

BLUMBERGS

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Charity Law Update

For the Law Society of Upper Canada's
14th Annual Estates & Trusts Summit

November 10, 2011

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Introduction

- Legal information not legal advice
- Views expressed are my own
- Questions during and at end
- Logistics and timing

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Blumberg Segal LLP

- Blumberg Segal LLP is a law firm based in Toronto, Ontario
- Mark Blumberg is a partner at Blumbergs who focuses on non-profit and charity law
- Assists charities from across Canada with Canadian and international operations and foreign charities fundraising here
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2011 Federal Budget - What's new for Canadian Registered Charities

http://www.globalphilanthropy.ca/index.php/blog/comments/2011_federal_budget_-_whats_new_for_canadian_registered_charities/

Budget 2011 Qualified Donee Proposals

- Motion 559 House Standing Committee on Finance to study charitable donation incentives.
- Publicly available list of qualified donees
- Receipt rules apply to all qualified donees
- All qualified donees must maintain adequate books and records
- RCAA - Exclusivity of Purpose and Function, Undue Benefits, Public Access to Information Returns etc., receipting penalties
- Safeguarding Charitable Assets through Good Governance
- Recover Tax Assistance for returned gifts
- Flow-through shares

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Publicly Available Lists of Qualified Donees

- Qualified donees that are not currently listed
 - municipalities in Canada;
 - municipal and public bodies performing a function of government in Canada; (certain First Nations groups)
 - housing corporations in Canada constituted exclusively to provide low-cost housing for the aged; and
 - RCAAAs (Technical amendments to the *ITA* already authorized CRA to release the name, registration number and other relevant information with respect to RCAAAs (see July 16, 2010 draft legislation).

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RCAAA Changes

- Registered Canadian Amateur Athletic Associations (RCAAA) are groups who have promotion of amateur athletics in Canada on a nation-wide basis as their primary purpose and primary function – now will be their exclusive purpose and exclusive function (consultation underway)
- Undue Benefits
- Public Access to Information Returns and Other Documents
- Monetary penalties for improper issuance of receipts extended to RCAAAs

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RCAAA Changes – Undue Benefits

- Budget 2011 proposes that, if an RCAAA provides an undue benefit to any person, the CRA be authorized to apply monetary penalties, suspend its receipting privileges or revoke its registration in the same manner as applies to registered charities
- May include excessive compensation to staff, a professional fundraising company or any individual or company with whom it does business.

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Safeguarding Charitable Assets through Good Governance

- The CRA is responsible for auditing registered charities and RCAAAs and reviewing applications for their registration.
- In some cases, applications may be submitted by individuals who have been involved with other charities or associations that have had their registered status revoked for serious non-compliance, for example, for issuing fraudulent donation receipts. Concerns may also arise if an individual, with significant influence with respect to an organization, has a criminal record involving a breach of public trust, such as fraud or misappropriation.

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Safeguarding Charitable Assets through Good Governance

- The *Income Tax Act* does not currently allow consideration of the criminal history or other past misconduct by such individuals as grounds for refusal to register the organization or to revoke its registration. As a result, the CRA may be unable to refuse or revoke the registration of an organization, even when there is a high risk of abuse.

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Safeguarding Charitable Assets through Good Governance

- The CRA will consider the particular circumstances of a charity or Canadian amateur athletic association in applying the proposed measures. For example, notwithstanding the involvement of a particular individual in the activities of a charity or association, the CRA will take into account whether appropriate safeguards have been instituted to address any potential concerns.

Good Governance - Ineligible Individual

- Applies to registered charities and RCAAAs
- **“Ineligible individual”**, in relation to a charity or Canadian amateur athletic association, means an individual who, at a particular time, has been
 - (a) found guilty of a relevant criminal offence for which a pardon has not been granted,
 - (b) found guilty of a relevant offence within five years preceding the particular time,

Good Governance - Ineligible Individual

- (c) a director, trustee, officer or like official of a registered charity or RCAA (or (d) an individual who controlled or managed a charity or RCAA) during a period the charity or association engaged in conduct that may reasonably be considered to have constituted a serious breach of the requirements for registration under this Act and for which its registration was revoked within five years preceding the particular time,
- (d) a promoter of a charity/RCAA tax shelter and charity/RCAA revoked within five years for reasons related to participation in the tax shelter.

Good Governance - Relevant Offence

- **“relevant criminal offence”** means a criminal offence that *relates to financial dishonesty, including tax evasion, theft and fraud, or is relevant to the operation of the charity or association.*
- **“relevant offence”** means financial dishonesty, including an offence under charitable fundraising legislation, consumer protection legislation and securities legislation, or offence that is relevant to the operation of the charity or association.

Response and Remedial Action

- CRA can notify charity if “ineligible individual” is involved with running charity.
- The charity will also have an opportunity to explain why the individual should remain involved with the charity or on the board, if it wishes to do so.
- CRA will take that into consideration when exercising its discretion.
- In some cases it may be reasonable to expect that charities will have such individuals on the board etc. for example charities dealing with rehabilitation of offenders.

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Response and Remedial Action

- If CRA does not accept that “ineligible individual” should still be on board or controlling charity the charity must take steps to prevent misuse of charitable assets and privileges.
- However, after a charity or association has been made aware of concerns on the part of the CRA in respect of an individual, failure to take adequate remedial action could result in the denial of the application for registration, suspension of receiving privileges or revocation of registered status, as the case may be.

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Safeguarding Charitable Assets through Good Governance

- The proposed measures will not require a charity or Canadian amateur athletic association to obtain background checks.
- In most cases a charity would not know that a person is an ineligible individual – would only know if CRA advises charity.
- Unlike some other countries does not require certification by all directors be provided to regulator.

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TERRORISM

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International Relief Fund for the Afflicted and Needy Canada (IRFAN-Canada) has status revoked

http://www.globalphilanthropy.ca/index.php/blog/comments/international_relief_fund_for_the_afflicted_and_needy_canada_irfan-canada_h/

Gadhafi charity in Canada linked to terrorism - CRA revokes status of World Islamic Call Society

http://www.globalphilanthropy.ca/index.php/blog/comments/gadhafi_charity_in_canada_linked_to_terrorism_-_cra_revokes_status_of_world/

Abusive Charity Gifting Tax Shelters

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**“Warning: If you donate to a gifting
tax shelter, expect to be audited.”**

<http://www.cra-arc.gc.ca/nwsrm/lrts/2010/l101223-eng.html>

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CRA discloses substantial penalty against promoter of tax shelter gifting arrangement

In this recent press release from CRA they noted that “Promoters and other third-party representatives are penalized when they make false statements involving schemes that are against the law. Currently, there are 71 audits involving promoters. Recent examples include a scheme involving RRSPs, for which the promoter was assessed a penalty of \$1.8 million, and a **tax shelter gifting arrangement case where the Canada Revenue Agency (CRA) proposed two penalties of \$24 million against the promoters involved.**”

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Donation Program for Medical Science and Technology by Trinity Capital Corporation

-TCC and FCA taxpayer lost – leave
to appeal denied by SCC

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Canadian Charities Recently Revoked by the Charities Directorate of CRA for Cause 2010 and 2011

http://www.globalphilanthropy.ca/index.php/blog/comments/canadian_charities_recently_revoked_by_the_charities_directorate_of_cra_for/

http://www.globalphilanthropy.ca/images/uploads/Canadian_Charities_Recently_Revoked_by_CRA_for_cause_-_April_2011.pdf

Lemberg v. Michael Perris

- Accountant liability for referral of long time client to gifting tax shelter arrangement
- Fiduciary relationship and not proper disclosure of fee/commission.
- Legal opinions, “lent apparent legitimacy to the scheme, were carefully crafted and laid out assumed sets of facts that bore little resemblance to the circumstances of the actual transactions that were recommended.”

http://www.globalphilanthropy.ca/index.php/blog/comments/accountant_liability_for_recommending_charity_tax_shelter_gifting_scheme_-_/

4 Class Action lawsuits relating to what charity gifting tax schemes

- None of the allegations have been proven in court.

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Class Action 1 – The first class action

- Defendants are charity, law firm, various corporations.
- Court Certifies Class Action lawsuit over Banyan Tree Leveraged Charitable Donation Program
- Plaintiff lawyers Scarfone Hawkins LLP
- Claiming \$55 million

<http://www.classactionlaw.ca/content/claims/Rochester/Rochester.htm>

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Class Action 2 – RCAA Scheme

- Major law firm and lawyer being sued for involvement with RCAA scheme.
- Plaintiffs represented by Davies Ward Phillips & Vineberg.
- Plaintiffs Claiming \$55 million in damages.
- Deals with RCAA scheme.

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Class Action 3

- The class action law suit concerns Donations Canada Charitable Donation program which was a program marketed by Parklane Financial Group Limited.
- There are a number of defendants including a law firm.
- Plaintiffs seeking \$50 million
- Plaintiff lawyers are Landy Marr Kats LLP at

http://www.thetorontolawyers.ca/class_actions.htm

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Class Action 4

- Defendants are Trinity Capital Corporation etc. - a major law firm and major accounting firm are being sued.
- Claim relates Donation Program for Medical Science and Technology for taxation years of 2001, 2002 or 2003.
- Plaintiff Lawyers are Sutts, Strosberg LLP and Groia & Company Professional Corporation
- Seeking \$300 million in damages

<http://www.trinityclassaction.com/>

Dangerous Opinions – Legal and Ethical Issues with Legal Opinions on Charity Law by David Thompson

http://www.globalphilanthropy.ca/index.php/blog/comments/dangerous_opinions_legal_and_ethical_issues_with_legal_opinions_on_charity/

Accountant Liability

- In Lipson case there is discussion about another case in which a retired business is suing his former accounting firm for advice with respect to a charity gifting tax scheme.
- Seeking 15m in damages

“The muddy world of tax shelters”

<http://www.globeadvisor.com/servlet/ArticleNews/story/gam/20080716/LAWCOLUMN16>

Tax Shelters - 2006 to 2009 saw participation drop by 80%, to 10,800 individuals, and the amount of “donations” drop by 76%, to \$284 million.

CRA's Fundraising Guidance

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CRA Guidance for Fundraising

- Prohibited fundraising conduct (illegal, main purpose, too much private benefit, misleading or deceptive)
- Apportioning expenses between fundraising and charitable
- Evaluation – Ratios, Best practices, Indicators of concern
- Disclosure and transparency

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-028-eng.html>

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Fundraising Ratio of Costs to Revenues

Ratio of costs to revenues over fiscal period for all fundraising activities

- Under 35% • *Unlikely* to generate questions or concerns.
- 35% and Above • The CRA will examine the *average ratio* over recent years to determine if there is a *trend* of high fundraising costs. The *higher the ratio*, the more likely it is that there will be concerns and a need for a more *detailed assessment of expenditures*.
- Above 70% • This level *will raise concerns* with the CRA. The charity must be able to provide an *explanation and rationale* for this level of expenditure to show that it is in compliance; *otherwise, it will not be acceptable*.

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Indicators of Concern

- Sole-source fundraising contracts
- Non-arm's length fundraising contracts
- Fundraising initiatives that are not well-documented
- Fundraising merchandise purchases that are not at arm's length, not at fair market value, or not purchased to increase fundraising revenue.
- Most of the gross revenues for non-charitable parties.
- Commission-based fundraiser remuneration
- Misrepresentations in fundraising solicitations or in disclosures about fundraising or financial performance

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Best Practices for Fundraising

- a. Prudent planning processes
- b. Appropriate procurement processes
- c. Good staffing processes
- d. Ongoing management and supervision of fundraising practice
- e. Adequate evaluation processes
- f. Use made of volunteer time and volunteered services or resources
- g. Disclosure of fundraising costs, revenues, and practice (including cause-related or social marketing arrangements)

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CRA consultation and review of Fundraising Guidance

What may change?

- NO major changes – more readable
- Evaluation – downplay ratio – less discussion of ratio - general assessment – ratio is more like indicator
- More integrated document – not two separate documents
- Prohibited fundraising clarification – indicators of concern can also be prohibited fundraising -whole document is about prohibited activities.

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What may change?

- No change on private foundation funding not fundraising (definition of fundraising excludes funds from other qualified donees)
- clarification of section on focus cannot be on fundraising
- allocation – removing emotive - too subjective
- Will do summary of guidance

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What may change?

- Every dollar donated goes to the cause and then charity pays funds separately to TP fundraiser
- Leaving door open to future changes

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CRA's Guidance

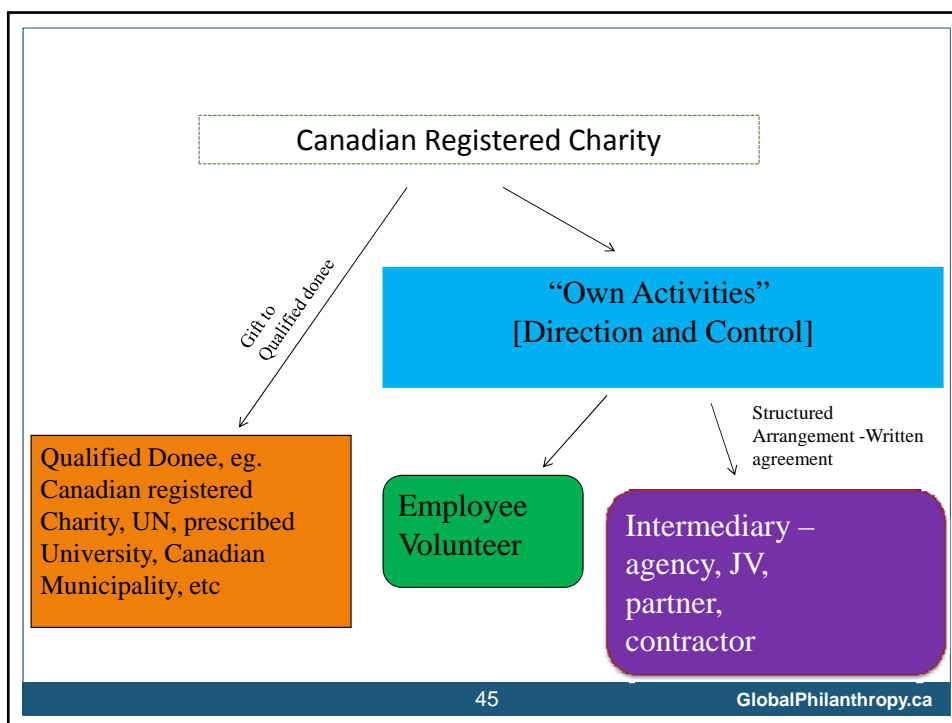
- **Guidance on Canadian Registered Charities Carrying Out Activities Outside Canada**

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>

- **Using an Intermediary to Carry out a Charity's Activities within Canada**

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>

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“Own Activities” Or “Direction And Control”

When not working with qualified donee or own staff:

- Investigate Intermediary (due diligence)
- Written agreement
- Detailed description of activity
- Monitoring and supervision
- Ongoing instruction for changes
- Periodic transfers
- Separate activities and funds
- Books and records showing above

CNCA and ONCA

- *“Canada Not-For-Profit Corporations Act” (CNCA)*
 - Affects federal non-profit corporations incorporated under Canada Corporations Act (CCA) (19,000 federal corporations)
 - Came into force October 17, 2011 – have 3 years from that date to continue for existing corporations

- *“The Not-for-Profit Corporations Act, 2010 (Ontario)”*
 - Affects almost all Ontario corporations under the Ontario Corporations Act (OCA) (50,000 non-profit corporations)
 - Probably will come into effect in late 2012

Thank you!

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