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**19<sup>TH</sup> ANNUAL NATIONAL  
CANADIAN ASSOCIATION OF GIFT PLANNERS  
(CAGP) CONFERENCE**

**Victoria, B.C. – April 19, 2012**

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**Essential Charity Law Update**

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

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**19<sup>th</sup> Annual National Canadian  
Association of Gift Planners  
(CAGP) Conference  
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## Essential Charity Law Update

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### OVERVIEW

- Federal Budget 2012
- Update on Federal Budget 2011
- Other Recent Federal Initiatives
- Recent CRA Publications
- Corporate Update
- Recent Case Law

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### A. 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, such as the charitable donation tax credit proposed by Imagine Canada
- Instead, Budget 2012 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
- See Charity Bulletin No. 280, "2012 Federal Budget: Including New Rules and Sanctions for Charities Conducting Political Activities" for more details, online at <http://www.carters.ca/pub/bulletin/charity/2012/chylb280.htm>

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1. New Rules and Sanctions Involving Political Activities

- Recent Senate debates have raised the fear 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
- First, there will be more disclosure required concerning political activities
  - More information about political activities will be required in the T3010, (incl. foreign donors) although details of what that involves are not yet known

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- Second, new sanctions are to be introduced:
  - Where a registered charity exceeds the limits in the *Income Tax Act* (“ITA”) for political contributions (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receipting privileges; and
  - Where a registered charity fails to report information that is required to be included on a T3010 annual return, CRA can suspend its tax receipting privileges until CRA notifies the charity that it has received the required information
    - This emphasizes the importance of having board members review and approve the T3010 annual return before filing it with CRA
  - \$8 million committed to enforcement by CRA

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- Third, a revised definition of political activities will apply
  - Generally, charities are permitted to engage in up to 10% of its total resources a year in non-partisan activities
  - However, the 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”
- There are many concerns that arise from these new rules:
  - What does the phrase “can reasonably be considered” in the context of political activities actually mean in practice?

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- Is the gift to be all allocated to political activities of the recipient qualified donee, or only on a proportionate basis depending upon how the qualified donee reports its own political activities
- What happens if the recipient qualified donee is involved in prohibited partisan activities?
- It will likely be best to direct a gift to a recipient qualified donee to not use it for political activities
- Concerns about how to track foreign funding and what sort of disclosure may be required
- Disclosure requirement will impact all charities that get funding from foreign sources, including religious charities as well as environmental charities
- Concerns about privacy issues if foreign sources have to be identified

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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 qualified donees under the ITA, and may therefore issue donation receipts to Canadian donors and receive gifts from registered charities
- There are currently only 9 of these foreign charitable organizations, including William J. Clinton Foundation
- Budget 2012 proposes that foreign charitable organizations that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities:
  - That relate to disaster relief or urgent humanitarian aid; or

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- Are in the national interest of Canada
- After consultation with the Minister of Finance, the Minister of National Revenue will have the discretionary power to grant qualified donee status to foreign charitable organizations that meet the above criteria
- Qualified donee status will be made public and will be granted for a 24 month period, beginning on a date to be chosen by Minister of National Revenue
- CRA will develop guidance regarding of this measure
- Foreign charitable organizations that currently have qualified donee status will continue to be qualified donees until the expiration of that current status
- 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 and
  - Limiting the period for which a tax shelter identification number is valid to one calendar year
- Currently, the penalty for selling an interest in, or accepting consideration in respect of, a tax shelter that is not registered with CRA, or filing false information in an application to register a tax shelter is the greater of \$500 and 25% of the consideration received or receivable in respect of the tax shelter

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- The Budget proposes the penalty be changed to the greater of the amount determined under the existing rules and 25% of the amount asserted by the promoter to be the value of the property that participants in the tax shelter can transfer to a donee
- The Budget also proposes an additional penalty be imposed if a promoter fails to either:
  - File an annual information return in response to a demand by the CRA to file the return; or
  - Report in the return an amount paid by a participant in respect of the tax shelter

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- This new penalty will equal:
  - 25% of the consideration received or receivable by a promoter in respect of all interests in the tax shelter that should have been, but were not, reported in an annual information return, or
  - Where the amounts paid by participants are not reported, the greater of 25% of the consideration received or receivable by the promoter and the amount asserted by the promoter to be the value of the property that those participants can transfer to a donee
- The measure will generally apply on Royal Assent of the enacting legislation

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4. GST Rebate for Books to be Given Away for Free by Prescribed Literacy Organizations
  - Currently, a rebate of the GST (and the federal part of the HST) is given for printed books acquired by public libraries, educational institutions, charities and qualifying non-profit organizations prescribed by regulation and whose primary purpose is the promotion of literacy
  - However, this rebate does not apply to tax paid on printed books to be sold or given away
  - The Budget proposes to allow charity and qualifying non-profit literacy organizations prescribed by regulation to claim a rebate of the GST (and the federal part of the HST) they pay to acquire printed books to be given away
  - This measure will apply as of Budget Day

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## B. UPDATE ON FEDERAL BUDGET 2011 (JUNE 6,2011)

- 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
- Bill C-13, which implements Budget 2011, received Royal Assent on December 15, 2011
- Budget 2011 contained significant changes to the regulation of charities and other qualified donees, and introduced the concept of "ineligible persons"
- CRA comment on Budget 2011 <http://www.cra-arc.gc.ca/chrts-qvng/chrts/bdqtts/2011/menu-eng.html>
- For more information on the Budget see Charity Law Bulletin Nos.245 and 253 at [www.charitylaw.ca](http://www.charitylaw.ca)

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1. New Regulatory Regime for Qualified Donees
  - "Qualified donee" (QD) is defined in the *Income Tax Act* – may issue official donation receipts for gifts and may receive gifts from registered charities
  - Budget 2011 extends certain regulatory requirements, that in the past only applied to charities 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
- The remaining QDs are not affected by the new rules
  - The Government of Canada
  - The provincial and territorial governments in Canada
  - The United Nations and its agencies
- Registered national arts service organizations are deemed to be “registered charities,” 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 to QDs listed above
  - QDs are to be identified in a publicly available 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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- Additional regulatory requirements to RCAAAs that in the past only applied to registered charities:
  - Promotion of amateur athletics in Canada on a nation-wide basis as their *exclusive* (not primary) purpose and *exclusive* (not primary) function
  - Monetary penalties, suspension of receipting privileges, or revocation if an RCAA provides an undue benefit to any person (e.g., excessive compensation to staff or professional fundraiser)
  - CRA may make available to the public certain information and documents in respect of RCAAAs (e.g. governing documents, annual information returns, applications for registration and the names of directors )

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2. New Governance Regime for Registered Charities and RCAAAs ("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 RCAAAs 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 RCAAA based on these grounds

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- Budget 2011 allows CRA to refuse or revoke the registration of a charity or a RCAAA or suspend its ability to issue official donation receipts, if a member of the board of directors, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity or RCAAA 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 or RCAAA
  - Includes offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation)

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

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- 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:
  - Possible to search for relevant criminal offences in Canada, but abroad?
  - Many relevant offences are not tracked in publicly available databases in Canada, and unlikely abroad
  - Names of directors and like officials of revoked charities not maintained in a single publicly available database
  - Not likely that an individual who otherwise controlled or managed the operation would be identified in publicly available documents – likely information solely in CRA's control

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- 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
- This new cause for revocation is similar to a strict liability offence – no due diligence defence is available in the legislation
- Charities will be required to undertake other forms of due diligence and hope CRA will excuse any inadvertent non-compliance?
- Are all charities going to be required to conduct police checks even if not dealing with ineligible individuals as a simple matter of due diligence?

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- Is a questionnaire necessary and if so, how frequent is a questionnaire to be used, how broad should the questions be and to whom should it apply?
  - Likely all directors, trustees, officers and like officials
  - Who is “an individual who otherwise controls or manages the charity” - likely all senior staff ?
- How does a charity deal with a director or officer that is an ineligible individual – usually only the members or directors can remove a director?
- How does a charity remove a staff member that is an ineligible individual – could have important employment law ramifications?

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3. Clarification on 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 a charity has issued an official donation receipt for the donation and subsequently returns the gift to the donor, if the fair market value of the returned property is greater than \$50, the charity must file an information return (e.g. a letter) with CRA and provide a copy to the donor within 90 days after the return of the gift
  - 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 (NQS)

- A NQS is generally a share, debt obligation, or other security (but not publicly listed securities and deposit obligations of financial institutions) of a corporation that is not at arm's length to the donor
- NQS rules currently apply to donations to private foundations and charities not at arm's length to donor
- Budget 2011 extended rules to gifts of NQS to all registered charities and to defer tax recognition until the recipient charity disposes of the NQS to a third party for consideration. If the NQS is not disposed of by the charity within the five-year period following the date of the gift, there will be no tax recognition of the gift
- Budget 2011 also created new anti-avoidance rules
- Effective for securities disposed of by donees on or after March 22, 2011

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#### 5. Granting of Options to Qualified Donees

- Budget 2011 delays the recognition of a gift of an option to acquire property given to a QD
- Previously, where a donor granted an option to purchase property to a QD, the gift was recognized on the date of the gift and a receipt could be issued immediately for the fair market value of the option
- Budget 2011 delays recognition until the option is exercised by the QD, e.g. the property is purchased based on the amount by which the fair market value of the property at that time exceeds the total of amounts paid by the QD
- New rules to coincide with proposed split-receipting rules
- Effective for options granted on or after March 22, 2011

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#### 6. Donations of Flow-thru Shares ("FTS")

- Previously, the combined effect of the deduction of the "flow-thru" expenses, the elimination of the capital gains tax, and the charitable donation deduction or credit substantially reduces or virtually eliminates the after-tax cost of making a charitable donation of FTS
- Budget 2011 limits the availability of the exemption from tax on capital gains where FTS are donated to a qualified donee to the extent that the cumulative capital gains in respect of the gift exceeds the original cost of the FTS
- The new rules apply where a taxpayer acquires shares issued pursuant to a FTS agreement entered into on or after March 22, 2011

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## C. OTHER RECENT FEDERAL INITIATIVES

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1. Standing Committee of Finance Study on Tax Incentives for Charitable Donations
  - Motion 559 referenced in Budget 2011 called for the Standing Committee on Finance ("FINA") to study current tax incentives for charitable donations:
    - Review changes to the charitable tax credit amount;
    - Review the possible extension of the capital gains exemption to private company shares and real estate when donated to a charitable organization; and
    - Consider the feasibility of implementing these measures
  - FINA received an "Order of Reference" to proceed with its study

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- On September 20, 2011, FINA approved a motion to undertake a comprehensive study of no less than 12 meetings on the current tax incentives for charitable donations with a view to encouraging increased giving
- FINA commenced the study and meetings have been held
- When FINA moved to undertake its study in September 2011, it slightly expanded the parameters of its review to also include consideration of the cost of changes to existing tax measures, as well as the implementation of new tax incentives
- There is now some concern in the charitable sector that there may be few, if any, limitations on what FINA can look at in their study and that broader issues may be brought up that fall beyond the parameters of the original motion

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- The lack of limitations may cause members of FINA to possibly focus on other issues rather than on the main issue at hand of charitable donation incentives
- The charitable sector will need to carefully monitor FINA's study, as the findings of the study will be reported back to the House of Commons for possible legislative consideration
- In mid-February 2012, FINA hearings were suspended while FINA dealt with legislation referred to it by the House of Commons
- No date for the recommencement of hearings has been set, though it is anticipated that hearings will resume in April 2012

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2. Senate Inquiry into Foreign Funding of Charities

- On February 28, 2012, Senator Nicole Eaton initiated an inquiry into the foreign funding of charities in Canada
- Allegedly, U.S. private foundations have given an estimated quarter of a billion dollars since 2000 to Canadian charities who protest energy projects and environmental causes (e.g. tar sands, the Keystone Pipeline Project, the seal hunt, B.C. salmon, etc.)
- The alleged concern is that foreign funding is interfering in the domestic affairs of Canada and abuses the status as a registered charity
- Certain members of the Senate have recommended greater transparency and disclosure for charities, particularly in relation to the source of foreign funding and its uses

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- It is unclear what the full outcome the inquiry will lead to, although it may lead to the issue of foreign funding of Canadian charities being examined or considered further by the Senate
- For more information, see the Debates of the Senate of Canada (Hansard) online at:  
<http://www.parl.gc.ca/ParlBusiness/Senate/Debates/Calendar.asp?Language=E>
- For more information on political activities and allowable limits under the ITA, see "Political Activities: What Churches and Charities Can and Cannot Do" online at:  
<http://www.carters.ca/pub/seminar/chrchlaw/2011/jml1110.pdf>

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

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

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

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- CRTC’s finalized *Electronic Commerce Protection Regulations* were released on March 7, 2012 and published in the Canada Gazette on March 28, 2012, available online at <http://www.gazette.gc.ca/rp-pr/p2/2012/2012-03-28/html/sor-dors36-eng.html>
  - Amended regulations require that the unsubscribe mechanism be able to be “readily performed” only, without mandating how many clicks are necessary
  - A request for express consent for the purposes of sending a “commercial electronic message” can be obtained orally, as opposed to being strictly in writing
- It is anticipated that Industry Canada’s finalized regulations will be released in April, 2012 - draft version is available online at <http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-09/html/reg1-eng.html>

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4. *Copyright Modernization Act*, Bill C-11
- Bill C-11, *An Act to amend the Copyright Act (Copyright Modernization Act)* was introduced and passed First Reading on September 29, 2011
  - The bill was referred to committee after it received Second Reading on February 2, 2012
  - The committee presented its report to the House of Commons on March 15, 2012
  - Bill C-11 would add new rights and exceptions to the *Copyright Act*, as well as expand the fair dealing provisions (e.g. would allow organizations to make certain uses of copyrighted works for educational purposes, without infringing copyright)

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**D. RECENT CRA PUBLICATIONS**

1. Guidance on Working With an Intermediary in Canada
  - On June 20, 2011, CRA released Guidance CG-004, *Using an Intermediary to Carry out a Charity's Activities within Canada* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>)
  - The Guidance assists charities who are or intend to conduct charitable activities through an intermediary within Canada
  - An intermediary is defined by CRA as an individual or a non-qualified donee (e.g. a non-registered charity)
  - The Guidance is a modified version of Guidance CG-002, *Canadian Registered Charities Carrying out Activities Outside of Canada*, and contains relatively little new information

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- However, the Guidance modifies the examples provided in CG-002 with respect to intermediaries (e.g. agents and contractors)
- It is recommended that charities, even if they do not conduct any activities outside of Canada, who are conducting any activities through an intermediary review both Guidances, to ensure that they are adequately documenting the necessary direction and control over their charitable resources

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2. Guidance on Trust Document
  - On August 15, 2011, CRA released Guidance CG-009, *Trust Document* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/trsts-eng.html>)
  - A trust document is one of three types of governing documents that may be used to establish a charity for the purpose of registration as a registered charity
  - For designation purposes, a trust document may be used for charitable organizations and private or public foundations
  - Guidance sets out the requirements for the contents of a trust document (e.g. name of trust, charitable purposes of trust, rules governing how trustees will administer all property etc.)

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- These requirements must be met for registration purposes, should the organization choose to use a trust document to be its governing document
- CRA recommends that applicants submit a draft copy of the trust document for its review because amendments to a pre-established trust may not be possible or may require court approval
- CRA will review draft governing documents, including trust documents, on a one-time basis when submitted with a complete application
- If CRA approves the application, applicants will have to submit a signed trust document prior to registration

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3. Guidance for The Promotion of Animal Welfare and Charitable Registration
  - On August 19, 2011, CRA released the final form of Guidance CG-011, *Promotion of Animal Welfare and Charitable Registration* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwlr-eng.html>)
  - Guidance sets out guidelines on promoting the welfare of animals and charitable registration
  - Focus at common law is on what is for the benefit of humans rather than what is for the benefit of animals

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4. Guidance on Arts Organizations and Charitable Registration under the *Income Tax Act*
  - On November 1, 2011 CRA released draft *Guidance on Arts Organizations and Charitable Registration* ("Guidance") for public consultation ([http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnsltns/rts-eng.html#\\_edn4](http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnsltns/rts-eng.html#_edn4))
  - Once finalized, the Guidance will replace Summary Policy CSP-A08 and Summary Policy CSP-A0A24
  - Guidance sets out guidelines regarding the eligibility requirements for charitable registration of arts organizations
  - Organizations will fall within one of two charitable heads
    - The advancement of education (2<sup>nd</sup>)
    - Other purposes beneficial to the community (4<sup>th</sup>)

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- There is a presumption that a public benefit exists in relation to second head but not the fourth head
- Arts organizations that fall under the fourth head will have to meet CRA's specific public benefit criteria
  - Artistic form and style: there must be a common or widespread acceptance of the form and style of art within the Canadian arts community
  - Artistic merit: the quality of a presentation, exhibition, performance, etc. must be sufficiently high
- Guidance would not apply to:
  - National arts service organizations, or
  - Organizations that seek to further other charitable purposes through arts programs, e.g. providing art therapy to relieve conditions associated with illness or disability

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5. New Fundraising Guidance (Revised 2012)
- a) Introduction
- From the media's perspective this is the number one compliance issue for charities
  - CRA is expected to release a revised Fundraising Guidance in April 2012
  - The new Guidance is a significant improvement but is a longer document at 39 pages compared to 31 pages
  - Although much improved, the new Guidance is still a complex document and will therefore require careful reading
  - The Guidance will have impact on current CRA audits, not just future audits
  - The Guidance will apply to all registered charities and to both receipted and non-receipted fundraising

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

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

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

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- Fundraising that is a purpose of the charity (a collateral non-charitable purpose)
- Fundraising that delivers more than an incidental private benefit
- Fundraising that is illegal or contrary to public policy
- Fundraising that is deceptive
- Fundraising that is an unrelated business
- d) Allocating Fundraising Expenditures
  - Registered charities must report fundraising expenditures (all costs related to any fundraising activity) on their annual T3010
  - Where some fundraising activities include content that is not related to fundraising, some of these costs may be able to be allocated to charitable activities, management or administrative activities, or political activities

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- Onus is on the charity to explain and justify the allocation
- The following are CRA's guidelines for allocation:
  - 100% allocation to fundraising
  - No allocation of costs to fundraising
  - Pro-rated allocation of costs
- e) Evaluating a Charity's Fundraising
  - Resources devoted to fundraising are disproportionate to resources devoted to charitable activities
  - Fundraising without an identifiable use or need for the proceeds
  - Inappropriate purchasing or staffing practices
  - Fundraising activities where most of the gross revenues go to contracted third parties

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

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

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- The fundraising ratio will place a charity into one of three categories:
  - Under 35%: unlikely to generate questions or concerns by CRA
  - 35% and above: CRA will examine the average ratio over recent years to determine if there is a trend of high fundraising costs requiring a more detailed assessment of expenditures
  - Above 70%: this level will raise concerns with CRA. The charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable
- See logic chart on next page (not by CRA)

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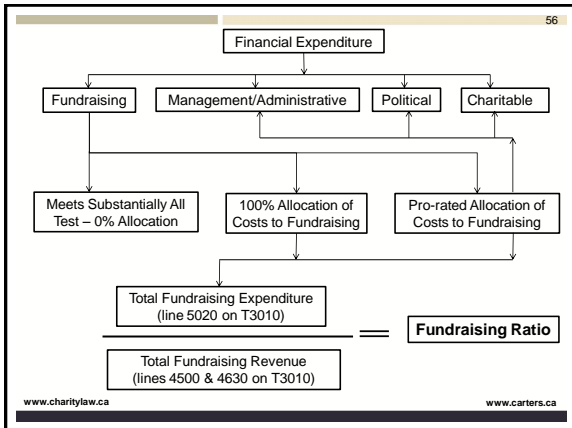
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f) Factors that may Influence CRA's Evaluation of a Charity's Fundraising

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

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

g) Best Practices for Managing Fundraising

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

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

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## D. CORPORATE UPDATE

1. New *Canada Not-for-Profit Corporations Act* ("CNCA")
  - *Canada Corporations Act* ("CCA") has not been substantively amended since 1917
  - On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("CNCA") received Royal Assent
  - CNCA was proclaimed into force on October 17, 2011
  - The new rules do not apply automatically to CCA corporations
  - Existing CCA corporations will have until October 17, 2014 to continue under the CNCA or face dissolution

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

- The Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- Not expected to be proclaimed in force until late 2012
- It is expected that an outline of the proposed regulations will be released in the first half of 2012 for public comment
- See *Charity Law Bulletin*. 262 "Nuts And Bolts of the Ontario *Not-For-Profit Corporations Act, 2010*" <http://www.carters.ca/pub/bulletin/charity/2011/chylb262.htm>

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## 3. Other Provincial Corporate Update

- On March 5, 2012, the B.C. Legislature introduced Bill 23, *Finance Statute Amendment Act, 2012*, available online at [http://www.leg.bc.ca/39th4th/1st\\_read/gov23-1.htm](http://www.leg.bc.ca/39th4th/1st_read/gov23-1.htm)
- Bill 23 proposes the creation of a new type of company - community contribution company - which combines socially beneficial purposes with a restricted ability to distribute profits to shareholders
- These companies would be subject to a higher degree of accountability than an ordinary company and required to publish an annual report detailing their social spending

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## F. RECENT CASE LAW

1. *News to You Canada v. Minister of National Revenue*, 2011 FCA 192 (CanLII) (June 7, 2011)
  - CRA refused application for charitable registration
  - Corporate objects of applicant included research and production of in-depth news and public affairs programs
  - Applicant appealed on the basis that its purposes fell within two heads of charity, the advancement of education (2<sup>nd</sup>) and other purposes beneficial to the community as a whole in a way which the law regards as charitable (4<sup>th</sup>)
  - Advancement of education - production and dissemination of news and public affairs programs may improve the sum of communicable knowledge about current affairs, but are not sufficiently structured to meet the test in the *Vancouver Society* decision

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- Other purposes beneficial to the community - the Court reviewed the *Native Communications* decision and concluded that the mere dissemination of news was not charitable at law - in part because the organization identified its audience as the general public and not any group or community in need of charitable assistance
- Court held in order to be charitable, the organization's purposes must be of special benefit to the community, with an eye to society's current social, moral, and economic context
- The Court did not accept the organization's argument that presenting the news in an "unbiased and objective" form met this requirement

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2. *Bentley v. Anglican Synod of the Diocese of New Westminster* (Docket no. 34045)
  - On June 16, 2011, the Supreme Court of Canada refused to grant leave to appeal in *Bentley*
  - In November 25, 2009 decision, B.C. Supreme Court ruled that the properties of four incorporated parishes were to remain within the Anglican Church of Canada ("ACC")
  - B.C. Supreme Court based its decision on the parishes' incorporating statute
  - Even though the parishes were separate corporations, the act of incorporation, the making and amending of by-laws, rules, regulations etc. were all subject to the consent of the executive committee and local bishop of the ACC

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- B.C. Court of Appeal upheld the lower court's decision on the basis that the purpose of the trusts upon which the parish corporations held the buildings and other assets was to further "Anglican ministry in accordance with Anglican doctrine"
- Implications of refusal to grant leave by the SCC:
  - The Court of Appeal decision remains the law
  - Based on the Court of Appeal's reasoning that the final determination of doctrine rests with the ACC and its willingness to make a determination as to who has the final say in doctrinal matters when it comes to a dispute over property, other Episcopal denominations may be affected

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3. *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah* 2011 ONSC 4696 (CanLII) (August 15, 2011)
  - No new members were ever admitted to a federal corporation yet certain individuals (other than the incorporators) called a meeting and purported to elect a new board
  - Since the election and composition of the board is governed by CCA and the general operating by-laws of the corporation only the first incorporators were valid directors

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4. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (CanLII) (September 27, 2011)
  - A parallel foundation unilaterally amended its objects so that it could disburse both existing and current funds to charities other than its operating charity
  - Prior to doing so, the foundation had fundraised from the public on the basis that said funds would go to the operating charity's programs
  - Confirmed that charitable property raised for the benefit of a particular charitable purpose cannot be unilaterally applied for a different charitable purpose by simply amending charity's objects through supplementary letters patent
  - Above funds were to be held in trust for operating charity

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- To change the charitable purpose of funds, charities must seek the approval of the Ontario Public Guardian and Trustee ("OPGT") under the *Charities Accounting Act*, not "self-help" remedies
- Supplemental reasons were issued on March 7, 2012 (2012 ONSC 1527 (CanLII))
  - The Court awarded the claimed costs of \$454,686.19 to the charity and \$24,853.95 to the OPGT on a substantial indemnity cost basis
  - The foundation's unsubstantiated and unproven allegations of dishonesty and deceit on the part of the charity, misrepresentations and refusal of two offers to settle justified the said costs
  - The OPGT has the right to claim against the directors for their role in the litigation

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5. *St. John's Evangelical Lutheran Church of Toronto v. Steers*, 2011 ONSC 6308 (CanLII) (October 24, 2011)
- There was a series of disputes between the leaders and members of the congregation and the defendants (The English District Lutheran Church Missouri Synod (Canada) and The English District Lutheran Church Missouri Synod (U.S.A.)) regarding the ownership, autonomy, and operation of a church and its property
  - A motion for certification of a class proceeding under the *Class Proceedings Act* ("CPA") was ultimately brought
  - The parties ultimately settled their disputes, but the CPA requires a proceeding commenced or certified as a class proceeding under it to be discontinued or abandoned only with the approval of the court

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- Therefore, the class proceeding was certified on the basis of a number of common issues including: breach of fiduciary duty; negligent misrepresentation (regarding the defendants' authority and legal status to install their own church council without the approval of the members and to appropriate church property); and conspiracy (to disband and disenfranchise the class members)
- Under terms of court approved settlement, the defendants agreed to release their claim to the church's property and the church agreed to resign from the English District Lutheran Church Missouri Synod
- The introduction of a class action into a church dispute may be the first in Ontario, if not Canada

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6. *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728 (CanLII) (November 22, 2011)
- Pastor was removed from office and brought an action for damages for constructive dismissal against Archdiocese
  - One of the exceptions to the general rule that the courts have jurisdiction to decide claims for wrongful dismissal is where the rules of a self-governing organization, especially a religious organization, provide an internal dispute resolution process
  - A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization

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- The courts will only interfere in the internal affairs of a self-governing organization if the internal process is unfair or does not meet the rules of natural justice or where the complainant has exhausted the internal processes
- Subject to any enabling statutory provision, if the complainant has exhausted the internal processes, the Court will not consider the merits of the decision but only whether the organization's rules were followed and the decision made in accordance with natural justice

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7. *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (CanLII) (January 18, 2012)
  - The Ontario Superior Court certified a class action involving a charitable donation tax scheme
  - In summary, a donor's original donation of \$2,500 was purportedly increased to \$7,500 through the exchange of sub-trust units between the various trusts involved, therefore making the original donation seem larger than it actually was
  - The recipient charities agreed to return 99% of the donations to the promoters to use a software program
  - CRA disallowed donors' tax deductions because donations were not gifts and charged interest on outstanding taxes owing due to the disallowance

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8. *Robinson v. Rochester Financial Limited*, 2012 ONSC 911 (CanLII) (February 7, 2012)
  - Ontario Superior court approved an \$11 million settlement of the class action relating to the "Banyan Tree" tax shelter
  - Small donations by donors were purportedly increased through a "loan" to donors
  - CRA disallowed donors' tax credits because the "donations" were not gifts
  - The defendant was a law firm which provided a legal opinion that the tax shelter complied with applicable tax legislation and that the tax receipts issued by the tax shelter should be recognized by CRA

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