

	<b>Ukrainian Canadian Congress 2013</b> <b>Mississauga – November 9, 2013</b>
<b>Essential Charity and Not-for-Profit Law Update</b>	
<b>Theresa L.M. Man</b> tman@carters.ca 1-877-942-0001	
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<b>OVERVIEW OF SELECTED TOPICS</b>	
A. Federal Budget 2013	
B. Other Federal Initiatives	
C. Highlights of Recent CRA Publications	
D. Update on Maintaining NPO Status	
E. Corporate Law Update	
F. Selected Case Law	
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<b>DIFFERENCES BETWEEN CHARITIES AND NON-PROFIT ORGANIZATIONS</b>	
<ul style="list-style-type: none"><li>• Terms “non-profit” and “not-for-profit” used interchangeably and generally refer to organizations whose profits are not passed on to their members</li><li>• NFP - not-for-profit - generally a corporate term</li><li>• NPO - non-profit organization in the <i>Income Tax Act</i> (ITA)</li><li>• Far-reaching influence on citizens’ well-being<ul style="list-style-type: none"><li>– Social, family and community service supports</li><li>– Sports and recreation and arts and culture</li><li>– Engagement in environmental, philanthropic, religious and other pursuits</li></ul></li></ul>	
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- See CRA website at <http://www.cra-arc.gc.ca/chrts-qvng/chrts/pplvng/rqstrtn/rqht-eng.html> for detailed comparison

**1. Charities**

- At common law a charity includes an organization established for one or more of the following recognized charitable purposes:
  - Relief of poverty
  - Advancement of education
  - Advancement of religion
  - Other purposes beneficial to the community recognized by the courts

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- Under the ITA - “qualified donees”
  - Includes a “registered charity”
    - Not defined in the ITA, CRA uses the definition at common law
    - Charitable organizations, public foundations and private foundations
  - Also includes other entities listed in the ITA, e.g., registered Canadian Amateur Athletic Associations (RCAAA); municipal, provincial and federal governments; United Nations and its agents; prescribed universities

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- Advantages of being a charity
  - Do not pay tax on income or capital gains
  - Can issue charitable donation receipts to donors
  - A gift for income tax purposes permits donor to receive a partial benefit (split-receipting)
- Disadvantages of being a charity
  - Must go through a registration process
  - Subject to more regulatory oversight
- Legal forms for a charity
  - Unincorporated associations
  - Charitable trusts
  - Corporations

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**2. Non-Profit Organizations (NPOs)**

- Paragraph 149(1)(l) of the ITA - 4 basic requirements
- Advantages of being an NPO
  - Not pay tax on income or capital gains, unless main purpose is to provide dining, recreation or sporting facilities
  - Broader possible purposes than a registered charity - any purpose other than profit
  - More freedom to operate vis a vis tax rules in the ITA than registered charities, i.e., non-profits can carry out political activities without limitation
  - No requirement to register with CRA and many do not even file a tax return

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- Disadvantages of being an NPO
  - Cannot issue donation receipts
  - NPOs cannot distribute earnings to members in the form of dividends or otherwise and there are limits on the nature of commercial activities that can be carried on
  - Cannot carry a substantial surplus on its books from year to year (other than reasonable reserve), but a registered charity can (e.g., endowments)

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- Legal forms for NPOs
  - Unincorporated associations
  - Corporations
  - But probably not trusts
- Recent CRA views create much uncertainty for NPOs and substantially limit their revenue-generating capacity

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**A. FEDERAL BUDGET 2013**

- On March 21, 2013, federal government announced the 2013 Federal Budget
- Budget 2013 includes a so-called "First-Time Donor's Super Credit" ("FDSC") to encourage new donors
- However, the Budget includes little from the Standing Committee on Finance ("SCOF") Report ,which was released in February 2013 and intended to be taken into consideration for Budget 2013
- Given the present economy, the charitable sector is lucky that there were any new charitable donation tax incentives included in Budget 2013

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- Hopefully, some of the other recommendations from the SCOF Report will be in future budgets, such as the "Stretch Tax Credit for Charitable Giving" proposed by Imagine Canada
- A portion of Budget 2013 was implemented on June 26, 2013 through the enactment of Bill C-60, *Economic Action Plan 2013 Act, No. 1*
- Other provisions have been proposed in Bill C-4, *Economic Action Plan 2013 Act, No. 1* - second reading on October 29, 2013, and has now been referred to committee in the House of Commons

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**1. Temporary One Time Donation Tax Credit for "First-Time Donors"**

- New tax credit to encourage donors who not donated to charity within the last 5 years and only available where neither a donor nor spouse or common-law partner has claimed a charitable donation tax credit in the 5 previous tax years
- When available, additional one time 25% tax credit for "first-time" donations up to \$1,000 of a cash gift
- E.g., a gift of \$500, there is an additional tax credit of \$125 and for a gift of \$1,000, an additional tax credit of \$250
- However, the FDSC can only be claimed once between 2013 and 2017 tax years

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**2. Early Collection of Amounts Owing from Donation Tax Shelters**

- Bill C-60 permits collection actions on 50% of disputed tax, interest or penalties resulting from the disallowance of a donation claimed with respect to a tax shelter
- CRA able to proceed with actions before the liability of the donor determined through the objection and appeal process
- Arguably unfair to permit CRA to collect taxes, fines, and penalties before the tax payer has exhausted all avenues of appeal

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**3. Extension of Reassessment Period for Donors to Registered Tax Shelters**

- Federal government has taken a hard line on various tax loop-holes, particularly those involving tax shelters
- Bill C4 proposes to extend the normal reassessment period with respect to participants in a tax shelter or "reportable transactions" where the information return required to be filed by the tax shelter or reportable transaction is not filed on time, or at all, by a further 3 years after the date that the information return has been filed (for a total of 6 years)

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**4. New Rules Concerning Collection of GST/HST on Paid Parking Affecting Charities**

- Bill C-4 will amend the *Excise Tax Act* to clarify that public sector bodies not exempt from collecting and remitting HST/GST on supplies of paid parking

**5. Repeated Focus on Transparency and Accountability in the Charitable Sector**

- Encourage donations and enhance public awareness, and increase transparency and accountability in the charitable sector, by working with organizations in the sector, including Imagine Canada

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**6. Recommits to Supporting Social Finance**  
Continue to “bring together key players in the non-profit and private sectors to develop investment-worthy ideas and tap the potential of the social finance marketplace to promote economic growth and prosperity”

**7. Amalgamation of the Department of Foreign Affairs and International Trade with CIDA**

- The Department of Foreign Affairs and International Trade and the Canadian International Development Agency amalgamated into new Department of Foreign Affairs, Trade, and Development (DFATD)

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**B. OTHER FEDERAL INITIATIVES**

**1. Technical Tax Amendments Act 2012**

- Bill C-48 received Royal Assent on June 26, 2013
- Brought into force the *Technical Tax Amendments Act*
- The key elements of Bill C-48 applicable to charities has administratively been in effect since 2002

a) Split receipting rules

- Broaden the circumstances in which a donor is entitled to a charitable gift receipt
- Donors are entitled to a charitable gift receipt even if an “advantage” is received as a result of making a gift to charity
- The amount of the gift on the receipt is the “eligible amount”, i.e., the fair market value (FMV) of the property donated minus the value of the “advantage”

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b) Changed how FMV of property gifted when determining the eligible amount of the gift

- Generally applies to situations where donor acquired the property less than 3 years before making the gift
- FMV deemed to be the lesser of the FMV of the property and the cost (or adjusted cost base in the case of capital property) of the property to the donor immediately before gift is made
- This deeming rule does not apply to gifts of inventory, real property or immovables situated in Canada, certified cultural property, publicly traded shares or ecological gift
- This deeming rule also does not apply to where the donor acquired the property from a transferor on a tax-deferred rollover basis

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- c) Amended definitions of "charitable organization" and "public foundation"
  - Large capital contributions from a single person (or group of persons not at arm's length with one another) will not preclude an entity from qualifying as a "charitable organization" or a "public foundation", provided that such person or persons do not control the charity
- d) Additional basis upon which charitable registration may be revoked
  - Charitable registration can be revoked where a registered charity makes a "gift" to a person or entity other than a "qualified donee"
  - Except where the transfer was in the course of the charity carrying on charitable activities

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- e) Section 6(1)(a)(vi) added to provide a new exclusion from the calculation of a taxpayer's employment of any benefit under a program offered by an employer to assist in furthering education provided that:
  - The benefit is received or enjoyed by an individual other than the taxpayer;
  - The employee taxpayer deals with the employer at arm's length; and
  - It is reasonable to conclude that the benefit is not a substitute for salary, wages, or other remuneration of the taxpayer
- The exclusion is retroactive, applying to such benefits received on or after October 31, 2011

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**2. Bill S-14, Fighting Foreign Corruption Act**

- Amends the *Corruption of Foreign Public Officials Act*, received Royal Assent on June 19, 2013
- Removed words "for profit" from the definition of business in s. 2 so that now defined as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere"
  - The prohibition on bribery now applies to organizations involved in any business or undertaking in a foreign country, regardless of whether there is any profit motive

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- Could impact charities carrying on activities outside of Canada where programs include a "related business" or a charitable program that involves inherently commercial element (such as microfinance)
- Repealed the "facilitation payment" exemption provision of the *Corruption of Foreign Public Officials Act* on a date to be fixed by order of the Governor in Council
  - Currently, such facilitation payments are excluded from the prohibition on bribery
  - With the amendment, charities could be exposed to possible criminal liability for activities which are permitted now

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### 3. Bill C-28 (Anti-spam Legislation)

- Creates new regulatory scheme for spam and unsolicited electronic messages
- Received Royal Assent on December 14, 2010
- Expected to come into force in 2014
- Broad definitions of "electronic message" and "commercial activity" and will include charities
- Prohibits sending an electronic message without the express or implied consent of the recipient
- A two year limitation on implied consent can arise from: a donation or gift made to a charity; membership or volunteering in a charity or non-profit
- Significant monetary penalties, which can include a maximum fine of \$10,000,000

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## C. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

### 1. Guidance on How to Draft Purposes for Charitable Registration

- On July 25, 2013, CRA released its Guidance on How to Draft Purposes for Charitable Registration
- Contains CRA's recommended approach to drafting charitable purposes - 3 key elements of charitable purposes

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1) The Charitable Purpose Categories

- The purpose must be exclusively charitable falling within one or more of the following four categories:
  - Relief of poverty
  - Advancement of education
  - Advancement of religion
  - Other purposes that are beneficial to the community in a way that the law regards as charitable and provide a benefit to the public or a sufficient segment of the public
- It can be met by using the wording of the particular category, (e.g. "advancement of religion")
- For the fourth category, it is necessary to specify the particular purpose within that broad category

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2) The Means of Providing the Charitable Benefit

- Purpose should define scope of activities conducted to directly further the purpose and ensure the provision of a charitable benefit

3) The Eligible Beneficiary Group

- Charitable benefit should be provided to the public or a sufficient section of the public
- Guidance provides definitions of the first three categories of charitable purposes

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- First time that a CRA Guidance has provided a definition with respect to charitable category of advancement of religion, defining it as:
  - "manifesting, promoting, sustaining, or increasing belief in a religion's three key attributes, which are: faith in a higher unseen power such as a God, Supreme Being, or Entity; worship or reverence; and a particular and comprehensive system of doctrines and observances"

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- Guidance addresses various other factors regarding charitable purposes
  - Should not be too broad or vague so that not open to interpretation
  - Not eligible for charitable registration or maintaining charitable registration if pursuing unstated purposes through activities that are not charitable
- CRA offers a one-time review of
  - Proposed purposes in draft governing documents
  - Proposed amendments to governing documents and a detailed statement of activities

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### 2. Guidance on Purposes and Activities Benefiting Youth

- On June 24, 2013, CRA released Guidance dealing with organizations that benefit youth
- Replaces the earlier CPS-015 Registration of Organizations Directed at Youth
- Describes how CRA determines whether organization that benefits youth is eligible to become a registered charity or continue as a charity if subject to an audit by CRA

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- Defines “Youth” as “young people, without restriction to a specific age range, which will now depend on the nature of the charitable purposes and activities in question.”
- Defines “at-risk youth” as “youth who are in danger of not making a successful transition to healthy and productive adulthood as a consequence of a range of possible issues, including, but not restricted to, learning difficulties, socio-economic environment, social relationships, and family/school situations.”
- Purposes that benefit youth may fall under any of the four categories of charity described in the Guidance on How to Draft Purposes for Charitable Registration

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- Eligible beneficiaries may qualify to receive benefits from the charitable purpose or from its respective activities
- Purposes may either allow all youth or particular youth to benefit
- Public benefit that is delivered by a charitable purpose needs to be “a reasonably direct result of the purpose and activities”
  - Incidental activities that do not further the purpose will not meet this public benefit requirement
- Must show that an activity can provide a public benefit by structuring and focusing activities to address the identified youth problem

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- Can demonstrate structure and focus through
  - activity’s form (e.g. structured discussions);
  - communications between qualified individuals and youth; and
  - roles and responsibilities of youth in activities (e.g. allowing youth to participate in supervisory roles)
- Guidance outlines examples of charitable purposes and activities relating specifically to youth
  - Purposes with a “teaching or learning component”
  - Social or recreational activities that further a charitable purpose
  - Sports activities designed to address youth problems, provided that there is a causal link between the activity and the charitable benefit

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### 3. Guidance on the Promotion of Health and Charitable Registration

- On August 27, 2013, CRA released a new Guidance on the Promotion of Health and Charitable Registration (CG-021), which replaces a number of previous policies
- Guidance states that the promotion of health is a charitable purpose upon which organizations may be eligible for charitable registration
- Guidance defines the promotion of health as “directly preventing or relieving physical or mental health conditions by providing health care services or products to eligible beneficiaries”

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- Promotion of health is a charitable purpose under the following two conditions
  - It provides services or products to the public, thereby directly preventing and/or relieving a physical or mental condition; and
  - It must meet relevant requirements for quality and safety
- To be eligible for charitable registration, promotion of health must
  - Be provided only to eligible beneficiaries (the public or a sufficient section of the public)
  - Not provide unacceptable, non-incident private benefits

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- Four categories of health related purposes
  - Core health care (diagnosing and treating health conditions, assisting with rehabilitation, protecting and maintaining public health)
  - Supportive health care (providing support to individuals diagnosed with health conditions or their caregivers and families)
  - Protective health care (saving people when lives are in danger by providing health-related emergency services)
  - Health care products (providing products that prevent or relieve health conditions, reduce threats to survival, or respond to large-scale emergencies)

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- Guidance discusses special topics related to healthcare which *may* further charitable purposes:
  - Complementary or alternative health care services
  - Physical fitness and wellness
  - Providing information as a charitable activity
  - Providing medical clinics
  - Providing health care services in underserved areas or areas of social and economic deprivation
- Charities may charge fees, as long as the fees do not further a profit purpose
- Guidance states that some health-related activities may further other charitable purposes as well, such as relieving poverty, advancing education, and advancing religion

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- Advancement of religion in the charitable sense is defined in the same manner as it is in the Guidance on How to Draft Purposes for Charitable Registration
  - There must be “a clear and material connection between the activity and the religion’s key attributes”
  - Eligible beneficiaries are the public at large
  - There are two contexts in which health-related activities may directly further advancement of a religion
    - Providing health care to the public, and by doing so, promoting the doctrines of a religion
    - Providing health care to religious staff, including those retired, in support of religious contribution or service

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#### 4. Guidance on Foreign Activities Changing Rules on Capital Property in a Foreign Country

- On an earlier date (likely in June 2012), Appendix B of CRA Guidance – CG-002 “Canadian Registered Charities Carrying Activities Outside of Canada” was amended
- It is now titled “What if a charity wants to transfer capital property to a non-qualified donee in a foreign country?”
- CRA has now made it much more challenging for a charity operating in a foreign jurisdiction to transfer ownership of capital property to a non-qualified donee

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- Transferring now only permitted in the three circumstances
  - If the jurisdiction in which the charity operates prohibits foreign ownership of capital property
  - If the capital property is transferred to relieve poverty by assisting communities develop into self-sufficient communities
  - If the charity has proof that it has unsuccessfully made every reasonable effort to gift the capital property to a qualified donee and to sell it at fair market value
- Amendment may also affect basic elements of a written agreement between parties in such situations situation, as set out in Appendix F
- Appendix F will now need to be read subject to the more onerous requirements outlined above

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**5. New T3010(13) and T4033 Forms Released**

- CRA released new T3010 forms for charities with fiscal periods ending on or after January 1, 2013 in response to Budget 2012 amendments (Bill C-38) requiring that charities give more details about their political activities
  - Bill C-38 amended the definition of “political activity” under s. 149.1(1) of the ITA 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”
  - Bill C-38 also required that charities disclose more information concerning their political activities
- The new T3010(13) asks if the charity carried on any political activities during the fiscal year, including “gifts to qualified donees...intended for political activities.”

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- A charity that participates in political activities must complete Schedule 7 and
  - describe its political activities, including gifts made to qualified donees intended for political activities
  - explain how these political activities relate to its charitable purpose
  - disclose how it has conducted its political activities
  - disclose the political activity that the funds were intended to support and the amount received from each country outside Canada
- CRA has number of pages on its website explaining key aspects of its *Policy Statement CPS-022, Political Activities* to help charities comply with its political activities requirements

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**6. Modifications Made to CRA Policy Statement on Political Activities**

- CRA has made a number of technical modifications to its *Policy Statement on Political Activities, CPS-022* originally issued on Sept 2, 2003
- Legislative changes made by Budget 2012 mean that political activities now include making of gifts to qualified donees that are intended for political activities;
- An explanation that the “substantially all” (i.e. 90% or more) allocation rule for charitable activities does not apply to gifts made to qualified donees that are intended for political activities, but the part of the gift intended for political activities can now “be treated as a separate transaction where the intent of the donor is clear”

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- Update in Appendix I by deleting reference to the 80% disbursement quota that had been repealed by the 2010 Budget, as well as updating the definition of qualified donee; and
- A number of updated legislative provisions in Appendix II.
- The balance of the Policy Statement on Political Activities remains as it was before Budget 2012 in accordance with a commitment to that effect by the Director General of the Charities Directorate, presented at the National Charity Law Symposium on May 4, 2010

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**7. Clergy Residence Deduction Can Include Part-Time and Assistant Ministers**

- On February 5, 2013, CRA released a technical interpretation on the Clergy Residence Deduction
- The deduction requires individuals to meet both status test and function test in order to be eligible
- Status test requires individual to be a member of the clergy or a religious order, or a regular minister
- Function test requires individual to be in charge of or ministering to a diocese, parish or congregation, or engaged exclusively in full-time administrative service
- Part-time and assistant ministers who meet the status test also meet the function test provided that “ministering to congregations is an integral part of their employment responsibilities and expectations.”

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**8. Clergy Residence Deduction – Individual Deductions Possible for Spouses**

- On June 4, 2013, CRA released interpretation stating that spouses who are both members of the clergy and who reside in different residences may individually claim separate clergy residence deductions
- Section 8(1)(c)(iv) of the ITA provides that the deduction applies to the principal place of residence, as opposed to the principal residence
- As a result, where it can be demonstrated that each ordinarily resided in a separate residence, spouses who are both clergy and living separately can have separate principal places of residence
  - Each may claim the full clergy residence deduction individually for their respective principal places of residence

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**9. Registration Requirements for Qualified Donees**

- As a result of amendments to the ITA that came into force on January 1, 2012, select qualified donees must apply to CRA for registration in order to maintain their qualified donee status:
  - low-cost housing corporations for the aged; and
  - municipal and public bodies performing a function of government in Canada
- As of January 1, 2014, the above - listed qualified donees that have not applied for registration will no longer have the ability to issue official donation receipts or receive gifts from registered charities

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- Applicants for registration must send letter, signed by at least one director, stating that it is applying for registration and include explanation of how it meets the registration criteria
- Criteria for registration can be found online:
  - Low-cost housing corporation:  
<http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/lwcsthsng-ltr-eng.html>
  - Municipal or public body:  
<http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/mncplpblcbds-ltr-eng.html>
- Applicants that show that they met the registration requirements as of January 1, 2012 will be granted retroactive status back to that date

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**10. CRA On Distinction Between Amalgamations, Mergers and Consolidations**

- On August 26, 2013, CRA posted new website to clarify important distinction between amalgamations, mergers, and consolidations
- Amalgamations bring memberships, assets, and liabilities of both charities into one new entity
  - Original charities continue as one entity, but not dissolved
  - New entity may choose which of the original charities' Business Names ("BN") to retain

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- Mergers involve winding up of one or more entity's affairs and transfer of the wound up entity's assets to another registered charity
  - Wound up charities voluntarily revoke their registration
  - BN of remaining charity is not affected
- Consolidations involve dissolution of all original bodies and transfer of assets to a new entity
  - All original bodies are wound up and undergo voluntary revocation of their registration
  - New body is given a new BN
- Charities that amalgamate, merge, or consolidate should inform the Charities Directorate before doing so
- To initiate request for amalgamation, merger, or consolidation, charities should follow steps outlined online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/chngs/mlgmtns-mrgns-nsldtns-eng.html>

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**D. UPDATE ON MAINTAINING NPO STATUS**

- NPO - non-profit organization in the *Income Tax Act*
- 161,000 charities and NPOs in Canada - CRA only keeps a record of number of registered charities
- Include voluntary recreational clubs e.g., book clubs, chess clubs, cubs and scouts, sports clubs,
- Other examples include service clubs, trade associations, professional associations, etc.
- Update on recent CRA views on the tax exempt status of NPOs, including
  - Capacity of NPOs to earn profits
  - Carrying on a trade or business through an NPO
  - Tax consequences of losing NPO tax exemption

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- To qualify as an NPO, an organization must meet all 4 criteria under paragraph 149(1)(l) of the ITA throughout any taxation year in order to maintain tax-exempt status
  1. Not be a charity
  2. Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
  3. Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
  4. Not distribute or otherwise make available for the personal benefit of a member any of its income

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- Consequences of losing NPO status
  - Automatically becomes a taxable entity
  - A deemed year end for the corporation is created and corporation deemed to have disposed of and reacquired all of the corporation's assets for fair market value
  - It also affects the corporation's ability to carry forward losses and other balances or reserves
  - Members of an unincorporated NPO would become responsible for any taxable income in the organization (CRA Document 2010-036970)

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- It is a question of fact that can only be determined after a review of the purposes and activities of the NPO
- NPO status must generally be reviewed on a year by year basis
- Document 2010-038058117 - It is possible for an organization to qualify for exemption as an NPO for a period shorter than its fiscal year
- Being incorporated as a not-for-profit under corporate legislation does not mean that the organization is an NPO for tax purposes
- See CRA *IT-496R, Non-Profit Organizations*  
<http://www.cra-arc.gc.ca/E/pub/tp/it496r/README.html>

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**1. Must not be a charity**

- If CRA considers an organization to be a "charity" as defined in subsection 149.1(1), then it cannot qualify in that period as a tax-exempt NPO
- No explicit opinion from CRA is required and no ruling would be issued because it is always a question of fact (Document 2009-03299)
- If an NPO is denied charitable registration, this does not automatically mean that it is not a charity
- Document 2010-038058117 - an organization with exclusively charitable purposes does not qualify as an NPO, even if it is not a registered charity

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**2. Must be *organized* for non-profit purposes**

- NPOs must be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
- Document 2010-038058117 - NPOs may be established to further any purpose other than for a profit purpose, no requirement that an NPO must have a "benevolent" or "social" purpose
- When determining the purpose for which an association was organized, the instruments creating the association will normally be reviewed, including letters patent, articles of incorporation, memoranda of agreement, by-laws, etc
- Rarely an issue

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**3. Must be *operated* for non-profit purposes**

- NPOs must in fact be *operated* exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
- This is the criteria that is the subject of the most uncertainty for NPOs
- CRA is generally of the view that an NPO can engage in commercial activities and earn an unintentional profit, but if it would be unable to undertake its not-for-profit activities but for its profitable activities, the organization cannot be an NPO because it has a profit purpose (Document 2009-033731)

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- Issues
  - Carrying on a trade or business
  - Accumulating excess income
  - Earning investment income
  - Carrying on a trade or business through a wholly owned subsidiary

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- Document 2010-038058117 - summary of CRA's view
  - NPOs must operate "exclusively" for purposes other than profit (incidental profits do not amount to a profit purpose)
  - May receive incidental profits through basic fundraising (lotteries, bake sales, chocolate bar sales, etc.) and soliciting gifts and grants
  - Can earn profits, but the profits should be incidental and arise from activities that are undertaken to meet the organization's not-for-profit objectives ("incidental profits")

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- Earning profits to fund not-for-profit objectives is not considered to be itself a not-for-profit objective (i.e., no destination test)
- Should fund capital projects and establish (reasonable) operating reserves from capital contributed by members, from gifts and grants, or from accumulated, incidental profits
- Capital contributions, gifts and grants, and incidental profits should generally be accumulated solely for use in the operations of the organization (including funding capital projects or setting up operating reserves) and not used to establish long-term reserves designed primarily to generate investment income

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- Maintaining reasonable operating reserves or bank accounts required for ordinary operations generally be considered to be an activity undertaken to meet the not-for-profit objectives of an organization - incidental income arising from these reserves or accounts will not affect the status of an organization
- May engage in limited fundraising activities involving games of chance (e.g., lotteries, draws), or sales of donated or inexpensive goods (e.g., bake sales or plant sales, chocolate bar sales)

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- In determining whether an organization has any profit purpose, the activities of the organization must be reviewed both independently and in the context of the organization as a whole
- CRA gave the following examples of acceptable activities that result in incidental profit
  - Operation of a canteen at a hockey arena
  - Charging admission above direct cost for a children's concert (where the not-for-profit purpose of the organization was to organize and promote youth participation in music)

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**4. Must not distribute income to members**

- An NPO must not distribute or otherwise make available for the personal benefit of a member any of its income unless the member is a RCAA
- No part of the income of an NPO, whether current or accumulated, can be paid to a member, nor may it declare and pay dividends out of income
- An NPO may fail to comply with this requirement on a winding-up, dissolution, or amalgamation resulting in tax liability
- Certain types of payments will not disqualify an NPO, such as reasonable salaries, wages, fees or honorariums for services rendered to the NPO

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**RECENT CRA ACTIONS**

- CRA View 2011-0392841E5 addressed whether an NPO can maintain its 149(1)(l) status while trying to recover its losses and continue to meet its objectives
- NPOs may:
  - Requiring higher member contributions to cover a previous year's losses would not be a for-profit purpose
    - Is for improving a loss position, not generating investment income
  - Have members provide loans to NPO without loan repayments being considered income from the NPO being payable to the members
    - Question of fact whether member receiving payment in capacity of a lender or member

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- Generating income to cover interest on loan will not indicate that NPO has a profit purpose
  - An expense to be taken into account
- Principal portion of loan should be paid from member contributions and incidental profits (or gifts and grants from other sources)
- Generating material profits from a particular activity in order to offset prior years' losses related to that activity would not be considered a profit purpose
- Cannot use profits from one activity to cover the expenses of another activity
  - "destination of funds" test has been rejected multiple times by the courts

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- Carry on a business for profit and may remain non-taxable if its meets the requirements of paragraph 149(1)(l)
  - Leasing activities may be acceptable if they are connected to the objectives of the NPO
    - Question of fact
    - Incidental profits from the activities could be used to offset losses or expenses from other activities or to repay loans
  - Operation of a canteen at a hockey arena that results in incidental profit would be acceptable
  - But an NPO's business activities cannot be designed to be a driving force of the entity's existence and cannot be the NPO's principle objective

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- Fundraise to help cover operating expenses or deficit or purchase of equipment
  - Usually NPOs that are organized for social welfare, civic improvement, or pleasure or recreation may do this
  - Need to use volunteers
  - Involve activities involving the sale of donated goods or services or games of chance
  - Need to ensure that the scope of the fundraising is not so significant that it can be considered to be a purpose of the NPO

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**Recent CRA Technical's**

- Condo operating a golf course, pro shop and restaurant (#2010-037956117),
- Condo installing solar panels on its roof in order to generate electricity (#2010-0380451E5)
- Condo renting space to telecommunication providers to set up and maintain a cell tower (#2011-040554117),
- Organization sharing proceeds from auction of donated items with contributing members (#2012-0441801E5 )
- Sports club receiving donations from its members and businesses affiliated with its members to fund a capital project and recognizing the contributions on a "wall of honor" or through naming rights of capital assets (#2012-0454251E5)

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**NPO Risk Identification Project**

- The NPO Risk Identification Project is in its final year of a 3-year research project on tax compliance in the non-profit sector
- NPOs have been under the microscope of CRA, particularly with respect to the revenue they earn in addition to membership fees
- CRA randomly selected NPOs to review from the 39,000 NPOs that file T2, T3 and/or T1044 returns
  - Over the three years of the project, 1440 NPOs will have been reviewed

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- The key question for an NPO that has generated a surplus in a particular year is can it be considered to have been operated exclusively for, and in accordance with, its non-profit purposes
  - This determination is usually made by CRA in respect of a particular taxation year of an NPO on the basis of a review of its yearly activities during the course of an audit
- Education letters have caused great concern among NPO sector and prompted many discussions with CRA
- As of April 23, 2012, CRA was directed by the Minister to stop issuing the education letters

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- CRA now has an informative question and answer section for NPOs to consult <http://www.cra-arc.gc.ca/tx/nnprft/ga-eng.html>
- CRA states that education letters were meant to “raise awareness of the rules governing the benefits available” to NPOs under the ITA and that reassessments are only occurring in the most “egregious cases”
- CRA maintains its position that it is possible for an NPO to generate a profit but
  - the profit must be incidental; and
  - arise from activities that support the organization’s not-for-profit objectives

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**Questions to ask**

- Does the organization continue to meet the definition of a non-profit organization under the ITA?
- Are the organization’s objects sufficient to ensure that it is not a charity, e.g., by including in its objects a disqualifying clause such as lobbying for legislative change?
- Does the organization earn a profit from a particular activity? If so, is the earning of the profit incidental or intentional, how much profit is earned from each activity and what is the profit used for?
- Does the organization maintain reserves in excess of a reasonable level acceptable to CRA?

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- Be careful about how capital projects are funded, CRA suggests this may only occur through increased member fees
- Does the organization carry out revenue activity within a taxable entity? If so, governance issues will need to be carefully considered
- Is the organization filing all required income tax forms?

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**Conclusion**

- Recent CRA views create much uncertainty for NPOs and substantially limit their revenue-generating capacity
- While these views are open to challenge on the basis that they contradict existing jurisprudence, NPOs seeking to comply will have to look closely at their revenue-generating activities and take proactive measures to ensure that they are not caught offside CRA's recent administrative positions
- Still remains to be seen what the outcome of the Risk Identification Project will be and whether activities such as ABCs will continue to be off-side of CRA requirements

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**E. CORPORATE UPDATE**

**1. Canada Not-for-profit Corporations Act (CNCA)**

- *Canada Corporations Act* (CCA) since 1917
- Enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of CCA
- Existing CCA corporations required to continue under the CNCA within 3 years - i.e., by October 17, 2014
- Failure will result in dissolution of the corporation
- There are approximately 17,000 Part II CCA non-profit corporations
- As of August 31, 2013, only 1,700 had continued
- Continuance process require the preparation of articles of continuance and a new by-law which complies with the CNCA

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

- The *Ontario Corporations Act* (OCA) has not been substantively amended since 1953
- The new *Ontario Not-for-Profit Corporations Act* will apply to OCA Part III corporations
- The ONCA received Royal Assent on October 25, 2010, but is not expected to be proclaimed until sometime in 2014
- The Provincial Government announced in September 2013 that proclamation of the ONCA would not occur until at least 6 months after the passing of Bill 85 to amend the ONCA introduced on June 5, 2013
- Defined by-laws and plain language guides have been released online at:  
<http://www.sse.gov.on.ca/mcs/en/Pages/onca6.aspx>

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- Unlike the CNCA
  - Optional transition process for corporations to file articles of amendment or adopt new by-laws to comply with ONCA requirements within 3 years of ONCA proclaimed in force
  - Subject to Bill 85, if no transition process taken:
    - Corporation will not be dissolved
    - LP, SLPs and by-laws will be deemed amended to comply with ONCA requirements, resulting in non-compliant provisions deemed invalid
    - Will result in uncertainty in relation to which provisions remain to be valid
  - Better to do transition process to avoid confusion interpreting by-law provisions
  - Social clubs with share capital will have 5 years to continue

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- However, Bill 85, if passed, will provide for the following amendments to the ONCA:
  - The public benefit corporation threshold, currently \$10,000, may be amended by regulation
  - All directors must consent in writing, and the corporation must keep this in the 'approved form'
  - During the 3-year transition period, Part III OCA Corporations must add to their articles all provisions, by-law provisions, or special resolutions that the ONCA requires to be contained in their articles, and any amendment to by-laws will require that all by-law amendments be adopted
  - Non-voting classes will have their limited right to vote delayed until at least three years after the rest of the ONCA comes into effect

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**ESSENTIALS TO KNOW ABOUT THE CNCA AND ONCA**

**1. Incorporation as of Right**

- Incorporation as of right under CNCA and ONCA
- Simpler and faster process
- Replaces the letters patent system with a statutory regime
- Removes ministerial discretion to incorporate
- Obtain certificate of incorporation, not letters patent
- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation's activities being *ultra vires*

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## 2. Corporations that Receive Public Funding

- Corporations that receive public funding are subject to special requirements
- Different rules in the CNCA and ONCA

### CNCA - Soliciting and Non-soliciting Corporations

- Where a corporation receives more than the prescribed amount [\$10,000] in its last financial period from public sources [(a) public donations, (b) federal, provincial and municipal governments or (c) conduit entities], it will become a soliciting corporation
- Status starts from the next AGM for 3 years

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- Implications of being a soliciting corporation
  - Must have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
  - Required to file annual financial statements with Industry Canada
  - Audit and public accountant rules more stringent
  - On liquidation, the articles must provide for the distribution of any remaining property on dissolution to qualified donees

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### ONCA - Public Benefit Corporations (PBC)

- PBCs include
  - Charitable corporations (at common law)
  - Non-charitable corporations that receive more than \$10,000 in a fiscal year in funding from public donations or the federal or provincial governments, or a municipality
- When a non-charitable corporation reaches the \$10,000 threshold, the PBC status won't attach until the first annual meeting of members in the next fiscal year

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- Consequences of being a PBC
  - Not more than one-third of the directors of a PBC may be employees of the corporation or of any of its affiliates
  - Higher thresholds for dispensing with the auditor and/or review engagement requirements
  - On liquidation, the articles must provide for the distribution of any remaining property on dissolution
    - Charitable corporation - to a charitable corporation with similar purposes to its own or to a government or government agency,
    - Non-charitable corporation - to another PBC with similar purposes or to a government or government agency

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- Low threshold means many corporations may become soliciting/PBC corporations
- Solution?
  - Monitor funding sources and quantum
  - Voluntarily be structured as a soliciting/PBC corporation

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### 3. Public Accountant and Financial Review

- CNCA
  - Corporations divided into two categories
  - Designated corporations:
    - A soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$50,000 or that is deemed to have such revenues under the Act;
    - A non-soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$1 million
  - Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of these amounts

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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- ONCA
  - PBCs are subject to higher thresholds for dispensing with the auditor and/or review engagement

Type of Corp/Gross Annual Revenues (GAR)	Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of → Less than \$100,000 (s.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
Over \$100,000 but less than \$500,000 (s.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
Over \$500,000 (s.68)	An auditor must be appointed annually	Audit is required

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
NON-PBC corporation with GAR of →	Less than \$500,000 in annual revenues (s.76(2)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	Over \$500,000 (s.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor and have someone else conduct a review engagement.	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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- #### 4. Directors – Number and Change
- CNCA
    - Minimum 1 director
    - For soliciting corporations - minimum 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
    - Articles may provide a maximum and minimum range
  - ONCA
    - Minimum 3 directors
    - For PBCs - not more than one-third of the directors may be employees of the corporation or of any of its affiliates
    - Articles may provide a maximum and minimum range
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- #### 5. Directors Taking Office
- Elected by members by ordinary resolution at an annual meeting
  - Maximum 4 year term (but no limit on number of maximum terms), may have staggered terms
  - CNCA
    - Cannot have ex-officio directors, need workarounds
    - Optional power of the board to appoint directors (up to 1/3 of those elected at previous AGM)
  - ONCA
    - Mandatory power of the board to appoint directors (up to 1/3 of those elected at previous AGM)
    - Can have ex-officio directors
    - Directors are no longer required to be corporate members
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**6. Directors and Officers – Powers, Duties and Defence**

- Similar rules in CNCA and ONCA
- Directors may borrow money on the credit of the corporation without members' authorization, unless articles or by-laws provide otherwise
- Directors may view certain corporate records that the corporation is required to prepare and maintain (e.g. meeting minutes, accounting records, members' resolutions, etc.) and receive free extracts of them
- Objective standard of care for directors and officers to
  - Act honestly and in good faith with a view to the best interests of the corporation
  - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

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- Directors and officers must comply with the ONCA, the articles and by-laws
- Reasonable diligence defence for directors (not officers)
  - Not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
  - Defence includes good faith reliance on financial statements and reports of professionals

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**7. Members**

- Both CNCA and ONCA provide the same principles but different detailed rules
- A corporation must have members
- Can have
  - One class of members in which case all are voting
  - Two or more classes as long as articles give right to vote to at least one class
- Where more than one class, the members of each class have certain built in protections
- All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership

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- Non-voting members are given voting rights in some limited circumstances, e.g.,
  - Extraordinary sale
  - Amalgamation
  - Continuance to another jurisdiction
  - Change to any rights or conditions attached to those non-voting members or a change in the rights of other classes of members relative to the rights of the non-voting members
- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
- Corporations wanting maximum flexibility will have one class of members

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- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
- Default rules to terminate membership and member's rights apply unless articles or by-laws state otherwise
  - Upon death, resignation, expiry of membership term, liquidation or dissolution of the corporation, expulsion, or termination of membership in accordance with the articles or by-laws
  - Rights terminated upon termination of membership
- ONCA - Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership

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**8. Members' Meetings**

- CNCA
  - Regulations provide a variety of prescribed means of giving notice of members' meetings
  - Default rule is to vote in person, unless participate in meeting electronically
  - By-law can set out any prescribed method of absentee voting (mail in ballot, electronic voting or proxy)
  - May participate in members' meetings by electronic means
  - By-laws can provide for consensus decision making
  - Right to requisition a meeting of members (5% of members)

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- ONCA
  - Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member
  - By-laws may provide for three other methods of voting for persons who can't be present at a meeting in addition to or as an alternative to proxies: by mail, telephone, or by computer (electronic means)
  - Right to requisition a meeting of members (10% of members)
  - No longer requires notice be sent by mail, provided that notice is given 10 to 50 days before the meeting
  - May participate in members' meetings by electronic means

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**9. Members' Rights**

- Members may requisition meetings of the members
- Right to access membership lists - to include name and address, by-laws may provide for more information
- Right to inspect financial records
- There are certain minimum rights in the event of a disciplinary action or termination of membership
- Default 1 vote per member, unless articles provide otherwise

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- CNCA
  - Right of any member to submit proposals to amend by-laws, or require any matter to be discussed at annual meetings, or nominate directors (5% of members) [nominations can also be made at the meeting]
  - Right to access corporate records
  - May sign resolutions in writing
  - Availability of unanimous members' agreement (except for soliciting corporations)

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- ONCA
  - A member entitled to vote at an annual meeting may raise any matter as a "proposal" but must give 60 days notice
  - A proposal may include nominations for directors if signed by at least 5% of members or such lower percentage set out in the by-laws. Nominations can also be made at the meeting
  - Proposal must relate in a significant way to the activities and affairs of the corporation
  - Directors can refuse to discuss the proposal if they give at least 10 days notice, but a member may appeal the refusal decision to court

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### 10. Members' Remedies

- CNCA
  - Right to seek an oppression remedy against the corporation
  - Right to seek a court order to commence a derivative action
  - Compliance and restraining orders
  - Court ordered wind-up and liquidation on application of a member

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- ONCA
  - Right to seek a court order to commence a derivative action
  - Compliance Order - where a corporation, or its directors and officers, fails to comply with the duties set out in the ONCA and regulations, the articles or by-laws
  - Derivative Action - gives members the right to bring an action in the name of the corporation (except religious corporations) to enforce one of its rights
  - Dissent and Appraisal Remedy - the right to a dissent and appraisal remedy is limited to corporations that are not public benefit corporations

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**11. Special Exemption for Religious Corporations**

- CNCA
  - Precludes the members' remedies, referred to above, where the court determines that:
    - The corporation is a religious corporation
    - The act or omission, conduct or exercise of powers is based on a tenet of faith held by the members of the corporation; and
    - It was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation
- ONCA
  - Broader faith base defence for religious corporations

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**12. Amalgamations**

- CCA corporations, once continued under the CNCA, will be able to amalgamate with one another
- Amalgamations between CNCA and ONCA corporations (as well as other jurisdictions) will also be possible

**13. Change of Jurisdiction**

- Possible for a corporation from another jurisdiction to be imported and continue as a CNCA or ONCA corporation
- Possible for a CNCA/ONCA corporation to be exported and continued as a corporation under another jurisdiction

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**14. By-laws**

- CNCA - by-laws no longer require to be approved by Industry Canada, but must be filed with Industry Canada within 12 months, but failure to file will not affect validity
- ONCA – no need to file by-laws with the Ministry

**15. Audit Committee**

- Special rules about committee members, right of public accountant to attend or call committee meetings

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**16. Conflict of Laws**

- ONCA must be read in conjunction with applicable charity law - explicit concept in ONCA
- If there is a conflict between the ONCA or its regulations and a provision made in any other legislation that applies to the following
  - A non-share capital corporation, then the provision in the other legislation prevails
  - A charitable corporation, then the legislation applicable to charitable corporations prevails
- Some provisions of the ONCA will not apply to charities

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- ONCA permits directors to fix their remuneration and receive reasonable remuneration and expenses for their services - but directors of charities cannot receive direct/indirect remuneration from the charity
- ONCA permits directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist - but directors of charities cannot
- ONCA permits corporations to invest its funds as its directors think fit - but charities must also comply with the prudent investor rule in s.27 to s.31 of the *Trustees Act* (s.10.1 of the *Charities Accounting Act*)
- ONCA permits corporations to indemnify the directors and officers and to purchase insurance – but charities must also meet factors in the Regulation 4/01 under the *Charities Accounting Act*

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**PRACTICAL STEPS**

1. Gather current governance structure and procedure
2. Review governing documents and consider
3. Review the key features of the CNCA/ONCA
4. Compare CNCA/ONCA rules with current governance structure and practice
5. Determine whether changes should be made prior to transition
6. Timing of transition
7. Drafting articles and drafting by-laws
8. Obtain membership approval and filing
9. Other consequential filings and records updates

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### 3. B.C. Introduces Bill to Create Community Contribution Companies

- B.C.'s Bill 23, *Finance Statutes Amendment Act, 2012* took effect on July 29, 2013, providing for a new type of company called a "community contribution company" ("CCC")
- CCCs promote social enterprise, allowing the for-profit sector to tap into socially focused investment options
- CCCs must primarily benefit the community through:
  - restrictions on corporate reorganizations to avoid the circumvention of payout restrictions;
  - an "asset lock" that caps dividends on company shares to ensure that profits are retained by the company or directed to the community benefit
- CCCs cannot issue tax receipts, and are not eligible for NPO status

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### 4. Nova Scotia Passes Community Interest Companies Act

- On December 6, 2012, Nova Scotia's *Community Interest Companies Act*, Bill No. 153 received Royal Assent, allowing businesses to seek designation as a "community interest company" ("CIC")
- To qualify for CIC designation, a company must:
  - have a "community purpose," being a purpose "beneficial to society at large or a segment of society that is broader than" those related to the CIC
  - have at least three directors who must act in accordance with the company's community purpose
- CICs are restricted in their ability to pay dividends and distribute assets on dissolution, and must either comply with the rules for non-profit organizations or pay tax as a for-profit corporation
- Proclamation date is not known

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### 5. Bill S-202 Could Eliminate Credit Card Acceptance Fees for Charities

- Bill S-202, *An Act to Amend the Payment Card Networks Act (credit card acceptance fees)*, was introduced in the Senate and received first reading on October 17, 2013
- It proposes to limit credit card acceptance fees charged by "designated payment card networks" to merchants who accept payment by credit card, eliminating credit card acceptance fees being charged to charities
- Currently, only MasterCard and Visa are proposed to be "designated payment card networks"
- If passed without amendments, Bill S-202 would benefit charities by allowing donations to be made by credit card without additional credit card acceptance fees

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**6. Proposed Employer Health Tax Act Amendments May Impact Charities**

- The Ministry of Finance announced intentions to introduce legislation to implement proposed changes to the *Employer Health Tax Act (Ontario)* ("EHTA") that would be effective January 1, 2014, subject to approval of Legislature
- Under the proposed changes, eligible employers under the EHTA that are registered charities with multiple locations will be able to treat each location as a separate employer for EHTA purposes
- Each location will be able to claim the EHTA tax exemption on the first \$400,000 of annual payroll remuneration, prorated where the particular location is new or otherwise exists for less than 365 days of any given year

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- To be considered a separate location, charities must prove that the location is separate from the organization's main body, by providing:
  - Supporting evidence that the location belongs to the charity and the location is publically advertised;
  - Proof of the location's own charitable registration number; or
  - Proof that the location files its own Registered Charity Information Returns with CRA
- For separate location claims, charities will also be required to provide:
  - A complete listing of addresses of all locations;
  - The period of time for which each location exists; and
  - Copies of by-laws or other proof that the charity is not controlled by any level of government

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**7. Proposed Payday Lending Amendments May Impact Affect Microlending**

- The Ontario Ministry of Consumer Services released its *Proposed Regulatory Amendments to the General Regulation (O. Reg. 98/09) of the Payday Loans Act, 2008* ("Proposed Regulations") on August 16, 2013
- The Proposed Regulations would expand the scope of payday loans to catch a broader range of organizations as designated payday lenders under the Act
- To be a payday lender under the Proposed Regulation, a lender must "extend credit" to borrowers, the transaction must not be secured against real property, and the transaction must fall under one of the four listed criteria

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- The first criteria would prescribe businesses that lend aggregate amounts of \$5,000 or less as designated payday lenders
  - Ontario charities and not-for-profits that engage in microlending could become designated payday lenders under the Act and be subject to the requirements and restrictions imposed upon payday lenders under the Act, such as licensing and disclosure requirements

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**8. Endowments to be Treated as Revenue under Accounting Statement of Principles**

- On April 10, 2013, the Accounting Standards Board (“AcSB”) and Public Sector Accounting Board (“PSAB”) of Canada issued a Statement of Principles proposing revisions to Part III of the Canadian Institute of Chartered Accountants (“CICA”) Handbook and the CICA Public Sector Accounting Handbook (“Proposed Principles”)
- Revisions would amend not-for-profit accounting standards in order to address transactions and circumstances unique to not-for-profit organizations
- For accounting purposes, an endowment is “a type of restricted contribution subject to externally imposed stipulations specifying that the resources contributed be maintained permanently, although the constituent assets may change from time to time.”

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- This definition is generally consistent with legal concept of a restricted charitable purpose trust.
- Up to now, an endowment has been treated for accounting purposes as a “direct increase in net assets”, which makes sense from a legal standpoint, since an endowment is a contribution of capital to the charity to be held in perpetuity
- However, Principle 2 of the Proposed Principles states that “an endowment contribution would usually be recognized as revenue when it is received...”, which the Proposed Principles explains is required because an endowment does not meet its definition of a liability

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- Treating an endowment where the capital is to be held in perpetuity as “revenue” for accounting purposes may give the impression to a charity that the capital of an endowment can be expended for current operating expenses, which obviously is not permitted at law and could lead to allegations of breach of trust

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**F. SELECTED CASE LAW (IN CHRONOLOGICAL ORDER)**

**1. *Pal et al v Chatterjee et al*, 2013 ONSC 1329, March 3, 2013**

- The decision involved Toronto Kalibari, an incorporated religious organization governed by a board of nine directors referred to in its by-laws as “trustees”
- On October 10, 2012, a member of the corporation circulated a petition which made various allegations and requested a special meeting of members
  - Two trustees signed the petition
  - A third trustee, although not a signatory to the petition, supported the allegations
- The other six trustees attempted to orchestrate a show cause hearing to remove the three dissident trustees as members of the corporation

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- The court examined the by-laws of the corporation and determined that there was no method available for the removal of the trustees
- The court found that the termination of the applicants as trustees warranted intervention and that the show cause hearing was being initiated for the improper and oblique purpose of their removal
- The decision is a reminder that corporate proceedings to discipline or terminate a member cannot be commenced for an improper or ulterior purpose

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**2. *Diaferia et al v Elliott et al*, 2013 ONSC 1363, March 7, 2013**

- *Diaferia v Elliott* was an application for an interlocutory injunction preventing a membership meeting discussing whether or not a church's pastor should be dismissed
- Church membership required members to complete a three-step process involving an interview, baptism, and confirmation by church membership vote
- Upon announcement of a meeting of members to discuss the pastor's dismissal on March 3, the pastor announced, with support of 5 members, a meeting to be held on February 24 at which the pastor would ask the elders to consider membership of those that supported him

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- The elders decided that only those who had met the qualification requirements for membership as of February 10, 2013, would be recommended for admission into membership
- Of 14 applicants, 12 were denied membership
- An injunction was sought and granted to prevent the meeting called for March 3
- The court sought to ensure that there was a level playing field for both sides concerning the employment of the pastor
- This case is a reminder that if a procedure for admitting members is in the organization's governing documents, it should be followed, and should be made well known to those who want to become members

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**3. *Prescient Foundation v MNR*, 2013 FCA 120, May 1, 2013**

- Pursuant to a CRA audit in 2008, CRA issued a notice of intention to revoke Prescient Foundation's charitable registration, based on three key issues:
  - 1) Prescient donated \$500,000 to the DATA Foundation, a foreign non-qualified donee
  - 2) Prescient was involved in the sale of a farm, where sale proceeds were routed on a tax-free basis "for the private benefit of certain taxpayers"
  - 3) Prescient had "failed to maintain adequate books and records" by only providing CRA with several relevant documents and not allowing CRA to verify information in Prescient's financial statements and registered charity information returns

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- The Federal Court of Appeal (“FCA”) held that the revocation of Prescient’s registration for the gifts to DATA was unfounded since there was no legislative basis at that time to enforce such position despite CRA’s administrative position and proposed amendments not yet in force
- Regarding books and records, the FCA stated that the MNR’s representative must “(a) clearly identify the information which the registered charity has failed to keep, and (b) explain why this breach justifies the revocation of the charity’s registration”, calling into question CRA’s determination of what constitutes adequate books and records

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- The poor books and records regarding the farm sale coupled with lack of documentation and disclosure regarding DATA was found to be sufficient grounds for revocation on the ground of failure to maintain adequate books and records
- This decision is significant for the charitable sector as the FCA addressed inconsistencies between CRA policy and applicable legislation on the issue of gifts to foreign charities and the reasonableness of revocation for inadequate books and records in the face of a “vague” legislation provision
- On July 31, 2013, the Prescient Foundation filed an application for leave to appeal to the Supreme Court of Canada

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**4. *Guindon v The Queen, 2013 FCA 153, June 12, 2013***

- CRA assessed a penalty of \$564,747 against Guindon under section 163.2 of the ITA
  - Guindon had provided a legal opinion on the “The Global Trust Charitable Donation Program” charitable donation scheme
  - She also issued 134 charitable donation receipts
- S. 163.2 provides for monetary penalties assessable against third parties who knowingly, or through gross negligence, participate in, promote, or assist conduct that results in another taxpayer making a false statement or omission in a tax return
- The Tax Court of Canada (“TCC”) held that the section 163.2 penalties to be applied were of a criminal nature, as per s. 11 of the *Charter*

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- The Tax Court's decision was overturned on appeal by the FCA on the basis that:
  - Guindon failed to serve a notice of constitutional question when she sought a finding that a section of the Act was invalid, inoperative or inapplicable
    - The TCC therefore had no jurisdiction to consider whether s. 163.2 created a criminal offence under s. 11 of the *Charter*
  - The FCA also held that proceedings under section 163.2 are in place to maintain discipline, compliance or order “within a discrete regulatory and administrative field of endeavour” and are, therefore, not criminal in nature
- On September 11, 2013, Guindon filed an application for leave to appeal to the Supreme Court of Canada

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**5. *RC v District School Board of Niagara, 2013 HRTO 1382, August 13, 2013***

- Application commenced by self-described atheists asking the Tribunal to consider whether materials explaining atheism should have the same protection and ability to be available to students as materials explaining or promoting mainstream religions, such as Christianity or Islam
- To answer this question, the Tribunal needed to decide whether atheism should be considered a “creed”, and thus a protected ground under the Ontario Human Rights Code (“Code”)
- The Tribunal decided that atheism is a “creed” for purposes of protection under the Code

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- However, the Tribunal did not have to decide whether atheism is a “religion” for purposes of the Code, since “creed” is a broad term that includes religion
- As such, the Tribunal decision is not expected to impact the definition of religion for purposes of “advancement of religion” under the common law in becoming a registered charity under the ITA
- Equally important is that the decision also confirmed that religious groups can be granted permission to distribute religious materials at schools, provided that such opportunity is offered to all creeds on an equal basis and that the materials are distributed outside the classroom

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**6. *Sowah v The Queen*, 2013 TCC 297, August 20, 2013**

- The Appellant's husband indicated that he and his wife made weekly donations to the Jesus Healing Center and that the donated money was from their "household salary", yet he was unable to provide bank records of the cash withdrawals
- The Appellant's receipt did not contain the required information to be clearly stated on a receipt, since it did not have a statement verifying that the receipt was an official donation receipt for income tax purposes, a specific date, and a specific location for where the donation receipt was issued
- The Appellant was held to not have donated \$10,252
- Because the receipt lacked the required information, the court dismissed the appeal

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**7. *Hall v The Queen*, 2013 TCC 314, August 24, 2013**

- In 2011, Hall donated \$24,800 to the International Association of Scientologists ("IAS") an organization that conducted charitable and charitable-like activities but was not a registered charity under the ITA
- Hall argued that it was unfair that he was unable to claim a tax credit while supporting the charity of his choice and that the provisions of the ITA requiring the charity be a "qualified donee" were discriminatory and violated the s.15(1) Charter right to equal treatment under the law
- The Court held that the provision of a tax credit for contributions to a non-registered charity is not a benefit provided by subsection 118.1 of the ITA

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- As a result, s. 15(1) *Charter* rights to equal treatment under the law could not be infringed and no discrimination could have occurred, since the legislation did not provide any benefits to non-registered organizations
- The Court stated that IAS was not barred from applying for registration and that, even if it had applied and been denied registration, registration was not a right for everyone, as organizations had to meet a legislative scheme in order to qualify
- The Court further held that since it was Hall's choice to donate to a non-registered charity, he could not then claim that he was being denied the benefit of the law that provided tax advantages for donations to registered charities

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**8. Applications to Delay Revocation of Charitable Registration**

**A. Gateway City Church v Canada (National Revenue), 2013 FCA 126, May 7, 2013**

- The Court denied an application by Gateway City Church (“Gateway”) for an order to delay the publication of CRA’s notice of intention to revoke Gateway’s charitable registration
- The FCA held that Gateway did not satisfy the balance of the three-part test for granting stays and injunctions
- Gateway argued that revocation of its charitable status would cause irreparable harm as Gateway would not be able to issue receipts for donations and future donations would decrease, and this would then prevent them “from doing essential work for its congregation and the wider community.”

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- The Court held however, that “such a general assertion” was not sufficient to establish “irreparable harm”
- It further held that irreparable harm must be demonstrated, not just asserted. Gateway’s evidence that unavoidable irreparable harm would result was found by the Court to be lacking

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**B. Chabad v MNR, 2013 FCA 196, August 23, 2013**

- CRA issued a notice of intention to revoke after audit determined that Cheder Chabad had issued unsubstantiated donation receipts for \$10 million worth of gifts in kind
- Cheder Chabad brought an application to stay the publication of the revocation in the Canada Gazette
- Court applied applicable test from *RJR-MacDonald*
- On the issue of irreparable harm (where charities have traditionally been unsuccessful at the Federal Court of Appeal) the Court took into account the fact that Cheder Chabad had few assets it could liquidate in order to operate the school for the school year, and the unexpected financial hardship of the parents for tuition fees if part of the fees was no longer receiptable

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- On the balance of convenience, the court took into account the impact that the publication of revocation would have on the 180 students who attended the school
- Taking into consideration the difficulty the students would have in finding a new school immediately before the start of the school year, and the shortfall in liquid assets that the school had to continue operating, the court found that the balance of convenience weighed in favour of granting a stay
- Court ordered a delay of publication in the Canada Gazette until December 31 to permit an orderly liquidation of assets and permit the charity to plan operations without status as a registered charity

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