

STEP Canada

Corporate and Tax Update

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Karen J. Cooper
Carters Professional Corporation
kcooper@carters.ca

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OVERVIEW

1. New not-for profit corporation legislation
2. Highlights of Budget 2011
3. Highlights of Budget 2012


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NEW NOT-FOR PROFIT CORPORATION LEGISLATION

- Both the Federal and Ontario government enacted new corporate legislation for the non-profit sector
- *Canada Not-for-Profit Corporations Act (CNCA)*
- *Ontario Not-for-Profit Corporations Act, 2010 (ONCA)*


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1. Status and Overview of the CNCA


- Enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of *Canada Corporations Act* (CCA)
- See Industry Canada's website for resources: http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html
- See *Charity Law Bulletins* on "Countdown to the *Canada Not-For-Profit Corporations Act* - Practice Tips" 1 to 9, Bulletin Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247

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- The new rules do not apply automatically to CCA corporations
- Existing CCA corporations will be required to continue under the CNCA within 3 years of proclamation – i.e., until October 17, 2014
- Failure to continue will result in dissolution of the corporation
- Can make amendments to existing articles, letters patent or memorandum or articles of association at the time of applying for continuance

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- This means all CCA corporations will need to
 - Review its letters patent and by-laws
 - Contact CRA (if a registered charity) where there are proposed changes to the purpose(s)
 - Prepare
 - Articles of Continuance
 - Notice of Directors and Registered Office
 - Create new by-laws
 - Get membership approval - Articles must be approved by 2/3 vote

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- File required documents with Industry Canada
- No filing fee, no need to file by-laws for continuance
- Industry Canada will issue a Certificate of Continuance
- File approved new by-laws within 12 months of adoption
- Charities – send Certificate of Continuance, Articles of Continuance and new by-law to CRA


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2. Status and Overview of the ONCA


- The Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953
- Bill 65 introduced the new Ontario *Not-For-Profit Corporations Act, 2010* (“ONCA”)
- Enacted on October 25, 2010, expected to be proclaimed in force on January 1, 2013
- Regulations not released, details missing
- See *Charity Law Bulletin*. 262 “Nuts And Bolts of the Ontario *Not-For-Profit Corporations Act, 2010*”

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- Unlike the CNCA
 - Optional for corporations to file articles of continuance or adopt new by-laws to comply with ONCA requirements in 3 years of ONCA in force
 - If no continuance process taken, then
 - Corporation will not be dissolved
 - LP, SLPs and by-laws will be deemed amended to comply with new ONCA requirements, resulting in non-compliant provisions deemed invalid
 - Will result in uncertainty in relation to which provisions remain to be valid

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- Social clubs with share capital will have 5 years to continue
- As part of the continuance process, OCA corporations can, by articles of amendment, amend any provision in its letters patent, supplementary letters patent, by-laws or special resolution to bring the provision into conformity with the ONCA

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- This means that all OCA corporations will need to
 - Review its letters patent and by-laws
 - Contact CRA (if a registered charity)
 - Prepare Articles of Continuance and other required documents
 - Create new by-laws
 - Get membership approval
 - File required documents
 - Certificate of Continuance will be issued
 - Charities – send to CRA

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UPDATE ON FEDERAL BUDGET 2011

- The 2011 Federal Budget (“Budget 2011”) was originally introduced on March 22, 2011 and was reintroduced in almost the identical form on June 6, 2011
- Royal Assent on December 15, 2011
- CRA comment on Budget 2011 <http://www.cra-arc.gc.ca/chrts-qvng/chrts/bdqt/2011/menu-eng.html>
- For more information on the Budget see Charity Law Bulletin Nos.245 and 253 at www.charitylaw.ca

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1. New Regime for Qualified Donees

- “Qualified donee” (QD) is defined in the *ITA* – may issue official donation receipts for gifts and may receive gifts from registered charities
- Budget 2011 extends certain regulatory requirements to the following types of QDs
 - Registered Canadian Amateur Athletic Associations
 - Municipalities in Canada
 - Municipal and public bodies performing a function of government in Canada
 - Housing corporations in Canada that exclusively provide low-cost housing for the aged

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- Prescribed universities
- Charitable organizations outside of Canada that received a gift from Her Majesty in right of Canada in the current or preceding year
- Registered national arts service organizations are deemed to be “registered charities,” so they are already subject to the same regulatory requirements
- The effective date of these proposals was January 1, 2012

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- The new requirements that apply
 - QDs identified in a public list maintained by CRA
 - If a QD does not issue donation receipts in accordance with the *ITA* and its regulations, it could have its receipting privileges suspended or its QD status revoked
 - RCAAAs will be subject to monetary penalties if they issue improper receipts or fail to file an information return
 - QDs are required to maintain proper books and records and provide access to those books and records to CRA when requested
 - Failure to do so may result in suspension of receipting privileges or revocation of its QD status


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2. Ineligible Individuals

- Budget 2011 identified a CRA concern that applications for charitable status were being submitted by individuals who have been involved with other charities and RCAAs that have had their status revoked for serious non-compliance
- In the past, CRA could not refuse to register or revoke the status of a registered charity or RCAA based on these grounds

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- Allows CRA to refuse or revoke registration of a charity or suspend ability to issue official donation receipts, if a director, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity is an "ineligible individual" – a person who:
 - Has a "relevant criminal offence" – convicted of a criminal offence in Canada or similar offence outside of Canada relating to financial dishonesty (including tax evasion, theft or fraud), or any other criminal offence that is relevant to the operation of the organization, for which he or she has not received a pardon

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

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

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- Budget 2011 stated that CRA will look at the particular circumstances of a charity or RCAA but does not state what those circumstances are
- Budget 2011 did state that CRA will take into account whether appropriate safeguards have been instituted to address any potential concerns – but no explanation of what these safeguards might be
- What due diligence will be required by a charity to ensure that an ineligible individual does not become involved or continue to be involved in the management of the charity?

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- Budget 2011 stated that a charity will not be required to conduct background checks, but even if the charity wanted to review the information required to independently assess whether an individual is ineligible may not be publicly or easily available
- Onus is shifted to charities to comply in a situation where it is impossible to ensure 100% compliance because the necessary information is not available


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3. Charitable Gifts Returned to Donors

- Budget 2011 clarified the effect of a charity returning a donation with respect to the ITA
- CRA can now reassess a taxpayer outside the normal reassessment period and disallow a taxpayer's claim for a credit or deduction when gifted property is returned to a donor
- If charity has issued an official donation receipt for the donation and subsequently returns gift to donor, if the fmv of the returned property is greater than \$50, the charity must file an information return (e.g. a letter) with CRA, copy to donor, within 90 days after return

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- Effective for gifts returned on or after March 22, 2011
- Budget does not address the issue of whether or not a gift can be returned to the donor at common law
- Legal advice should be sought in this regard




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4. Gifts of Non-qualifying Securities

- A NQS is generally a share, debt obligation, or other security (but not publicly listed securities and deposit obligations) of a corporation that is not at arm's length to the donor
- NQS rules apply to private foundations and charities not at arm's length to donor
- Rules extended to gifts of NQS to all charities and tax recognition deferred until the charity disposes of the NQS to a third party for consideration
- Effective for transactions on or after March 22, 2011




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5. Granting of Options

- Budget 2011 delays the recognition of a gift of an option to acquire property
- Previously, the gift was recognized on the date of the gift and a receipt could be issued immediately for the fmv of the option
- Recognition now delayed until the option is exercised
- New rules to coincide with proposed split-receiving rules
- Effective for options granted on or after March 22, 2011

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6. Donations of Flow-thru Shares

- Previously, the deduction of the “flow-thru” expenses, the elimination of the capital gains tax, and the charitable donation deduction or credit substantially reduced the after-tax cost of making a charitable donation of FTS
- Budget 2011 limits the availability of the exemption from tax on capital gains to the extent that the cumulative capital gains in respect of the gift exceeds the original cost of the FTS
- Applies to shares issued pursuant to a FTS agreement on or after March 22, 2011

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FEDERAL BUDGET 2012

- The 2012 Federal Budget (“Budget 2012”) was introduced on March 29, 2012 and available online at <http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html>
- Budget 2012 does not include any new donation tax incentives
- Instead, largely focuses on measures dealing with the perceived lack of transparency and accountability concerning political activities, as well as a number of other ad hoc charity issues


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1. New Rules and Sanctions Involving Political Activities

- Recent discussion that “foreign foundations” have been funding Canadian charities, and that Canadian charities, particularly environmental charities, have been using those funds for untoward political objectives
- Budget 2012 has responded in a number of ways to address this alleged concern, all of which will come into force upon Royal Assent and will apply to both registered charities and RCAAAs

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- More disclosure required concerning political activities
 - More information about political activities will be required in the T3010, (incl. foreign donors)
 - See Speech by the Director General, Charities Directorate on May 4, 2012 for details (available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdqtts/2012/dgspch-eng.html>)

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- New sanctions are to be introduced:
 - Where a registered charity exceeds the limits in ITA for political activities (generally 10% of its total resources a year), CRA can impose suspension of tax receiving privileges
 - Where a registered charity fails to report information that is required to be included on a T3010, CRA can suspend its tax receiving privileges until CRA notifies the charity that it has received the required information
- \$8 million committed to enforcement by CRA

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- Revised definition of political activities
 - definition of “political activities” under section 149.1(1) will be amended 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”
 - What does the phrase “can reasonably be considered” in the context of political activities actually mean in practice?

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2. Gifts to Foreign Charitable Organizations

- Certain foreign charitable organizations that have received a gift from the Government of Canada in the previous 24 months are currently deemed to be QDs under the ITA
- There are currently only 9 of these foreign charitable organizations, including William J. Clinton Foundation

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- Budget 2012 proposes that foreign charitable organizations that receive a gift from the Government of Canada may apply for QD status if they pursue activities:
 - That relate to disaster relief or urgent humanitarian aid; or
 - Are in the national interest of Canada
- QD status will be made public and will be granted for a 24 month period
- Measures will apply to applications made on or after the later of January 1, 2013 and Royal Assent

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3. Tax Shelter Administrative Changes

- Budget 2012 proposes to encourage tax shelter reporting by:
 - Modifying the calculation of the penalty
 - Introducing a new penalty for a promoter who fails to meet their reporting obligations with respect to annual information returns
 - Limiting the period for which a tax shelter identification number is valid to one calendar year

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