DONOR LISTS PROTECTED AS CHARITABLE PROPERTY UNDER CANADIAN LAW

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A. INTRODUCTION

Many Canadian charities commence operations in Canada as an affiliated charity of an existing foreign charity. In establishing their Canadian charitable entity, often the U.S. or other foreign charities will utilize a number of mechanisms to ensure control and supervision over the new Canadian charity. One of these mechanisms is an association or an affiliation agreement, often supplemented by a trade-mark license agreement, between the two charities whereby agreement is reached on the structure of the relationship between the parties as well as what is to happen on the termination of the association between the two charities.

Often it is the case that upon termination of the association or affiliation, the foreign charity wishes to ensure the return of all literature and/or materials used by the Canadian charity. In addition, the foreign charity may seek to ensure in an association or an affiliation agreement that upon termination, the Canadian charity will be obligated to return all donor lists generated by it during the association back to the foreign charity. The purpose of this Charity Law Bulletin is to provide readers with a summary of the law in Canada as it applies to donor lists of Canadian registered charities, as well as to outline a possible alternative approach that balances the various interests on this issue.

B. DONOR LISTS AS CHARITABLE PROPERTY OF CANADIAN CHARITIES

1. Application of Canadian law to the Donor Lists

It is not advisable under current Canadian law for a Canadian charity to hand over donor and magazine subscriber lists to a foreign charity upon the termination of an association or affiliation agreement between the parties. As a result of the *Personal Information Protection and Electronic Documents Act (Canada) ("PIPEDA"),* the *Income Tax Act (Canada)* ("ITA") and common law, Canadian charities should not contract to transfer their donor and/or magazine subscriber lists to a foreign charity for the reasons set out hereafter:

Under the ITA and common law:

- A Canadian charity and its Board of Directors owe fiduciary obligations at common law to its donors akin to those required of a trustee. When a donor gives money to a Canadian

charity and in the process provides his or her personal information, there is generally a fiduciary relationship that the Canadian charity then has toward the donor concerning the information that he or she provided. Any misapplication by the Canadian charity in relation to how the donated money and/or personal information is to be used by the Canadian charity or its affiliated foreign charity, could constitute a possible breach of fiduciary duty, subjecting both the Canadian charity and its Board of Directors in their personal capacity to liability.

- It is very difficult to maintain a fiduciary relationship between Canadian donors and a foreign charity with regard to donor information unless full disclosure of this relationship is provided to each donor, and a consent is first obtained from each and every Canadian donor agreeing to disclose their donor information to a foreign charity.

- Canada Customs and Revenue Agency ("CCRA") is the federal agency responsible for overseeing registered charities in Canada and their compliance with the ITA. CCRA requires that all Canadian charities, whether or not they are also incorporated entities, must be autonomous organizations. Accordingly, while it is possible for an American or foreign charity to exercise some indirect degree of control over its Canadian associate by contractual arrangement, the Canadian charity must have its own independent Board of Directors comprised of a minimum 51% of Canadian residents, its own Canadian organizational structure, and control over its own charitable property. While CCRA may permit a foreign charity to effect a world ministry through contractual agreements (eg. association agreements/trade-mark license agreements) with its Canadian charity, such contracts must be reasonable in the circumstances.

- Donor lists of a charity would be considered under Canadian law and likely by CCRA to be property of the Canadian charity. As with all charitable property in Canada, the Board of Directors of the Canadian charity would be required by law to utilize such donor lists only in furtherance of its own current charitable purposes. The use of donor lists and any other charitable property for purposes other than those of the Canadian charity might constitute a breach of fiduciary duty subjecting both the Canadian charity and its Board of Directors in their personal capacity to liability.

  In addition, Sections 110.1(1) and 118.1(1) of the ITA do not permit a registered Canadian charity to distribute or transfer any of its charitable property to "non-qualified donees", which would include a foreign charity.

- It is possible for a Canadian charity to sell its charitable property to a non-qualified donee for fair market value. However, as donor lists are an integral part of the Canadian charity, the sale of donor lists in this situation could negatively impact the ability of the Canadian charity to operate, since the foreign charity could then use the said donor lists to assist in the establishment of another competing charity in Canada.

Under PIPEDA:

- In addition to the ITA, PIPEDA is also very relevant to the issue of whether Canadian donor lists can be transferred to another organization, whether Canadian or not, by the Canadian charity which first received the information. PIPEDA is federal legislation which governs all organizations engaged in commercial activities involving the collection, use and retention of personal information of individuals. The principles contained in PIPEDA are similar to Privacy legislation in other jurisdictions, such as the United States, wherein personal information obtained from individuals cannot be used without the consent of those individuals.

- While *PIPEDA* does not explicitly state whether it applies to all registered charities, it is likely that Canadian registered charities will be subject to *PIPEDA* if they are involved in any commercial activity, whether as a direct charitable program or a related business involving their charitable purposes, eg. sale of literature or fundraising promotional offers. Where it does apply, *PIPEDA* requires that the respective charity implement a privacy policy that fully discloses how it intends to use the personal information obtained from individuals and how it will protect and secure such personal information. Accordingly, if a Canadian charity received donations from Canadians, it would have to fully disclose to such donors beforehand the purposes for which their donations were to be used, and how the personal information provided by them is to be used and to be protected in the future by the charity. Similarly, if any donation and/or personal information was received by a Canadian charity which the Canadian charity intended to be used by its foreign affiliate, then this would have to be fully disclosed to the Canadian donor at the time the donation was made or the personal information received. The donor would then have to consent to the use of his or her money or personal information by the foreign charity before it could be shared.

  If a Canadian charity wished to transfer the personal information collected by it to a foreign charity, or to use such personal information for a purpose different than the one for which it was originally collected, then the Canadian charity would need to again obtain consent from each donor to do so. If consent was not obtained from a donor, then their personal information could not be transferred or used for the new purpose, and would have to be destroyed (on dissolution of the Canadian associate).

- The type of consent (eg. implied vs. express, written or not required from donors for a transfer or different use of personal information, will depend upon the type of information which has been collected by the Canadian charity. A Canadian charity wishing to transfer its donor lists should obtain the written consent of all affected donors before such a transfer takes place. Implied consent will not be enough to justify such a transfer of personal information, as *PIPEDA* requires full consent by individuals to any transfer of information. Individuals have the right to know which personal information has been collected, how it has been and will be used, and why and to whom such information has been and will be transferred. Further, individuals have the right under *PIPEDA* to vet any personal information, previously provided by them, which is to be transferred to another organization.

Accordingly, if a Canadian donor list was to be transferred to a foreign charity by any Canadian charity, then a violation of *PIPEDA* would likely occur unless consent to do so is first obtained from the Canadian charity holding the donor lists, which has already obtained the consent to do so from the Canadian donors themselves. However, even if the foreign charity was able to receive the Canadian organization's approval to transfer such donor lists and such a transfer subsequently occurred, such a transfer may still constitute a breach of the ITA for the reasons stated above.

- It should be noted that Ontario tabled draft privacy legislation in early 2002 entitled *"Privacy of Personal Information Act, 2002"*. This legislation has revived the option of implied consent to new uses of personal information and will be applicable to all organizations, companies or operators in Ontario. The proposed legislation will make it difficult, if not impossible, for charities to carry out trans-border transfers of personal information between Canadian charities operating in Ontario and their foreign counterparts.

- A foreign parent charity could not be the outright owners of these donor lists as, pursuant to the ITA, it is not possible to separate donors and donor lists from their donations. This means that when a donation is made from a Canadian to a Canadian charity, the personal information of the Canadian donor must remain with the Canadian charity.

  However, under *PIPEDA*, with the consent of each donor to the Canadian charity, it might be possible for the foreign charity to be the owner of these donor lists in trust, for a registered Canadian charity with whom it is associated, whether it be the existing Canadian charity or a successor organization. Alternatively, at the time of making a donation to or otherwise contacting the Canadian charity, individuals could be asked to consent to their personal information being shared between both the Canadian charity and its foreign parent. These alternative options are discussed in more detail in Section 2 below.

- In the event of a termination of the association between the Canadian charity and the foreign charity, the foreign charity may not be able to unilaterally obtain the donor lists of the Canadian charity but would rather have to hold such lists, in trust, for a successor Canadian charity with whom it would associate in the future. However the successor Canadian charity would have to be a fully autonomous organization from the foreign charity, rather than only a type of subsidiary. As well, this may not address the continued use of the donor lists by the original Canadian charity, albeit it in a new form, following the termination of the association with the foreign charity.

  Alternatively, where donors have initially agreed to share their personal information with both the Canadian charity and the foreign charity, then such personal information could be retained and used by the foreign charity following the termination of the association. However, the foreign charity could only use this personal information for the purposes for which it was originally collected. This would presumably preclude it from unilaterally

transferring such information to its new successor Canadian charity without obtaining beforehand the consents of all donors to do so.

In summary to this point, it is not advisable for Canadian charities, under either ITA or PIPEDA, to transfer its donor and/or magazine subscriber lists to foreign affiliates of the Canadian charity. Accordingly, any association or affiliate agreement between the parties should not contain provisions requiring the Canadian charity to transfer its donor lists following termination of the association between the parties. However, it may be possible to effect a balance of the different interests between the parties on this issue as set out below.

2. Possible Balanced Approach

A possible balanced approach in this regard may be as follows:

a) Where the Associated Charities are on Good Terms

Under *PIPEDA*, provided the consent of each donor to the Canadian charity is first obtained, it may be possible for the foreign charity, to be the owner of these donor lists in trust for a Canadian registered charity, whether it be the existing Canadian charity or another successor organization. However, the personal information of any Canadian donor who did not consent to their personal information being held in trust by the foreign charity would have to be destroyed.

Alternatively, the Canadian charity could request that all Canadian donors consent to have their personal information shared between both the Canadian and the foreign charity. Where Canadian donors have initially consented to share their personal information with both the Canadian charity and the foreign charity, such personal information could be retained and used by the foreign charity following the termination of the association. However, the foreign charity could only use this personal information for the purposes for which it was originally collected. This would presumably preclude it from unilaterally transferring such information to a successor Canadian charity without obtaining beforehand the consent of all Canadian donors to do so.

However, for the reasons indicated above, the foreign charity likely cannot be the outright owners of these Canadian donor lists. This is because the ITA may not permit the separation of donors and the resulting donor lists from their donations, i.e where the donation is from a Canadian interest to a Canadian charity, the donation and the personal information of the Canadian donor must stay with that Canadian charity.

b) Termination of the Association

In the event of a termination of the association between a Canadian charity and its foreign parent, the foreign charity would not be able to unilaterally obtain the donor lists but would rather need to continue to hold such lists in trust for another Canadian charity with whom it would associate in the future. However, a successor Canadian charity would need to be independent of the foreign charity as an autonomous Canadian charity with an independent Board of Directors. Again, in this scenario,

before the existing Canadian charity could release the donor lists to the new Canadian charity to be associated with the foreign charity, the consent of all the individual donors to the existing Canadian charity would have to be obtained permitting their personal information to be transferred to the new Canadian charity. In the event that consents were denied or not obtainable from individual donors, then the personal information of those donors would have to be destroyed and could not be transferred to the new Canadian charity.

Another issue, which arises on the termination of the association between a Canadian charity and its foreign parent, is the ability of the Canadian charity to continue to own the Canadian donor lists. In any association agreement between the parties, the foreign charity could require the Canadian charity to advise all Canadian donors of any termination of the association and that the foreign charity would be in contact with them to advise of the successor Canadian charity's information. Alternatively, the parties would need to agree by contract that upon any future termination of the association between them they would jointly write to all Canadian donors to advise of the termination and request the transfer of personal information to a new Canadian charity to be associated with the foreign charity. Through the association agreement, following termination, the foreign charity could also instruct the Canadian charity to stop using the Canadian donor lists created by it.

c) Summary of Balanced Approach

While the foreign charity likely cannot become the outright owner of the donor/subscriber lists of its Canadian associate, it may be possible to have shared ownership of these lists by the foreign and the Canadian charity. By the terms of an association or an affiliate agreement the Canadian charity can agree to contact all of its donors, upon termination, with a notice (mutually agreed upon by the parties) to advise of the termination and to give each donor the option to release his or her personal information to another Canadian registered charity to be identified by the foreign charity.

Provided both parties were agreeable, the association agreement could also address whether the donor lists in question would then be exclusively used by the new Canadian associate of the foreign charity, whether the original Canadian charity would be able to continue to use the lists (under its new name) following termination of its association with the foreign charity, and/or whether the original Canadian charity would have to cease use of the donor lists altogether following termination of its association with the foreign charity.

C. PRIVACY POLICY

As indicated above, *PIPEDA* requires all Canadian organizations engaged in any inter-provincial transactions and/or commercial activities, which involve the collection, use and retention of personal information of individuals, to prepare and implement a privacy policy. This mandatory privacy policy of the organization must outline how the organization will gather and protect the personal information collected from individuals through its commercial activities. It is advisable that a Canadian charity involved either in inter-provincial transactions or commercial activities have a privacy policy in place to govern its management and protection of the personal information collected from its donors and subscribers.

D. CONCLUSION

In the increasingly global field of charities, the resulting increase in the number of charities with international relationships will continue to grow. Where such international relationships exist involving a Canadian charity, there will need to be a careful review of the terms of the control established over the Canadian affiliate charity as well as applicable Canadian laws, as evidenced by the comments in this Bulletin. While international associations provide Canadian affiliate charities with considerable goodwill, name recognition value and a solid foundation by which to operate, it is still necessary for the Board of Directors of the Canadian charity to ensure that it is an autonomous and independent entity and that the control provisions exercised over it are not onerous and are in compliance with Canadian law. This will require careful study, implementation and monitoring by directors of charities and their legal counsel.

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