary penalties assessable against third parties who, participate in, promote, or assist conduct that results in another taxpayer making a false statement or omission in a tax return
- Court concluded that the penalties under s. 163.2 are criminal in nature meant that the penalties would therefore have to be prosecuted not in a tax court

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- Decision is likely to be appealed
- If the decision is left to stand, it will become significantly more difficult to impose penalties on advisors backing abusive donation schemes (or other forms of excessively aggressive tax planning).
- The decision not only brings attention to abuses of donation incentives at a crucial moment of policymaking in this area of law, it also calls into question the current capacity of the Canada Revenue Agency to police such abuses

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