March 30, 1999

The Hon. Herb Dhaliwal, P.C., M.P.
Minister of National Revenue
7th Floor, Connaught Building
555 Mackenzie Avenue
Ottawa, Ontario
K1A 0L5

Dear Minister,

Re: Proposed treatment of Charities under the *Income Tax Act*

We are writing this letter on behalf of the National Taxation Section of the Canadian Bar Association. This letter was prepared by Wolfe D. Goodman, Q.C. and the Charity and Not-For-Profit Law Section of the Canadian Bar Association - Ontario, and has been approved by the National Taxation Section.

For many years, organizations and their professional advisers have criticized the narrow criteria used to determine whether an organization is a charity for income tax purposes. If the organization qualifies as a charity, it can apply for and receive registration under the *Income Tax Act* (ITA). This, in turn, affects both the charity and those who make donations to it.

A registered charity is exempt from tax on its income, by reason of para. 149(1)(f) of the ITA. Individuals who make donations to a registered charity are entitled to charitable donations tax credits under s. 118.1(3) and corporations which make donations are entitled to deductions from their income under para. 110.1(1)(a).

The ITA does not contain any definition of a charity, leaving this matter to be determined under general law. Unfortunately, the law which defines a charity is of ancient vintage, being derived from the preamble to the *Statute of Charitable Uses*, an English statute from 1601. This definition was restated in somewhat more modern terms by the House of Lords in *Income Tax Special Commissioners v Pemsel*, [1891] AC 531.

It has become abundantly clear that the categorization of types of charity in the *Pemsel* decision is no longer appropriate in Canada on the eve of the 21st century. While our courts have provided some recognition of the view that the legal concept of charity is evolving to meet contemporary conditions, this concept is not evolving sufficiently rapidly to accommodate the needs of today's Canada -- at least with respect to income tax issues.

This is clearly evident from the Supreme Court of Canada's recent decision in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, unreported, January 28 1999, Court File No. 25359, where the Court split 4:3 on whether an organization to assist immigrant women was charitable. It is also indicated by the decisions (fifteen of which summarized at Annex "A") of the Federal Court of Appeal, which hears appeals from Revenue Canada decisions to deny organizations registration as a charity. A large proportion of these decisions involve activities which most Canadians believe should benefit from the tax advantages which are presently accorded charities and their donors under the ITA. However, by its rigid and literal adherence to the categories of charity enumerated in the *Pemsel* decision, the court has refused registration for many organizations which we consider should receive tax benefits.

It would be theoretically possible for Parliament to develop a new legal definition of charity which would be applicable for tax purposes. Unfortunately, while some of the finest legal minds in the English-speaking world have attempted to craft such a definition, their efforts have not been generally accepted by other scholars.

Rather than attempt the difficult task of redefining charity for tax purposes, it would be simpler for Parliament to add additional categories to the list of organizations which can qualify for tax exemption and to which gifts can qualify for tax credits or deductions.

In his Working Paper entitled "Charities, Public Benefit and the Canadian Income Tax System - A Proposal for Reform", published in September 1998, Arthur B. C. Drache, Q.C., proposes that Parliament establish a new category called a "public benefit organization" (p. 72 and following). This would include those organizations falling under the current legal definition of charity but would also be broader than that definition. A "public benefit organization" would be entitled to the same tax benefits, for itself and for its donors, as registered charities. Such an organization would have to devote substantially all its resources to "public benefit activities" and no part of its income could be paid or made available to any of its members.

Mr. Drache would define "public benefit activities" as "actions designed to promote activities or provide services which are intended to improve the quality of life of the community or of a group within the community". He then provides a lengthy list of activities which he believes should be deemed to be public benefit activities (p. 74). Many of these reflect a desire to provide tax benefits for organizations which have been held by the Federal Court of Appeal not to be charities but which should be entitled to these benefits as a matter of public policy.

We share Mr. Drache's desire to encourage Parliament to extend these tax benefits to most, if not all, of the organizations which carry on the activities which he has listed. Of course, individual Canadians may differ as to whether a particular type of organization should receive tax benefits, however we believe that most Canadians would generally agree with Mr. Drache's list.

However, we are concerned that the federal government may be deterred from taking the steps recommended by Mr. Drache by the rather open-ended definition of "public benefit activities" which he has proposed. The government may view such a definition as potentially opening the door to a flood of applications from organizations which claim to be "improving the quality of life of the community or of a group within the community". It would, in our view, be most unfortunate if reforms which are desperately needed in order to provide tax benefits to many worthy organizations and their donors were to be held up by concerns over the definition of "public benefit activities".

Pending a more comprehensive review of Mr. Drache's broader proposals by the government, the Canadian Bar Association and others, we believe that the government should establish a mechanism to deal with the issues identified above. Such a mechanism would also accommodate most, if not all, of the organizations performing the activities listed by Mr. Drache. However, we would recommend that this be done in a less open-ended manner by amending subsection 118.1(1) of the ITA to add these organizations to the lists contained in the definition of "total charitable gifts" (for individual donors) and in the definition of "charitable gifts" (for corporate donors). These two definitions already include, for example, "a registered Canadian amateur athletic association", which is probably not a charity in the legal sense, but which Parliament has decided should enjoy the same benefits as a registered charity. We suggest that there is no reason why these lists could not also include other registered organizations of the kinds suggested by Mr. Drache. We strongly urge that such an amendment be made as soon as possible. It would also be necessary to add these new types of organizations to the list of exempt organizations in subsection 149(1).

These new types of organizations would still have to apply for registration with Revenue Canada, just as charities and Canadian amateur athletic associations presently do. Revenue Canada would have to decide whether they qualify for registration under the extended list, just as it does when considering applications from charities and Canadian amateur athletic associations. Under the present system, applicants have a right to appeal any refusal of registration to the Federal Court of Appeal.

We agree with Mr. Drache that the present system of appeals from refusal of registration is clearly defective (p. 82). The cost of launching such an appeal is prohibitively high for many organizations. Also, the appeal process is flawed because the Court must review the relevant questions of law and fact without the benefit of any findings of fact by a trial court and without the benefit of any sworn evidence. A way must be found to deal with these serious defects.

We suggest that Revenue Canada establish an Advisory Panel to review refusals of registration and to recommend whether an organization which applies for registration as a charity, a Canadian amateur athletic association or any of these new types of organizations ought to receive registration. The Advisory Panel should be selected by the Minister of National Revenue in consultation with the Minister of Canadian Heritage and should consist of people from outside the federal government with expertise in charities and other public organizations.

The Panel should have the right to conduct itself much like a court, with simple pleadings and sworn witnesses (if requested by the applicant) but its decisions should not be binding on Revenue Canada. However, if Revenue Canada is not prepared to accept the advice of the Advisory Panel to allow registration and the applicant organization wishes to appeal to the Federal Court of Appeal, consideration should be given to having the Government pay the costs of the appeal unless the Court otherwise determines. The written record of the hearing before the Advisory Panel should be made available to the Court, on the basis of which it could then determine the appeal.

We are conscious of the wishes of the members of our two Sections, and of what we believe are the wishes of most Canadians, that this matter be dealt with speedily, in order to remedy what most of us have long recognized is a defect in our tax system. We are prepared to lend our assistance in order to further this work.

Yours truly

Mr. J. Scott Wilkie
Chair, National Taxation Section

cc. Mr. Bill McCloskey, Assistant Deputy Minister Policy and Legislation, Revenue Canada
Mr. Neil Barclay, Director Charities Division, Revenue Canada
Mr. Carl Juneau, Assistant Director, Charities Division, Revenue Canada
Ms. Susan Fletcher, Privy Council Office
Mr. James Wheelhouse, Privy Council Office
Executive, National Taxation Section, CBA
Mr. Terrance S. Carter, Chair Charities Section, CBA-Ontario

ANNEX "A"

These decisions are current to the end of 1997.

(i) *Scarborough Community Legal Services v. The Queen*, [1985] 1 C.T.C. 98, 85 D.T.C. 5102 (F.C.A.)

The court found that political activities in the form of participation in rallies and work to change municipal by-laws would not invalidate charitable purposes because they were non-essential and incidental to other charitable activities. This issue was addressed by the amendments to the ITA in 1985-86 to permit limited political activity by registered charities.

(ii) *Native Communications Society of B.C. v. M.N.R.*, [1986] 2 C.T.C. 170, 86 D.T.C. 6353 (F.C.A.)

This is a leading case, with the Court noting that the law of charity is an evolving area. The activities of the society in publishing a newspaper on issues of concern to the aboriginal community were held to be beneficial to the community (impliedly the community as a whole, and not only the aboriginal community) and therefore charitable. Therefore, the society was found to be a charity. The court examined the activities proposed to be conducted and held that there was no political activity, based on statements that the newspaper was politically non-aligned, despite references in the society's objects to providing information on political matters which the court characterized as related only to "procurement and delivery of information".

Although hailed at the time as a ground-breaking case, its impact in subsequent decisions has been diminished by focus on statements in the decision relating to "the special legal position in Canadian society occupied by the Indian people".

(iii) *Alberta Institute on Mental Retardation v. The Queen*, [1987] 2 C.T.C. 70, 87 D.T.C. 5306 (F.C.A.)

The court in this case decided that commercial activities carried on by this charitable foundation were acceptable on the basis that all proceeds went to further the principal objects of the foundation, namely the welfare of persons suffering developmental handicaps. The activity in question was the collection of second hand items delivered to an unrelated business entity which in turn sold the items at retail stores. The charity received a fixed minimum amount and a percentage of profits over a set amount. A factor considered by the court was that one of the objects of the charity was to raise money for its work with the disabled. On this basis, it held that the business activity was not an unrelated business and did not affect the foundation's charitable purposes.

(iv) *Polish Canadian Television Production Society v. The Queen*, [1987] 1 C.T.C. 319, 87 D.T.C. 5216 (F.C.A.)

An organization with objects of advancing multiculturalism and in particular the Polish-Canadian community was held not to be charitable. The court gave no reasons for its decision and declined to express a view as to whether such objectives are to be considered charitable within the terms of the ITA.

(v) *Positive Action Against Pornography v. M.N.R.,* [1988] 1 C.T.C. 88 D.T.C. 6186 (F.C.A.)

A group involved in anti-pornography lobbying and distribution of educational material was found not to be charitable. The court stated that it did not meet the test for advancement of education since the organization merely presented selected items of information. The benefit to the community test was not met either because the primary purposes and activities of the organization were political, and were not ancillary or incidental to other purposes. The court found that the phrase "beneficial to the community" is not used in a "loose sense", but only means "what is beneficial in a way the law regards as charitable".

(vi) *Toronto Volgograd Committee v. M.N.R.*, [1988] 1 C.T.C. 365, 88 D.T.C. 6192 (F.C.A.)

An organization devoted to promoting peace and understanding between a Canadian city and a Soviet city through education, public awareness, exchanges and meetings was found not to be charitable. The court acknowledged that it should consider prevailing circumstances and look at eligibility in light of current social conditions. However, the organization was disqualified under both the 'education' and 'benefit to the community' categories of charity since its activities and objects were categorized as "no more than propaganda", being "education for a political cause, by the creation of a climate of opinion".

(vii) *NDG Neighbourhood Association v. Revenue Canada*, [1988] 2 C.T.C. 2048, 88 D.T.C. 6279 (F.C.A.)

A community organization which focussed on social issues in the community, accessibility to community resources, development of educational facilities and services to the disadvantaged was held not to be charitable, again on the grounds of political activity. The non-exclusive assistance to the disadvantaged negated the organization being granted charitable status under the "poverty" category, while providing

information and conducting letter writing campaigns were considered as not educational. The emphasis on lobbying efforts and "defending people's rights" made the organization too political for these activities to be incidental and ancillary. Because the organization "not only *has* activities beyond education but that it *is*, in effect an *activist* organization", it failed to qualify as a charity.

(viii) *National Model Railroad Association v. M.N.R.*, [1989] 1 C.T.C. 300, 89 D.T.C. 5133

Despite the court's finding that it had recognized charitable purposes (education and other purposes beneficial to the community), a national association promoting model railroads and information on railways generally was found to have activities "too member-oriented to have a truly public character".

(ix) *Everywoman's Health Centre Society v. Canada*, [1991] 2 C.T.C. 320, 92 D.T.C. 6001

A society with objects of providing "necessary medical services for women for the benefit of the community as a whole" and carrying on "educational activities incidental to the above" in the form of a free-standing abortion clinic was found to be eligible for registration as a charity. The court analogized the services provided to those of a hospital. It rejected Revenue Canada's position that the benefit to the community could not be found in a controversial issue where no public consensus exists, saying public consensus is not an appropriate test. The court also found there to be no hint that the Society would be engaging in political activity.

The court stated that the "Society's purposes and activities at this point in time [i.e. the operation of the clinic] are beneficial to the community within the spirit and intendment, if not the letter, of the Preamble to the Statute of Elizabeth and ... the Society is a charitable organization within the evolving meaning of charity at common law" and should be registered under the ITA.

(x) *Canada UNI Association v. M.N.R.*, [1993] 1 C.T.C. 46

An organization with objects of informing Canadians about the unique nature of Canada, establishing communication between Canadians and enhancing appreciation and tolerance of linguistic and cultural differences, all with special emphasis on English- and French-speaking Canadians was held not to be a charity. The court found the organization's objects and activities to be inherently political, using virtually the same considerations it applied in the *Toronto Volgograd* case. The *Native Communications Society* case was found to be different because of the special position of natives in Canadian society.

(xi) *Vancouver Society of Immigrant Women and Visible Minority Women v. M.N.R.*, [1996] 2 C.T.C. 88

A society with objects of providing educational forums and workshops to immigrant women to help them find employment and carrying on incidental and ancillary political activities and raising funds for these purposes was held not to be eligible for registration as a charity. The court once again limited the scope of the *Native Communications Society* case, based upon the special constitutional status of aboriginal peoples. The decision was largely based on what the court characterized as indefinite and vague purposes and activities, which did not clearly identify the recipients as persons in need of charity as opposed to those in need of help. The court repeated the principle that laudable community services are not necessarily charitable at law and activities and objects of general public utility are not always charitable in the legal sense.

(xii) *Briarpatch Incorporated v. The Queen*, [1996] 2 C.T.C. 94

This was the first case involving a full hearing of a decision by Revenue Canada to deregister a charity. The organization's objects focussed on low-income people and included communications, media access, educational workshops and breaking down barriers. Its main activity was the publication of a magazine, *Briarpatch*. The court agreed with Revenue Canada that the society's activities were no longer charitable and ordered the charity deregistered. The court said that there was not sufficient "continuity, structure and analysis" to qualify as education in the sense of training the mind. The court also found that there was no purpose beneficial to the community in general because the focus of the magazine was not exclusively on the poor. Again, the court refused to apply the *Native Communications Society* case because of the special constitutional status of native people.

(xiii) *Vancouver Regional FreeNet Association v. Minister of National Revenue*, [1996] 3 C.T.C. 102

A "FreeNet" association with purposes including the development and operation of a free, publicly accessibly community computer utility, education of the public in the use of computer telecommunications and related objects was held to be eligible for registration as a charity. The court reached its decision by analogizing the "information highway" to highways and other public works, which are referred to in the *Statute of Uses*.

(xiv) *STV Stop The Violence ... Face The Music Society v. R.,* [1997] 2 C.T.C. 10

An organization producing and distributing anti-violence, anti-drug and anti-crime material to youth groups was found not to be charitable. The court found that an organization must demonstrate that its activities are more than worthwhile. Instead, they must be specific and clearly focussed on "charitable objects in the legal sense". In the case of STV, the goals were too loosely defined to meet this test.

(xv) *Interfaith Development Education Association, Burlington v. M.N.R.*, [1997] 3 C.T.C. 271

Following the *Briarpatch* decision, the court held that an association holding study groups, public meetings and lectures on social justice issues and promoting interaction among churches, missions and development and social justice organizations did not qualify under the "advancement of education" category of charity, and was not charitable. The "restricted meaning" of the educational category as formal training of the mind was confirmed. The advancement of religion category was not discussed.