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Annual T3010 Information Return and T4033 Guide for Registered Charities

**NATIONAL CHARITIES AND NOT-FOR-PROFIT LAW SECTION
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 37,500 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Charities and Not-For-Profit Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Charities and Not-For-Profit Law Section of the Canadian Bar Association.

TABLE OF CONTENTS

Annual T3010 Information Return and T4033 Guide for Registered Charities

I.	INTRODUCTION	1
II.	GENERAL COMMENTS ON T3010 RETURN	1
A.	Question A1	2
B.	Question A2	3
C.	Question C1	3
D.	Question C2	3
E.	Question C3	4
F.	Question C4	4
G.	Question C5	5
H.	Question C6	5
I.	Question C7	6
J.	Question C8	6
K.	Question C9	6
L.	Question C10	7
M.	Question C11	8
N.	Question C13	8
O.	Question C14	9
P.	Question D1	9
Q.	Question D2	9
R.	Question D3	10
S.	Question D4	10
T.	Schedules	11
III.	CONCLUSION	12

Annual T3010 Information Return and T4033 Guide for Registered Charities

I. INTRODUCTION

This submission is made by the Charities and Not-For-Profit Law Section of the Canadian Bar Association (the CBA Section). The CBA Section represents lawyers from across Canada who advise or serve on the boards of charitable and other not-for-profit organizations.

The CBA Section has made submissions in the past on the content, scope and purpose of the T3010 Return and the Guide for completing the T3010 Return,¹ most recently in 2011. The comments in this submission are based on the revised version of T3010 E (13) (the Return) and the Guide “Completing the Registered Charity Information Return”, T4033(E) Rev. 02/13 (the Guide).

II. GENERAL COMMENTS ON T3010 RETURN

The CBA Section offers several general comments on the Return, with comments on specific provisions below.

- 1) The legal basis for some of the questions that charities are required to answer in the Return is unclear. We have highlighted areas of concern in our comments below.
- 2) It would be helpful to use consistent terminology throughout the Return and Guide. For instance, “gift” and “donation” are often used interchangeably where one would suffice. The use of variations may lead to confusion. We elaborate on this point in our detailed comments below.
- 3) It is unclear whether information in the Return is required as part of a public information return or as part of a private return. Combining elements of both raises confidentiality issues. In particular, we are concerned about the risks to organizations or individuals required to be identified on the Return as having provided financial assistance or acting as an intermediary.
- 4) Many of the questions are unclear or ask for information that, in our view, is unnecessary or potentially misleading. It would be helpful to include more elaboration

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www.cba.org/CBA/submissions/pdf/11-17-eng.pdf; www.cba.org/CBA/submissions/pdf/06-28-eng.pdf

in the Guide to enhance clarity, particularly where the scope of the legislation is uncertain. For example, the Guide might clarify that answering “yes” to a question about whether the charity is engaged in an activity does not mean the activity is permitted (and *visa versa*). More detailed comments on specific provisions are below.

- 5) We suggest highlighting in the Guide or at the beginning of the Return that not all charities will complete each part of the Return and all Schedules, depending on the criteria for each section. For example, the section to be completed on financial information depends on the size of the charity.
- 6) We are concerned that the failure to complete even an insignificant part of the Return correctly could expose a charity to penalties, since there is no legislative safe harbour. An innocent mistake, particularly in the context of ambiguous questions mentioned above and discussed in more detail below, could have seriously adverse implications for a charity despite its reasonable efforts to complete the Return correctly.

Our comments on the specific provisions in the Return (including comments on the related Schedules and supplementary information in the Guide) are set out in the order they appear in the Return.

A. Question A1

Question A1 asks if the charity was in a “subordinate position” to a “parent organization”. The words “subordinate” and “parent” are unclear and are likely to cause many charities difficulty in attempting to complete the Return correctly.

The Guide does not provide sufficient clarity on what is meant by “subordinate position” or “parent organization”. Normally “parent” suggests ownership. The concept of ownership is not applicable to corporations without share capital or other registered charities, such as trusts or unincorporated associations. The question also seems to assume that the “parent” organization is itself a registered charity. This would not necessarily be the case, particularly if the “parent” organization is a foreign entity.

It should be clarified in the Return or the Guide if “subordinate position” is intended to have the same or similar meaning as in CPS-019, the guidance dealing with carrying on a related business. In CPS-019, a business is “subordinate” to a charity’s purpose if it remains subservient to a dominant charitable purpose, as opposed to becoming a non-charitable purpose in its own right. This determination requires a review of the business activities in the context of the charity’s operations as a whole and lists four factors to be considered.

Finally, it is not clear if CRA is trying to determine whether the charity is a conduit, an agent or in some other manner not acting freely of its own volition. If the charity indicates it was in a subordinate position to a parent organization, it must disclose the name and registration number of the parent organization. This raises questions about the purpose of the question and how the parent organization might be affected by such a response from another organization, without necessarily concurring that it is in a dominant position with respect to that organization.

B. Question A2

Question A2 asks if the charity has “wound up, dissolved, or terminated operations.” This is a compound question which may be difficult to answer accurately. A charity might be wound up but not dissolved, dissolved without its affairs wound up, or have terminated its operations without being either wound up or dissolved as an entity. Winding up can refer to activities or legal existence. Recent jurisprudence, including the decision of the Federal Court of Appeal in *Canada v. MacDonald*, 2013 FCA 110, dealing with subsection 84(2) of the *Income Tax Act*, illustrates this point in the context of corporations with shares. We suggest that the questions compounded in A2 be separated so that the charity can clearly indicate whether it has been wound up or dissolved and whether it has terminated operations.

C. Question C1

Question C1 asks if the charity was “active” during the fiscal period, covering some of the same ground as question A2, and giving rise to potential confusion. If a charity has terminated its operations, it is no longer active. However, some charities are active initially but become inactive, either indefinitely or for a limited period of time. Other charities have been inactive from the time of registration. In the past, CRA has asked some inactive charities to apply for voluntary revocation of registration. It would be helpful if the purpose behind this question were clarified in the Guide.

D. Question C2

Question C2 asks for a description of all ongoing and new charitable programs and asks “grant-making charities” to describe the types of organizations they support. It is not clear if “grant-making” charities are the same, in this context, as registered charities that make gifts to qualified donees, or whether the question is aimed at eliciting some other type of information.

The Guide indicates that if a charity is considering new activities that have not been approved by CRA, it should contact CRA to discuss those new activities before implementing them. There is no

legal basis for requiring that a charity check its activities in advance with CRA and, in our view, this direction is unnecessary and inappropriate. We recommend that the Guide refer to “new purposes” rather than new activities. Alternatively, the Guide should clarify that any contact with CRA regarding new activities is voluntary, not mandatory.

E. Question C3

Question C3 asks if the charity made gifts or transferred funds to qualified donees or other organizations. The question is unclear and confusing. It is obvious that “other organizations” cannot be qualified donees and it is uncertain why CRA would want to know if the charity has made gifts or transferred funds to organizations that are not qualified donees. If that is the purpose of the question, it should be clarified. Further confusion is created by the statement in the box at the top of page 2 of the Return that charities can make gifts to qualified donees, and qualified donees are other registered charities as well as certain other organizations described in the *Income Tax Act*. This reference to “other organizations” being qualified donees is confusing because references to “other organizations” elsewhere are made in connection with non-qualified donees.

There is no clear place in the Return or its schedules for a charity to report a “designated gift” in accordance with anti-avoidance rules dealing with the disbursement quota. The only guidance is on CRA’s website, where charities are directed to report designated gifts on a blank line in Form T1236, “Qualified Donee Worksheet/Amounts Provided to Other Organizations”. Charities must write the words “designated gift” on the blank line, along with the amount of the gift that is designated. In addition to being hard to find, these instructions are cumbersome and confusing. Since failure to designate a gift could result in the revocation of the recipient charity (if specific spending requirements are not met), the process for indicating that a gift is designated should be clearly identified, and located along with corresponding instructions in the Return or the Guide.

F. Question C4

Question C4 asks if the charity carried on activities outside Canada through employees, volunteers, agents, joint ventures or other individuals or intermediaries. It does not ask for the same information about activities carried on inside Canada through employees, volunteers, agents, etc., although the implications are the same, in that gifts to non-qualified donees are not permitted and charitable organizations must devote all of their resources to their own charitable activities. We presume this is an oversight and recommend that it be corrected.

G. Question C5

Question C5(a) asks if the charity carried on any political activity. The box above this question states that a charity may pursue political activities that meet certain criteria, including a criterion that the activities are “limited in extent” (also used in Schedule 7). The meaning of these words is unclear and should be clarified in the Guide.

In C5(a), gifts to qualified donees that were “intended” for political activities are specifically included. The same term is used in the Guide and in Schedule 7. The *Income Tax Act* states that “political activity” includes 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. It does not refer to “intent”. We recommend that the note in the Return and the Guide outlining when an activity will be considered political (para. 3, p. 10 of the Guide) not refer to the intent of the gift, but rather set out a test for determining whether it is reasonable to consider that the purpose of the gift was to support the political activities of the recipient.

Schedule 7 refers to “Property” under “Resources Used”. It is not clear how the schedule is to be completed. C5(b) asks about the total amount “spent” on political activities; it is uncertain whether this refers to just money spent or also includes resources used. We are concerned that charities might believe they are compliant if they have not spent any money, even though they have devoted substantial resources to political activities, and recommend that this point be clarified.

C5 (d) asks about the amount received from outside Canada that was “directed” to be spent on political activities. It is not clear what “directed” means in this context. In our view, an amount would not be “directed” absent a clear, legally binding requirement that it be spent for specific purposes; a suggestion or recommendation from the donor would not amount to a “direction”. In any event, there is no requirement in the legislation for disclosure of this information.

H. Question C6

Question C6 asks about fundraising activities and methods. The Guide refers charities to the CRA website, specifically Guidance CG-013, *Fundraising by Registered Charities*, for information needed to complete the Return. This forces charities, many with limited resources, to search further to try to determine what is required. In view of the potential penalties for failure to complete the Return correctly, we submit that the requirements should be clearly set out in the Return and the Guide.

I. Question C7

Question C7 asks about payments to external fundraisers and requires the charity to provide information in Schedule 4 about fundraisers and donors who are not resident in Canada. We are concerned about risks to the fundraisers and donors if their names and other confidential information are ever disclosed. We understand the importance of preventing inappropriate fundraising and tracking funds raised from potentially improper sources, but a better balance could be achieved between protection of confidential information (and safety of individuals) and the “the need to know” for regulatory purposes. We also draw attention to Schedule 2, which deals with activities carried on outside Canada. Questions asked about amounts transferred to individuals or organizations outside Canada require identifying country codes beside each individual or organization name, raising concerns regarding the safety of the recipients.

J. Question C8

Question C8 asks about compensation paid to directors “for services provided” during the fiscal period. It is not clear whether “services” is meant to include just services of acting as director or to also include other kinds of services (for example, giving professional advice). The Guide provides additional information, but does not clarify this point. We also ask if C8 is aimed at compensation paid to a licensed trust corporation that acts as trustee of a charitable trust, as contemplated in the trust indenture, as well as payments made to a director of a corporation.

The application for charitable registration, Form T2050, asks if there has been or will be any financial transactions between the charity and its directors. We recommend that there be a correlation between that question and Question C8 in the Return.

K. Question C9

Question C9 asks if the charity incurred “any expenses for compensation of employees” in the fiscal period. It does not ask whether the charity “paid any compensation” to its employees. The wording of the question is confusing and we recommend it be corrected.

We assume C9 contemplates calculation on an accrual basis rather than a cash basis, which raises a question about whether the calculation of compensation to directors contemplated in C8 and the calculation of compensation to employees in C9 differ in this regard.

Schedule 3 requests detailed information about compensation, but uses inconsistent terminology, making it difficult to complete the Return accurately. Question 1(a) in Schedule 3 asks for the number of “permanent, full-time, compensated positions”. Question 2(a) asks for the number of “part-time or part-year” employees but does not refer to them as “compensated” as in 1(a). It is also not clear if the compensation contemplated in Schedule 3 includes benefits in addition to salary.

Question 3 in Schedule 3 asks for the charity’s total expenditure on compensation in the fiscal period without indicating if it is to be determined on an accrual basis or a cash basis. It is potentially confusing and puts the charities at risk if they inadvertently fail to complete the form correctly. Further, the requirement in question 1(b) to disclose information about the 10 highest compensated permanent, full-time positions is clearly not aimed at highly paid part-time employees, despite the effect of their compensation on the total expenditure on compensation requested in question 3. Finally, while we understand that it is in the public interest to require as much transparency as is reasonable in the circumstances, we question whether the disclosure of this information requires more than is reasonable from charities.

L. Question C10

Question C10 asks about receipt by the charity of donations or gifts “of any kind”, with a value in excess of \$10,000, from any donor that was not resident in Canada or did not meet certain other criteria (referred to below).

A charity will often not be able to determine if a donor is a Canadian citizen, is employed in Canada, is carrying on business in Canada or has disposed of taxable Canadian property. Even if the charity made reasonable efforts to obtain that information, there is no assurance the donor would provide an accurate response. This question appears to be directed at the tax affairs of third parties, extending beyond the bounds of auditing the charity. Again, the question creates the risk of penalties, without safe harbour, for failure to complete the Return correctly, despite the charity’s reasonable efforts. Having made reasonable inquiries, a charity should be able to respond that it “does not know” the status of the non-resident donor. Alternatively, the Guide should indicate that the charity will not be penalized if it makes reasonable efforts to obtain the information.

The question uses the words “donations” and “gifts” interchangeably. If they have the same meaning, only one should be used, and the use should be consistent throughout the Return. The question also does not refer to the relevant period during which donations or gifts were received. We assume it is intended to apply to the fiscal period for which the Return is being filed, but this needs clarification.

M. Question C11

Question C11 asks if the charity received any non-cash gifts for which it issued tax receipts (with no reference to “donations”, inconsistent with the terminology in C10). As with C10, it is not clear if the question is directed at gifts received in the fiscal period for which the Return is being filed. The applicable timeframe should be clarified.

Question 2 in Schedule 5 requires disclosure of the “amount” of tax-receipted non-cash gifts. It is not clear if this is asking for something other than the “value” of the gifts (both terms are used in the Return) and, in particular, whether the “amount” refers to the eligible amount disclosed on the official receipt or some other amount. Question D3 (discussed below) asks about the “total eligible amount” of all gifts for which the charity issued tax receipts, the “total amount” for all other donations for which no receipt was issued, and other questions using variations on this wording. We are concerned about confusion about the difference between “amount”, “eligible amount” and “total” and the use of inconsistent terminology in the Return.

Finally, C11 (and C14) refer to “tax receipts”, which presumably is intended to mean official donation receipts that comply with the regulations. The terminology here, and throughout the Return, should be consistent and precise to avoid confusion and inadvertent errors in completing the Return.

N. Question C13

Question C13 asks if the charity allowed any of its donors to use any of its property, except for “permissible uses”. “Permissible uses” are excluded without definition or elaboration. Definition is required if a charity is expected to be able to answer this question and is subject to penalty for inadvertently answering it incorrectly.

O. Question C14

Question C14 asks if the charity issued any receipts for donations on behalf of another organization. (It refers to “donations”, rather than “gifts”, illustrating earlier comments on inconsistent terminology.) The question appears to be aimed at situations where charities act as conduits or agents. The Guide refers the charity to the CRA website, rather than provide needed information on the meaning of the question. Some charities might think receiving donations and making grants to qualified donees is tantamount to issuing a receipt “on behalf of” the qualified donee, which could lead to an incorrect answer to the question. The Guide should illustrate the situations that fall within the purview of this question and, at a minimum, should state that when a charity issues its own receipt and later makes a grant to a qualified donee, it is not issuing a receipt “on behalf of” the qualified donee. (See note under C11 above on use of the term “tax receipts”.)

P. Question D1

Question D1 asks whether the financial information provided in Section D (to be completed only by charities that meet certain criteria; otherwise complete Schedule 6) was prepared on an accrual basis or cash basis. Some charities use a combination of an accrual basis and a cash basis, which could lead to answering D1 incorrectly, particularly by small charities that often do not have the resources to pay accounting or financial advisers to deal with their financial statements or to prepare the Return. Since there is no requirement to use generally accepted accounting principles or any other accounting standards, it should not be presumed that only one method or the other will be used, as long as the information is fully disclosed and correct.

Q. Question D2

Question D2 asks if the charity owned any land or buildings. It is not clear why land and buildings are singled out for disclosure, separate from other assets. It is also not clear if the question refers to ownership at any point during the year or at the end of the year. The question is ambiguous for charities that owned land or buildings during the year but sold those assets before the end of the year. The Guide suggests that the question is aimed at ownership at the end of the year, but clarification is needed.

There is potential for disconnect between the information required by this question and the information related to assets in the charity’s financial statements, which are generally prepared

for other purposes. As a result, the opening wording in D2, "using the charity's own financial statements" is potentially problematic.

R. Question D3

Question D3, line 4565, which asks if the charity received any revenue from any level of government in Canada, is not included in schedule 6 for larger charities. We are uncertain if this is intentional.

Line 4360 asks about non tax-receipted revenue from fundraising. This requires the charity to consider the issues set out in the fundraising Guide, in particular the requirement to track revenue "from fundraising" compared to revenue that may not necessarily be "from fundraising". We recommend adding a reference to revenue raised through sponsorships and other non-receipted sources.

D3 (line 4505), for smaller charities, and Schedule 6 (line 4180), for larger charities, require disclosure of any 10-year gifts, but this concept is no longer relevant since the 2010 Budget. We are uncertain why charities are still being asked to disclose 10-year gifts.

The information requested in Question D3, lines 4575, 4630 and related provisions about non tax-receipted amounts affects the fundraising ratios and other assessments made by CRA in auditing the performance of a charity. Exempt organizations, either in Canada or outside Canada are not likely to ask for tax receipts for donations or grants, potentially skewing the reporting. It appears that line 4500, requiring disclosure of the eligible amount of donations for which the charity issued receipts, is to be read with line 4571 which is limited to tax-receipted "revenue" from sources outside Canada, and presumably includes the eligible amount of gifts in line 4500. However, this is not clear.

S. Question D4

Question D4, line 4860 asks for expenditures on professional and consulting fees, without distinguishing between expenditures incurred for charitable activities and those incurred for administration. Line 4950 is apparently intended to include all expenditures (excluding gifts to qualified donees). Line 5020 in Schedule 6 (for larger charities) requires disclosure of expenditures on fundraising, but there is no similar requirement in D4.

We recommend that the Guide provide more information about the process to be used in allocating expenditures. Schedule 6 requires an allocation of the total at line 5000 among the components set out at lines 5010, 5020, 5030 and 5040. It would be helpful for the references in Schedule 6 to be mentioned in the part of the Guide dealing with D3 and D4, while making it clear in Schedule 6 that smaller charities are not required to complete the Schedule.

Line 4890 in Schedule 6 requires disclosure of the fair market value of all donated goods “used in charitable programs”. We presume that the goods must be used during the year for which the Return is filed, but this should be clarified. There is no similar deemed expenditure for smaller charities in D4. It is not clear why smaller charities should not be presumed to use property donated to them and qualify for deemed expenditures based on the use of property in carrying out their charitable activities.

We are unaware of the basis for not requiring a fundraising ratio calculation for smaller charities that complete section D rather than Schedule 6. It appears that the information requires some analysis and manipulation to arrive at fundraising expenditures.

T. Schedules

The CBA Section offers the following recommendations on the schedules to the Return, in addition to comments on specific schedules made above.

Schedule 2

Schedule 2, line 200 asks for information about expenditures on activities/programs/projects carried on outside Canada, excluding gifts to qualified donees. It is not clear how this question should be answered where payments are made to qualified donees outside Canada. Some qualified donees operate both inside Canada and outside Canada, and in some cases, act as intermediaries as well as qualified donees, making it difficult for a charity in this situation to answer the question accurately.

Line 210 asks if the charity’s financial resources were “spent” on programs outside Canada. It is not clear what is meant by “spent” and whether this is limited to financial resources, or would include use of personnel or other types of resources.

We are concerned about disclosing in Schedule 2, line 210 the names of individuals or organizations who act as intermediaries, for security reasons. We suggest that this information be included instead in Schedule 4, where it would at least remain confidential.

Schedule 6

Under statement of operations, there does not appear to be any disclosure of revenue received from operations, such as tuition received by universities or other schools, or fees charge by medical clinics. In addition, as noted above, we suggest that information be specifically requested about revenue raised by sponsorship, rather than being included in non-receipted revenue. Line 4640 seems to be aimed at the disclosure of revenue from the sale of goods and services except to government. Line 4630 appears to contemplate revenue from sponsorships, although this is not necessarily “fundraising”, as many sponsorships are taken at the initiative of the payor.

There is no line item in the expenditures column for amounts expended directly on carrying out charitable activities other than an oblique reference to line 5000, for which there are confusing statements in the Guide. Program related investments, including microloans and other types of financial assistance, should be regarded as an expenditure for this purpose.

Line 4250 asks the charity to identify the assets and liabilities that are not used in charitable activities. The purpose of this question is unclear. If it pertains to calculating the disbursement quota, it appears to be redundant since questions relevant to that calculation are set out elsewhere (lines 5900 and 5910 of Schedule 6). If there is another purpose for asking the question, we suggest that it be identified.

Schedule 7

Line 707 refers to gifts to qualified donees for political activities, raising questions noted in our earlier comments about directed gifts and transfers between registered charities for political activity purposes.

III. CONCLUSION

Given the severe consequences to charities that inadvertently complete the Return incorrectly, it is critical that the requirements in the Return be communicated clearly and with precision. The CBA Section's recommendations are made with this goal in mind. The Return needs to be

improved by using consistent terminology, providing more explanation in the Guide regarding the purpose of the questions and meaning of terms, and ensuring that the questions asked have a legal basis and seek only necessary information.