Submission for Meeting with Canada Customs and Revenue Agency and Finance Canada

NATIONAL CHARITIES AND NOT-FOR-PROFIT LAW SECTION
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TABLE OF CONTENTS

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Preface .... - i -

I. **Introduction** 1
II. **Categories of Charities** 1
III. **Split Receipting and Concept of "Gift"** 6
IV. **Disbursement Quota** 24
V. **Definition of Tax Shelter** 25
VI. **Related Business** 27
VII. **80-20 Rule and Administrative Costs** 27
VIII. **Political Advocacy** 28
IX. **Eliminating Racial Discrimination** 28
X. **4.5% Disbursement Quota** 28
XI. **Capital Gains and 10-Year Gifts** 29
XII. **Grants by Registered Charities to Foreign Charities** 29
XIII. **Charitable Remainder Trusts** 29
XIV. **Gifts by Will** 29
XV. **Gifts of Public Securities** 30
XVI. **Audit Issues** 30
XVII. **Registration and Amendments** 30
XVIII. **Use of Recreational Property** 30
XIX. **JRT Report** 30
XX. **Incorporation of Charities** 31

PREFACE

The Canadian Bar Association is a national association representing 38,000 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 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

Submission for Meeting with Canada Customs and Revenue Agency and Finance Canada

I. INTRODUCTION

These submissions deal with a number of items that had been discussed during the joint meeting with representatives of Canada Customs and Revenue Agency and the Department of Finance in January 2002 and issues that have arisen subsequent to that meeting. These include issues arising out of the draft legislation and explanatory notes dealing with technical amendments to the Income *Tax Act* (the "Act") introduced on December 20, 2002 (the "Proposals") and arising out of the federal budget introduced on February 18, 2003 (the "Budget") and the Notice of Ways and Means Motion and Explanatory Notes tabled by the Department of Finance of March 19, 2003 (the "Budget Notice").

Some of the issues that were discussed previously have been addressed in the Proposals and new issues have arisen, which we have not discussed previously. These are addressed below.

II. CATEGORIES OF CHARITIES

The proposed new definitions for "public foundation" and "charitable organization" in clause 88 raise questions about "control". Since the concept is "controlled directly or indirectly in any manner whatever" and if the test is to be applied as if the organization or foundation were a corporation, seems clear that subsection 256(5.1) will be relevant. Under subsection 256(5.1), a corporation is

considered to be controlled by a person or group of persons if that person or that group has any "direct or indirect influence" that, if exercised, would result in control in fact of the corporation, with certain exceptions. Those exceptions include situations where the corporation and the person or group are dealing with each other at arm's length and the influence is derived from a franchise, license, lease, distribution, supply or management agreement or other "similar" agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the person or group regarding the manner in which a business carried on by the corporation is to be conducted. Where this "purpose" test is met, the corporation is not considered to be controlled by the person or group for this purpose.

In addition to the uncertainty that has always been present under the current rules dealing with the concept of "arm's length", we feel the proposal will introduce further uncertainty. It is not difficult to think a number of situations in which a person or group of persons (not necessarily dealing other than at arm's length) could be considered to be in a position of direct or indirect influence. It is not so easy to determine whether the exercise of direct or indirect influence would result in "control in fact". This Proposal appears to implement the comfort letter issued on September 11, 2001 by the Department of Finance, which was intended to prevent inappropriate results where large gifts were received by a charitable organization or a public foundation from a single person or a non-arm's length group of persons.

The potential concerns are evident from the decision of the Tax Court of Canada in *Mimetix Pharmaceuticals Inc. v. The Queen*[1], in which it was held that a non-resident corporation had *de facto* control for purposes of subsection 256(5.1) because it was in a position to exert the kind of pressure that would enable it to have its will prevail with respect to the business of the corporation. The non-resident had granted the corporation a sublicense for no consideration and had

1 2001 DTC 1026

lent a substantial amount of money without interest. The court held that this constituted a form of "economic controlling influence" and stated that this is precisely what is covered by the definition of *de facto* control in subsection 256(5.1), and the mere possibility of exercising influence sufficient to cause a control relationship, even if that influence is never actually exercised. The court observed as well that *de facto* control may shift from one person to another based on external factors and it referred to an article which suggested that a person might find himself in control of a corporation because of changes in economic conditions, which could be either external or internal to the corporation.

This case illustrates the difficulty that many charitable organizations and foundations will encounter in situations involving large gifts, where the gift itself or some other legitimate arrangement may result in the type of indirect influence to which the new rules will apply. Thus, many situations in which donors will have some type of theoretical or potential economic "influence" may still be problematic, because it will not be a simple matter for the organization or foundation to make this determination when categorizing itself. This will be particularly problematic for donors who make gifts of marketable securities, on the assumption that the donee is a charitable organization or a public foundation, only to find that CCRA subsequently alleges the donee, unknown to it and to others, was subject to an inappropriate degree of "influence", either as a result of a pre-existing arrangement or as a result of the donation itself. It appears that the new rules will not apply at the time of a particular donation if the donation itself results in a change in status, and will apply only after the gift is made. As a result, it appears that even if there is a degree of control as a result of or after a particular donation, that donation itself will not be affected, since the donee will have been a charitable organization or a public foundation at the time of that particular donation. This will be important where the consequences of a donation depend on the status of the donee. However, immediately thereafter, it appears that the status of the registered charity will become uncertain.

Presumably there is a concern about a potential "end run" around the relief, if a person or group of related persons could effectively convert a private foundation to a public foundation or a charitable organization simply by ensuring that more than 50% of the directors or other like officials deal at arm's length with each other and with each of the other directors or trustees and with each person or member of the non-arm's length group that has contributed more than 50% of the capital. There appears to be a concern that a person or group of persons will be able to effectively "control" an organization or foundation simply through economic means, even if more than 50% of the directors deal at arm's length with each other, with each of the other directors and with each person who has contributed most of the funds.

Perhaps the concept would be better aimed at the relationship between the contributor or contributing group and the organization or foundation itself, rather than the relationship with the directors. We suggest that this limitation be more clearly delineated and the circumstances in which the exemption is not going to be available for "control" reasons be more clearly delineated.

As discussed in the section dealing with split receipting, one of the Proposals provides that a transferor of property must establish to the satisfaction of the Minister that the transfer was made with the intention to make a gift. The new rules dealing with the categorization of charitable organizations and public foundations is tantamount to requiring a transferor of property to establish to the satisfaction of the Minister that the transfer of the property and any other arrangements with the charity, no matter how remote, will not cause the donor to "control" the charity. We submit that this concept would be better put in the converse, and the charity should be able to assume that it is still a charitable organization or a public foundation unless the Minister establishes that there is control in fact. We are concerned that as a practical matter, most registered charities will not be in a position to make a meaningful determination as to whether they have ceased to qualify as charitable organizations or public foundations, either as a result of significant donations, or as a result of legitimate

business arrangements with significant donors, under this nebulous "influence" test.

We submit as well that the concepts applicable to business corporations, in commercial arrangements involving shareholders, are not appropriate to charitable corporations or charitable trusts, and the uncertainty introduced by the jurisprudence dealing with the concept of "group control" will simply add to the compliance burden faced by registered charities. For instance, it appears that CCRA could take the position that two donors, otherwise dealing at arm's length, might be dealing other than at arm's length if they have reached a common purpose of raising funds and making donations to the same charity. If they constitute a group of persons that do not deal at arm's length with each other, the charity would be adversely affected, whereas this would not be the case if those two donors had not agreed to co-operate with each other. This also illustrates the problems in applying the concept of non-arm's length relationships in many situations.

Although we think the concept of "control" should be applied in the charities sector in a manner that reflects the fiduciary obligations of directors who are administering charitable property, we also think CCRA should apply consistent standards in determining whether there is an arm's length relationship. For instance, we understand CCRA has taken the position that a lawyer and an employee of the lawyer are not dealing at arm's length for purposes of the rules dealing with the status of a charity, whereas they may be considered to be dealing at arm's length for other purposes of the Act. There appears to be no basis for a "double standard", if in fact such a double standard exists. On the other hand, if the concept of "control" is introduced, we think it must recognize the different relationships in the charities sector as compared to the business sector. We would like to discuss the administrative practices that CCRA intends to adopt in

reviewing the status of a charity and in particular whether CCRA anticipates issuing a technical news release.

III. SPLIT RECEIPTING AND CONCEPT OF "GIFT"

Proposed subsections 248(30) to (33) contain new rules that are intended to apply to both gifts and contributions. Contributions are relevant in determining the tax relief available for payments made to registered parties or candidates, and some of the concepts are relevant to the charities sector.

We recognize the difficulty that CCRA has faced, along with the charities sector, in dealing with situations in which the law has not responded to the times. In particular, we recognize the uncertainty that has arisen as a result of certain jurisprudence dealing with the definition of "gift" and circumstances in which a payment is made for multiple purposes, such as a fundraising dinner. As a result, we applaud the efforts of CCRA and the Department of Finance to try to resolve these issues and permit the charities sector to move forward with some assurance that there is a legal basis for the administrative practices that have been developed over the years. However, we are concerned that there are some technical problems with the Proposals and our submissions are aimed at improving the viability of the Proposals. As a result, we have set out some fairly detailed analysis, including references to certain jurisprudence, to try to illustrate our concerns about the potential problems that we think may arise. We have also suggested what we hope are helpful changes in the approach and in the draft wording.

Under the *Interpretation Act*, as recently amended, when terminology has a different meaning in the civil law and under common law in a federal statute, the civil law terminology or meaning is to be adopted in Quebec and the common law terminology or meaning is to be adopted in the other provinces. It appears to be

well recognized that the concept of "gift" is subject to a different definition in Quebec under the civil law than in the common law provinces.

Jurisprudence has evolved dealing with the availability of tax relief for gifts under the Act. CCRA has adopted a somewhat benevolent administrative approach, attempting to reconcile the civil law concept of a "gift" in circumstances in which there is some form of advantage or benefit available to the "donor", with the strict common law test, which denies the existence of a gift if there is any significant benefit available to the "donor". If there is a benefit, there is no gift.

For instance, in *The Queen v. Littler*[2], the majority of the Federal Court of Appeal held that there was no gift for purposes of the gift tax provisions in the Act (prior to their repeal) where a sale occurred at an undervalue. However, counsel for the Minister did not plead a provision in the Act that would have deemed a benefit arising as a result of a sale at an undervalue to be a gift expressly for this purpose. As a result, the case turned on common law principles. The majority rejected arguments based on the Civil Code in Quebec, notwithstanding that the taxpayer was a resident of Quebec and the Civil Code and earlier jurisprudence in Quebec were relevant. For instance, Chief Justice Jackett stated that:

> "I have not overlooked the decision of the Quebec Court of Appeal in *Charlebois v. Charlebois*, 1974 C.E. 99 on which the appellant relies. As it seems to me, however, if that decision does hold that a sale at an undervaluation was an indirect gift for the purpose of Article 712 of the *Civil Code*, and should not be taken to extend the application of section 111 of the *Income Tax Act* in the province of Quebec beyond what it would be in another province. Apart from that decision, I should have no doubt that a disposition 'of property…indirectly by way of gift' referred to as a gratuitous disposition of 'property' by a circuitous route and does not include a direct 'sale' at an undervaluation".

2 78 DTC 6179 (FCA)

In dissenting, Justice Dubinsky was prepared to find that there was a gift at common law (he does not appear to have felt constrained to apply the civil law of Quebec) where there was an intention to sell at an undervalue. He stated that:

> "It goes without saying that the intent of the *Income Tax Act* can readily be collected from the statute itself. Pure and simple, it is a taxing enactment and, as already noted, by section 111 it is provided that a tax is to be paid on a gift. If in such a statute the word 'gift' were to be limited to gratuitous transfers of property, in my view, the door would be opened wide to those who would seek to circumvent the avowed purpose of the Act by the subterfuge of disguised sales as was done by the Respondent herein and by the Appellant in *Joseph Simard & Ltee v MNR*."

In *Gervais v. The Queen*[3], Justice Walsh in following *Littler* stated:

> "In the present case, we are dealing with a taxing statute which must be applied in the same manner throughout Canada and as the former Chief Justice Jackett stated, in dealing with different sections of the *Income Tax Act* even if the sale at an undervaluation constituted an indirect gift for the purposes of Article 712 of the Quebec Civil Code this should not be taken to extend the application of section 111 of the Act in a litigation in that case in the Province of Quebec beyond what it would be in another Province. I believe that the same must apply to the interpretation given to section 20(6)(c) of the Act in effect at the time in the present case and that I am governed by the decision in the *Littler* case. Although the benefit conferred the deed of sale would probably be considered as a gift in Quebec law, for income tax purposes in which the law must be interpreted consistently throughout Canada, the word 'gift' in section 20(6)(c) of the Act must be given the strict and narrow interpretation given to in the *Littler* case, for income tax purposes".

More recently, in *Gonthier v. The Queen*[4], Judge Archambault of the Tax Court referred to the definition of "gift" in Article 1806 of the Civil Code and stated that the definition corresponds with the definition at common law and whether one refers to the Civil Code definition or the common law definition, it is the essence of a gift that it is a transfer of title that is made gratuitously and without consideration. In that case, the taxpayer had made a payment to a registered charity on the understanding that the funds would be used to acquire a computer for his personal use. The court appears to have been unwilling to apply the

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3 85 DTC 5004 (FCTD)

4 Court File No. 2001-2389 (IT)I

concepts that were mentioned in *Littler* and Gervais as perhaps applicable in Quebec, and appears to have assimilated the concept of gift under the Civil Code entirely with the concept of gift at common law. It appears that the Department of Finance is now proceeding on the basis that, consistent with the *Interpretation Act*, the Act should be administered on a consistent basis notwithstanding apparent differences between the common law provinces and Quebec.

We are concerned that the proposals will apply for all purposes in the Act. This seems to go far beyond what is required. For instance, under subsection 69(1), there is a clearly defined concept of a potential "one-sided" adjustment. If a person disposes of property by way of a "gift", there is a deemed receipt of proceeds of disposition equal to fair market value. Similarly, if a person acquires property by way of "gift", the cost of that property is deemed to be its fair market value. In each case, the reference is to a disposition or an acquisition "by way of gift". This does not appear to be limited to situations in which only the "donor" has disposed of property. Under the Proposals, there might be an element of "mutuality", in the sense that there can be a disposition or acquisition of property that is purportedly the subject matter of the gift, while at the same time there is a corresponding disposition or acquisition of other property from the "donee" to the "donor" that might also be acquired "by way of gift" for this purpose.

It is clear that subsection 69(1) is intended to apply to sales for less than fair market value in non-arm's length situations, and that such a sale will not be a "gift". Otherwise, there would be no need to differentiate between a sale at an undervalue in a non-arm's length situation and a gift[5].

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5 It appears to be contemplated by the Act that a transfer for less than fair market value in an arm's length situation will not give rise to proceeds of disposition equal to fair market value, but if the transaction is treated as a "gift", then the "donor" will be required to report proceeds equal to fair market value. This illustrates the significance of determining whether the parties to the transaction are dealing at arm's length. It also raises questions as to whether a sale for less than full value is a disguised gift, with the intention of avoiding proceeds of disposition equal to fair market value.

It appears that the "problem" with respect to gifts and contributions is limited to those situations in which relief is claimed for a gift to a qualified donee or a monetary contribution that is eligible for relief as a political contribution. It appears to us that there is no need to amend the concept of "gift" for all purposes of the Act and to do so will raise a host of problems that will require much more consideration than appears to have been given to the Proposals at this stage.

The concept of "gift" applies to various transactions among registered charities and to transactions by registered charities with third parties. It will be important to determine whether transfers to and from charities by persons other than "donors" will be regarded as "gifts", particularly for purposes of the disbursement quota and the expansion of the circumstances in which a registered charity can have its registration revoked. For instance, subsection 149.1(12) contains various provisions that are predicated on the existence of a "gift". If the concept of "gift" is to be expanded, it should be clear that this concept will apply for all purposes, including those contemplated in that subsection.

Proposed subsection 248(30) provides that the eligible amount of a "gift" is the amount by which the fair market value of the property that is the subject of the "gift" exceeds the amount of the advantage, if any, in respect of the gift. It appears to be assumed that this definition, in and of itself, somehow will make something that is not a gift become a gift as a matter of law. We do not think that this is a correct premise on which to proceed.

It seems clear that in the absence of stronger wording, if there is no gift at common law, subsection 248(30) has no application. It appears to have been intended that subsection 248(30) would produce the result that would follow if it were worded along the following lines:

> "If there is a transfer of property that would not otherwise constitute a gift, the fact that the transfer is made pursuant to an agreement or an advantage is available to the person making the transfer will not in and of itself disqualify the transfer from being regarded as a gift for purposes of this Act. In those

> circumstances, subject to the other provisions of this Act, the transfer will be deemed to be a gift and the eligible amount of the gift will be the amount by which the fair market value of the property that is the subject of the gift exceeds the amount of the advantage, if any, in respect of the gift."

But for this expanded concept, we do not think that subsection 248(30) will adequately address the current problem. If it does not go so far as to deem a gift to have occurred for purposes of the Act, the common law will continue to apply in the common law provinces. As a result, there will still not be a "gift" and subsection 248(30) will have nothing on which to operate. We suggest that this concept be limited to those circumstances in which the transfer of property is made to a registered charity or other qualified donee or, perhaps, by a registered charity. This would cover those situations in which a registered charity makes a "disbursement by way of gift" for purposes of the expanded circumstances in which a registration can be revoked, in clause 88. There seems to be no reason to deem a gift to occur in situations that do not involve tax incentives for donors or compliance by registered charities. Whether a "gift" under an agreement, as well as a gift in return for an advantage, should be saved under the Proposals should be discussed and resolved. If it is thought that the scope of the Proposals should be limited, the wording could be along the following lines:

> "If there is a transfer of property that would not otherwise constitute a gift, and if the person making the transfer would not otherwise be eligible for a credit or deduction in respect of a gift for purposes of section 110.1 or section 118.1, or a monetary contribution for purposes of subsection 127(3), or not otherwise treated as having made a gift for purposes of the requirements imposed on registered charities under section 149.1, the fact that the transfer is made pursuant to an agreement or an advantage is available to the person making the transfer will not in and of itself disqualify the transfer from being regarded as a gift for purposes of the relevant provisions of this Act, and subject to the other provisions of this Act, the transfer will for purposes of sections 110.1, 118.1, 127(3) and 149.1 and related provisions, be deemed to be a gift and the eligible amount of the gift will be the amount by which the fair market value of the property that is the subject of gift exceeds the amount of the advantage, if any, in respect of the gift."

While there may be a concern that it is beyond the power of the federal government as a matter of constitutional law to legislate with respect to the meaning of a "gift", it appears that as long as the federal government legislates

only within the four corners of the Act, and does not purport to create a different relationship as a matter of common law, this will not be a practical problem. However, it should be noted that there may be situations in which a person intending to make a gift has not made a gift at all as a matter of common law and the Act will nevertheless provide relief, on the assumption (in reality a fiction) that there has been a gift, at least for purposes of the Act. This may raise issues about the "unwinding" of a gift as between the "donor" and the "donee", if the common law would permit the "donor" to rescind the transfer, on the basis that it was intended to be a gift at common law but failed, because an advantage was reserved to the donor, and neither the common law nor equity would "save" the defective gift.

The courts have been reluctant to perfect an otherwise imperfect gift. The maxim "equity will not assist a volunteer" has been applied consistently by the courts to deny the advantages of an imperfect gift to an intended donee. The English Court of Appeal recently addressed this in *Pennington v. Wain*[6], in which a gift that otherwise would not have been perfected at common law was nevertheless recognized as valid under equitable principles. This illustrates the difficulty in determining whether there is or is not a true "gift" in certain circumstances, where all of the requirements of the common law have not been met. In those situations in which the common law would deny the validity of a gift on the basis that it was not gratuitous or there had been an improper reservation of benefit to the donor, the same considerations and the same degree of uncertainty will arise as a matter of common law under the current proposals. As a result, there may be situations in which there is no "gift" as a matter of common law but there is a contract that is enforceable and that is regarded as a "gift" for purposes of the Act under the new rules.

6 [2002] 4 All E.R. 215

In cases that do not involve income tax, the "onus" is usually on the "donee" who seeks to establish the validity of a gift. For instance, in *Scott Estate v. Scott*[7], a deceased person purportedly made a gift of a guaranteed investment certificate to her son and daughter-in-law before dying. When issues arose in the course of the administration of the estate, a determination was required as to whether a gift had in fact had been made. The court refused to recognize the gift, referring to the three underlying requirements of the common law, namely that in order for a perfectly constituted inter vivos gift, there must be an intention to donate, acceptance of the gift and a sufficient act of delivery. In quoting from an author of a text on personal property law, the court observed that:

> "There must be an effective delivery of a gifted property or some accepted substitute. As a rule, the gift must literally be given away. This act of transfer serves the purpose of providing tangible proof of a gift. In the absence of consideration of the type that can support a simple contract, the delivery of the gifted item is the main way that the necessary donative intention can be shown concretely. Words alone are insufficient as proof of delivery because there is a 'facility with which words may be distorted'. The stress placed on the transfer of possession is a symptom of a cynical society which assumes bargains and not gifts, so much that when the trappings of a contract are missing, tangible proof of donative action is demanded".

The Proposals will raise questions about the treatment under the Act of contractual arrangements, including contractual payments such as pledges. It is not unusual for a donor to promise to make a payment in future on condition that the charity will apply the funds in a specified manner. This could be viewed as a gift, subject to a condition subsequent, or as a contractual obligation. The enforceability of that promise is often a concern. It appears that if the parties enter into an enforceable agreement, there would not be a "gift" at common law, if the payment is subsequently made. It appears that the Proposals will not deal with this type of situation, and will be limited to those situations in which there would otherwise be a valid gift at common law, but for the reservation of a benefit or advantage to the donor. Thus the lack of "intention to donate", evidenced by reliance on a contract, may be fatal. This raises other questions

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7 45 E.T.R. (2d) 291 (Alberta Court of Queens Bench)

about bare promises, promises under seal but otherwise without consideration and contractual "promises" made for consideration.

We are concerned that the Proposals do not address a number of fairly typical situations that are likely to cause further concerns. By way of example, consider the following situation:

1. Mr. A is an individual resident in Canada with significant income;
2. Mr. A owns all of the shares of a very successful operating company, Xco;
3. Mr. A personally wants to support a parallel foundation (the "Foundation"), which raises funds for the support of a local public hospital (the "Hospital");
4. The Foundation and the Hospital are prepared to offer significant "naming opportunity" in exchange for a significant "donation";
5. Mr. A makes a significant payment to the Foundation, on the understanding that the Hospital will ensure that the name of Xco is prominently displayed in perpetuity on the new wing of the Hospital;
6. Mr. A's name is not the same as the name of Xco. The name of Xco is well recognized in the community and its display on the Hospital will arguably be beneficial to it in terms of advertising and promotion.

In these circumstances, the following questions arise:

1. Whether either the Hospital or the Foundation is conferring an advantage on Mr. A, as the donor, by naming the wing after Xco;
2. Whether, if that is the case, Mr. A has transferred property to Xco, for which he should receive an increase in the adjusted cost base of his shares;
3. Whether Xco is considered to have acquired some type of intangible property from Mr. A and whether that intangible property has a cost base to it;

4. Whether the Hospital has made a "gift" to the Foundation, by permitting the Foundation to agree to have Xco's name appear on its new wing;

5. Whether the official receipt to be issued by the Foundation to Mr. A must be for less than the full amount paid by Mr. A to the Foundation;

6. Whether a "10 year direction" given by Mr. A to the Foundation will apply to the full amount he has paid to the Foundation or only to the net amount, if there is a reduction on account an "advantage" given by the Foundation (or perhaps by the Hospital) to Mr. A through the naming of the wing after Xco;

7. Whether the situation would be different if the payment to the Foundation were made by a private foundation established by Mr. A.

While these questions appear to be straight forward, the answers are far from clear, even under the present rules. They will be less clear under the Proposals. As noted below, there are many situations in which it does not follow at all that a naming opportunity represents any form of "advantage" to the donor, particularly where the donor is not carrying on a business or is not affiliated with a business that is carried on by a related person. We would like to discuss CCRA's administrative practices with respect to naming opportunities, both from the perspective of general principles and as they will be applied in the context of the Proposals.

In *Woolner v. Attorney General of Canada*[8] the court held that the circumstances were not distinguishable from those in *Zandstra*[9] and contributions were made by the taxpayers to their church with the anticipation that their children would receive bursaries for education at a private school. The court recognized that the "contributions" were voluntary. It stated that the main issue for determination

8 99 DTC 5722 (FCA)

9 *The Queen* v. *Zandstra*, 74 DTC 6416 (FCA)

was whether the contributions were made with the anticipation of a benefit or advantage of a material nature. The court refused to distinguish *Zandstra* and found that while a parent could theoretically not pay any money to the church for a child to receive a bursary, all parents would also presumably understand that if each and every parent refused to donate money to the church, there would be insufficient money available to provide students with bursaries. Moreover, the court found that there was clear evidence that a link existed between the contributions made and the bursaries awarded. Presumably, under the Proposals, it would be necessary to determine whether the "advantage" could be quantified, and thus "save" the invalid contribution and effectively convert it to a valid "gift" with an eligible amount equal to the difference between the contribution and the amount of the "advantage". In this type of situation, notwithstanding that the advantage might be "obtained" from a third party (i.e. the school), the church would presumably be expected to quantify the amount of that advantage because of its connection with the school.[10]

Subsections 69(1), 149.1(12) and a number of other provisions refer to the concept of a disposition or a transfer "by way of gift". There seems to be no reason why a registered charity, acquiring appreciated property from a donor, would not be considered to have disposed of property resulting in a "benefit" to the donor for purposes of these rules, with the result that the registered charity would be considered to have disposed of property to the donor "by way" of gift inter vivos and the donor would be considered to have acquired that property "by way of gift". If that is the case, it appears that proposed subsection 248(32) is redundant, in so far as it applies to property that is "acquired by the taxpayer (i.e. the donor) in circumstances where subsection (31) applies to include the value of the property in computing the amount of the advantage "in respect of" a gift or a

10 In its technical news release no. 26 dated December 24, 2002, CCRA sets out a number of guidelines that it intends to apply in dealing with the split receipting issue. It has stated that it will continue to apply certain of its existing guidelines and will abandon others, including its administrative position on charitable gift annuities. It has stated further that the underlying premise of its interpretative approach is that whether there is a gift, in situations other than where there is an outright transfer of property for no consideration, is that there must be a clear donative intent to make a gift. This is inconsistent with the concept of a transfer by contract, which would not qualify as a gift at common law.

contribution. Since there does not appear to be any equivalent to subsection 69(1) that applies to a contribution that is not a gift", the concept in subsection 248(33) may be necessary to deal with the cost of property received by a contributor in exchange for a contribution. In that regard, subsection 127(3) applies only to "monetary contributions" and it is not clear whether section 248(31) is intended to apply to contributions other than monetary contributions that are contemplated in subsection 127(3).

Subsection 248(31) refers to the amount of the advantage "in respect of a gift or a contribution by a taxpayer". The courts have consistently held that the words "in respect of" should be given the widest possible meaning. Subsection 248(32) is intended to provide that the existence of an amount of an advantage "in respect of a transfer of property" will not in and of itself disqualify the transfer from being a gift in certain circumstances. Again, this must be given the widest possible meaning and therefore even the most obscure "advantage" would nevertheless arguably be "in respect of" a transfer of property for this purpose.

The proposed amendments to subsection 127(3) for contributions are apparently intended to parallel the concepts set out in new subsection 248(30) for gifts. Subsection 127(3) will be amended to provide that a deduction is available for the amount by which a monetary contribution exceeds the amount of the advantage, if any, in respect of the contribution. It appears that there may be a "contribution" where there is a reserved benefit, whereas there is no "gift" at common law. The British Columbia Supreme Court dealt with this issue to some extent in *Longley v. The Queen*[11], in which it recognized that a contribution is different from a gift and is not affected by a reserved benefit. This appears to be reflected in the Proposals, which do not attempt to validate "contributions" and deal only with the amount recognized in subsection 127(3).

Under new subsection 248(31), the amount of the advantage in respect of a gift or

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11 99 DTC 5549

contribution will be the total of all amounts each of which is the value at the time of the gift or contribution, of any property, service, compensation or other benefit that the taxpayer or a person not dealing at arm's length with the taxpayer has received or obtained or is entitled to receive or obtain as partial consideration for or in gratitude for the gift or contribution. Clearly the objective of this rule is to quantify the amount by which the gift or the contribution is to be reduced, on the assumption that there is a gift or a contribution in the first place.

As it is currently worded, this provision raises a number of problems. It contemplates that there is a gift or contribution despite the advantage. Clearer language is required to ensure the advantage itself does not prevent the gift for purpose of the Act. It also contemplates that the advantage may be provided to a person other than the taxpayer. In many cases, it will not be possible for the taxpayer to determine the amount of the advantage and in many cases the taxpayer may not be aware that the advantage has been provided to another person. In addition, the proposal to require the recipient of the gift or contribution to issue an official receipt that takes into account the amount of the advantage is problematic, since there will be situations in which an advantage is conferred by a third party on the taxpayer, and not by the recipient of the gift or contribution.

For instance, if a payment is made in circumstances that might otherwise qualify as a gift, but the gift is made under compulsion or subject to an arrangement under which the donor will receive an advantage, such as relief from prosecution for an offence, it seems that there probably is not a gift at common law, in the sense that the payment is not made gratuitously. In this situation, the gift fails for lack of intention as much as for an alleged advantage, particularly where the recipient is not involved in providing the advantage. If the rules are extended to validate this type of arrangement and deem it to be a gift, it seems that it would be beyond the ability of the recipient to determine whether any advantage had been received by the taxpayer at all, and even if it were aware that an advantage had been conferred by a third party, it would be impossible for it to quantify it and to

reflect it in the official receipt.[12]

New subsection 248(32) introduces the concept of intention. This appears also to be misguided. It states that the existence of an amount of an advantage in respect of a transfer of property does not in and by itself disqualify the transfer from being a gift in certain circumstances. While this appears to be intended to "save" transactions that would not otherwise be gifts at common law, it does not appear to achieve the desired result. It would be far preferable to state positively and clearly that a transfer that would not otherwise be a gift at common law is deemed to be a gift, rather than to try to achieve this indirectly by stating that the existence of an advantage does not disqualify a transfer from being a gift.[13] There is a two-fold test, either branch of which must be met to rely on this provision. The first is that the amount of the advantage cannot exceed 80% of the fair market value of the transferred property. This appears to be completely arbitrary and there appears to be no logical basis for choosing a "bright line" test. The second is that the transferor must establish to the satisfaction of the Minister that the transfer was made with the intention to make a gift. This appears to be

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12 The courts have held that the tax benefit received by a donor is not the type of "advantage" that would destroy the validity of a gift. In *The Queen v. Friedberg*, 92 DTC 6031 (FCA), reference was made to *The Queen v. McBurney*, 85 DTC 5433 and the proposition that "The word gift is not defined in the statute. I can find nothing in the context to suggest that it is used in a technical rather than its ordinary sense", and the court went on to state that a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor, citing *Zandstra*. The court stated in *Friedberg* that the tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors. Nevertheless, it would appear to be advisable to provide expressly in the Proposals that the tax benefit is not the type of advantage that will either invalidate a gift or reduce the amount of the gift, in the same way that this has been accomplished in subsection 127(4.1), for political contributions. In *Felsen Foundation v. Jabs Construction Ltd. and The Queen*, 98 DTC 6454 (SCBC), the provincial court refused to accept jurisdiction or make an order where a charity had sought a declaration that an arrangement would constitute a gift at common law, in order to support a position being taken by the donor under the Act. It therefore seems that when the court is dealing with tax matters, exclusive jurisdiction where there are disputes relating to the tax consequences of transactions will rest with the tax courts, and there will be no access to the provincial courts to determine issues of provincial law.

13 In *Friedberg*, the court stated that in tax law, form matters and a mere subjective intention is not by itself sufficient to alter the characterization of a transaction for tax purposes. The court went on to state, in the context of a claim by the taxpayer for relief for a gift where the documentation did not establish ownership, that while evidence of intention may be used by the courts on occasion to clarify dealings, it is rarely determinative and in sum, evidence of subjective intention cannot be used to "correct" documents which clearly point in a particular direction. This suggests that if a taxpayer intended to make a contract pursuant to which a transfer is to be made to a qualified donee, the courts would be reluctant to accept evidence of a subjective intention later that was inconsistent with the intention expressed in the documents. As a result, the intention to enter into a contract in and of itself appears to be fatal to a subsequent argument that there was a gift.

completely at odds with the concept of "saving" an arrangement that would not be a gift at common law because there is a contractual arrangement under which the transferor receives an advantage. In other words, if it is necessary for the transferor to establish that a gift was intended, this would seem to be inconsistent with the concept that a transfer that was not a gift at common law was intended to be a gift and that that transfer should be "saved" under these new rules. A gift is defined in the Civil Code of Quebec as a contract by which a person, the donor, transfers ownership of property by gratuitous title to another person, the donee. It appears to be contemplated that a "contract" can give rise to a gift, whereas at common law, it appears to be generally accepted that any arrangement under which there is a contract requiring the donee to make a "gift" would not be regarded as a gift. Thus, a sale at a price below fair market value is not a gift, because the parties did not intend it to be a gift and not simply because the subject of the "gift" was intended to be the "net" amount. The decision in *Hudson Bay Mining and Smelting Co., Limited v. The Queen*[14] makes it clear that the parties cannot "synthesize" a gift out of a commercial arrangement.

The explanatory notes state that for a transfer of property to qualify as a gift, it is necessary that the transfer be voluntary and with the intention to make a gift and at common law, where the transferor has received any form of consideration or benefit, it is "generally presumed" that such an intention is not present. This would apply to two different situations, since a transfer can be voluntary but not gratuitous or voluntary and gratuitous, but with a benefit. The notes further state that new subsection 248(32) will allow the opportunity to rebut this "presumption", if the 80% threshold is not exceeded. If the 8% unrestricted is exceeded. Unfortunately, the example in the explanatory notes does not really illustrate the point. It refers to a transfer of land and building subject to a mortgage. It is far from clear that the assumption of a mortgage results in the conferral of a benefit or advantage on the transferor that would disqualify the transfer of the equity in the property from being recognized as a gift of the equity

14 89 DTC 5515 (FCA, affirming 86 DTC 6244)

in the property. The tests in new subsection 248(32) are in the alternative. The explanatory notes make it clear that even if the 80% threshold is exceeded, the "gift" will not necessarily be invalid. In that event, the transferor is required to establish "to the satisfaction of the Minister" that the transfer was made with the intention to make a gift. It is difficult to see how the transferor could argue that there was an intention to make a gift if the position of CCRA is that the real intention was to have the donee assume the obligations under the mortgage, as a matter of real property law. The better view appears to be that where real property subject to a mortgage is transferred, there is an intention to make a gift of the equity, and the assumption of the mortgage automatically follows as a matter of real property law. This is not the conferral of an advantage by the donee on the donor, but is simply a recognition that the amount of the gift is the interest that is owned outright by the donor, and is subject to the rights of a third party.

New subsection 248(33) will apply in respect of gifts or contributions made after December 20, 2002. The explanatory notes state that the cost to the taxpayer of property acquired by the taxpayer in the course of making a gift or a contribution by the taxpayer is the fair market value of the property at the time of the gift or a contribution. Interestingly, there does not appear to be any equivalent where the advantage is received in the form of a service rendered by the recipient or in some other form. Presumably the transferor is nevertheless required to report the value of that service or other compensation in computing income.

There may be a concern that the Act should not try to create legal relationships through a deeming process in circumstances where the legal relationship does not exist between the parties as a matter of law. In effect, the new proposals appear to define a gift to exist in circumstances in which the common law will not recognize a gift. While this is presumably within the power of the federal government, as long as it is for purposes of taxation, and is not a veiled attempt to deal with property and civil rights or other powers that are exclusively within the jurisdiction of the provinces, it does create potential concerns if the parties themselves did not intend that a "failed" gift should be validated solely for

income tax purposes.

There may be situations in which a taxpayer seeks relief under the Act for a transfer of property, on the understanding that an advantage will be received in exchange. An example arises in the case of a naming opportunity. We submit that there are a number of situations in which there is no advantage at all received by the transferor where a naming opportunity arises. Even if there is an advantage for purposes of the Proposals, a number of issues will arise. While it may be difficult to quantify the value of the advantage that a donor may receive through a naming opportunity, it is common for the transferor to enter into a binding contract, which requires the recipient to agree to administer a gift in a certain manner, and to provide recognition through a name designated by the donor. If the name is not the donor's own name, it is difficult to see how the value of that advantage can be quantified easily. Even if the value can be determined, the problem is that a contract between the transferor and the recipient appears to run afoul of the common law rules, and would not be "saved" at common law. As a result, there would be an enforceable contract that is likely not a "gift" at common law but is deemed to be a gift solely for purposes of the Act, if the Act is amended to make it clear that what is not otherwise a gift will be regarded as a gift solely for tax purposes. In that event, the second branch of the saving test in new subsection 248(32) would not be available, since the transferor would presumably not be able to establish to the satisfaction of the Minister that there was an intention to make a gift, when there was clearly a contractual arrangement under which the transferor bargained for the very recognition that would otherwise taint the transaction from being a gift at common law. This accentuates the fundamental inconsistency between "saving" a gift that is not a gift at all solely for tax purposes, and recognizing that a contractual arrangement, at least in the common law provinces and apparently in Quebec as well (at least for income tax purposes), is not a "gift" at all, and can never be saved because of the lack of intention to make a gift, which is fundamental. As a result, the entire concept of deeming a transfer of an economic interest in a particular property to be a gift of the "net amount" is completely at odds with the common law concept,

which requires a gift of the property itself in its entirety or recognizes no gift at all.

It is clear that the Act did at one time contain deeming provisions with respect to gifts. This is evident from *Littler* and other cases, which dealt with gift tax and the "avoidance" rules which specifically deemed certain arrangements to be "gifts". The introduction of the general anti-avoidance rule and the current version of subsection 246(1) have eliminated the earlier provisions dealing with a deemed "gift"[15].

It is not clear that the meaning of "advantage" will be consistent for purposes of new subsection 248(30) and new subsection 248(32). Subsection 248(30) refers to the "amount of the advantage" and subsection 248(31) purports to define this term, presumably not only for purposes of subsection 248(30) but also for purposes of subsection 127(3). This appears to be strictly a "measurement" concept. On the other hand, subsection 248(32) deals with a substantive issue. The concept of "the amount of the advantage" is not necessarily the same as the concept of whether there is or is not an advantage at all. Subsection 248(31) refers to the amount of the advantage in respect of a gift or contribution, whereas subsection 248(32) refers to the existence of "an amount of an advantage in respect of a transfer of property". Interestingly, there does not appear to be any attempt to "save" a contribution where there is an advantage, since subsection 248(32) applies only where there is a transfer that would otherwise apparently be disqualified as a gift. This presumably recognizes the result in *Longley*, which held that the existence of an advantage does not disqualify a transfer of money from being a contribution. Consequently, it appears to be recognized that there may be situations in which a contribution is accompanied by an advantage to the taxpayer, and that advantage will not disqualify the payment from being a

15 Subsequent cases, such as the *The Queen v. Kieboom*, 92 DTC 6382 (FCA), dealing with what was then subsection 245(2)(c), make it clear that the repeal of the gift tax provisions did not mean that the rules deeming the conferral of a benefit in certain cases to be a disposition by way of gift were no longer applicable. It seems that if former paragraph 245(2)(c) or its equivalent were still in the Act, a variety of transactions would not be a gift at common law or under the *Civil Code* of Quebec but would nevertheless be treated as "gifts" for purposes of the Act, with all of the attendant consequences for both the donor and the donee.

contribution, although it will reduce the amount of the contribution by the amount of the advantage and the fair market value of any property received by a taxpayer making a gift that is saved or a contribution that need not necessarily be saved will become the cost of that property to the taxpayer under subsection 248(33).

IV. DISBURSEMENT QUOTA

We understand that the policy behind this proposal is to address a change in administrative position announced by CCRA several years ago, in which it had reversed a long-standing practice of permitting transfers of property for charitable purposes to third parties, where the disbursement quota and the other requirements in the Act had otherwise been met. It had been recognized by CCRA many years ago that provided all the other technical requirements were met, there was no requirement that the charitable activities be carried out directly by the charitable organization or the charitable foundation, as long as the ultimate use of the charitable funds was carried out by a charity, even if that charity itself was not a "qualified donee" and even if it was not in Canada. After a challenge in the Ontario courts, CCRA conceded this point. It now appears that CCRA and the Department of Finance plan to amend the Act to prohibit any registered charity from making a "gift" to an unregistered charity, either in Canada or outside Canada, even if the ultimate destination of the funds is consistent with the very charitable purposes for which the registered charity has been formed and is being operated.

This is apparently designed to require all registered charities to enter into agency agreements or otherwise comply with CCRA's administrative guidelines for the retention of control over funds that are expended by third parties, or to comply with the "charitable goods" policy. This in turn raises questions, as a result of the recent decision in *Canadian Magen David Adom for Israel v. The Queen*[16].

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16 2002 DTC 7353 (FCA)

We believe that there should be a *de minimis* test, under which certain amounts can be expended by registered charities indirectly through transfers to other charitable organizations that are not necessarily qualified donees, as long as the overall objectives and charitable purposes of the registered charity are met.
The coming into force provisions in clause 88 state that these particular changes are to be applicable to gifts made after the announcement date, but the explanatory notes state that they will apply on royal assent. There appears to be an inconsistency between the wording in the proposals and the explanatory notes. Moreover, the Proposals are limited to "gifts" and apparently will not apply to transfers by contract that are not gifts at common law and that are not "saved" by the new "split receipting" rules.

V. DEFINITION OF TAX SHELTER

The Budget introduces an expanded concept of tax shelter, which will extend the circumstances in which promoters and others will be required to divulge the nature of various arrangements. The amendments are very broad and would appear to include certain arrangements that might not necessarily be the kinds of arrangements that should be covered. Under the amendments, an arrangement pursuant to which an individual is entitled to claim a credit in computing tax payable will no longer automatically be excluded from the definition of "tax shelter" for that reason alone. Moreover, the Budget states that the tax shelter rules will apply in respect of an arrangement under which it can reasonably be considered that property acquired pursuant to the arrangement will be the subject of a "gift" referred to in section 110.1 or section 118.1 or a contribution referred to in subsection 127(4.1) of the Act. The Budget Notice expands on this concept.

The word “arrangement” is very broad. It is not clear whether there is an “arrangement” if a broker, selling flow-through shares, points out to a potential investor that there are tax advantages in donating the shares of the mutual fund corporation to a registered charity or other qualified donee, nor is it clear if there is an arrangement where a registered charity suggests to a potential donor that a flow-through share (or any share) is a tax-effective way to make a gift of shares.

The Budget Notice clarifies some of our initial concerns. However, it also introduces further complexity, particularly through the proposed definition of “gifting arrangement”. The fact that the Budget Notice expressly excludes property that is a flow-through share appears to confirm our concern that, but for this express exclusion, the “arrangement” mentioned above might be regarded as a tax shelter under the new definition.

The concept of a “gifting arrangement” appears to be different from the concept of an “arrangement, plan or scheme” in subsection 46(5), although there is no definition of “arrangement”. The definition of “gifting arrangement” requires only that it be reasonable to consider that a person would make a gift or a political contribution of property acquired by the person under the arrangement. Since relief is available only for a “monetary contribution” under subsection 127(3), we are puzzled by the reference to a contribution of property in this context. We are also concerned about the concept in paragraph (b) of the proposed definition of gifting arrangement, which refers to a limited-recourse amount that can reasonably be considered to “relate” to a gift or contribution. This is an extremely broad concept and we are concerned that many bona fide structures may now be regarded as tax shelters. It appears that if a charity suggests to a potential donor that the donor acquire shares of a corporation and then donate them or identical shares to average the cost of other shares owned by the donor, this might be regarded as an arrangement under which it is reasonable to consider, having regard to statements and representations made by the charity about the tax advantages of charitable giving, that the donor would make a gift of property acquired by the donor under the arrangement.

We assume it is not intended to extend the concept of tax shelter to arrangements under which property is acquired for the sole purpose of making a gift, if there is no limited-recourse amount and if the tax credit does not exceed the cost of the property. However, there may be a problem in determining the "cost" of the property "acquired" under the arrangement if similar property is acquired outside the arrangement.

It is not clear how the reduction in the amount of a gift or a contribution through a "prescribed benefit" under these amendments will be linked to the Proposals dealing with split receipting and in particular the "eligible amount" of a gift or a contribution. We would like to ensure there is no inadvertent mismatch between these concepts.

VI. RELATED BUSINESS

Rather than comment in detail at this stage on the consultation paper dealing with related business, we plan to wait for the release of the next version. We had originally contemplated providing you with detailed comments on the first draft of the consultation paper, but wanted to wait for the outcome of the decision of the Federal Court of Appeal in the *Earth Fund* case. Since we understand leave to appeal to the Supreme Court of Canada is not being sought in that case, it now appears to be appropriate to comment on the next draft of the consultation paper.

VII. 80-20 RULE AND ADMINISTRATIVE COSTS

We are concerned about the uncertainty and ambiguity arising out of the way in which CCRA administers the disbursement quota rules and in particular the so-called "80-20" rule. For instance, we are aware that CCRA has taken the position that legal fees and other professional costs incurred by a charitable organization in defending itself against claims for breach of contract or for tortious conduct as a

result of claims resulting directly out of charitable activities, and any amounts paid to settle those claims, are regarded as administrative costs and are not regarded as costs incurred in carrying out charitable activities. We think this is incorrect.

In addition, we understand that a broad range of issues relating to disbursements are now being discussed as a result of adverse publicity last fall in various newspaper accounts dealing with charities and the role of CCRA and the Office of the Public Guardian and Trustee in Ontario. We would like to discuss CCRA's views and whether the Department of Finance contemplates amendments to deal with this.

VIII. POLITICAL ADVOCACY

We have reviewed the most recent consultation draft dealing with political advocacy and will be making our comments in that regard under separate cover.

IX. ELIMINATING RACIAL DISCRIMINATION

We have reviewed the recent consultation draft dealing with the elimination of racial discrimination and we will be making our comments in that regard under separate cover.

X. 4.5% DISBURSEMENT QUOTA

We previously discussed this topic with you. The economy continues to under-perform and the same concerns that we raised earlier continue as a result of the fact that charities are not able to earn a 4.5% return on their investment assets. We would like to pursue this.

XI. CAPITAL GAINS AND 10-YEAR GIFTS

We previously discussed this topic. We would like to pursue our earlier discussions. In particular we would like to discuss the technical problem in the formula, as outlined in the memo of Wolfe Goodman submitted at our last meeting.

XII. GRANTS BY REGISTERED CHARITIES TO FOREIGN CHARITIES

This topic was discussed at our previous meeting. We have now had the benefit of reviewing recent jurisprudence and the Proposals include amendments that are designed to limit the ability of registered charities to make "gifts" where they have complied with their disbursement quotas. We think the Proposals should be modified and in addition we think they may be overly narrow in the sense that they refer to "gifts", and the Proposals dealing with split-receipting accentuate the concerns about the meaning of "gift".

XIII. CHARITABLE REMAINDER TRUSTS

We discussed this topic briefly at our last meeting. We understand the Canadian Association of Gift Planners will be presenting its own proposals in the relatively near future. As a result, we have not formulated separate submissions on this topic. We anticipate commenting on the proposals developed by the CAGP.

XIV. GIFTS BY WILL

This topic was discussed at our last meeting. We would like to pursue it if time permits.

XV. GIFTS OF PUBLIC SECURITIES

We are pleased that the rules have been extended, but we are disappointed that there was no initiative to extend the scope for gifts of public securities to include gifts to private foundations in the circumstances we had discussed previously. We would like to discuss this.

XVI. AUDIT ISSUES

The audit of registered charities remains a concern. This has been accentuated by some of the recent jurisprudence. We would like to discuss this.

XVII. REGISTRATION AND AMENDMENTS

Although there has been a market improvement in the turnaround on some applications for registration, there appears to be a significant backlog in dealing with requests for approvals of amendments. In addition, some applications continue to languish and we would like to discuss whether further improvements can be expected, and CCRA’s plans to deal with this.

XVIII. USE OF RECREATIONAL PROPERTY

We discussed this topic at our last meeting. Although it is still a matter of interest to us and may be affected by the split receipting Proposals, we do not anticipate discussing it at our meeting.

XIX. JRT REPORT

We made submissions to the JRT and look forward to its report. Depending on the timing of the release of the report, we may want to discuss it at our meeting.

XX. INCORPORATION OF CHARITIES

We understand that under the current administrative practice of the Charities Directorate, an unincorporated charity that incorporates is treated as a continuation of the same charitable purpose for income tax purposes. However, it appears that for purposes of CPP and EI deductions, the incorporated charity is treated as a new employer. This can result in costly duplication of CPP and EI deductions for the charity as an employer where the effective date of the incorporation is after January 1st in any year. To overcome this problem, we recommend that there be co-ordination, either through administrative practice or, if necessary, legislative amendments, to ensure that the incorporation of a charity is seen as a continuation of the charitable purpose with respect to both CPP and EI deductions, as well as for income tax purposes.

In addition, we submit that CCRA should adopt a more flexible approach in reviewing draft articles of incorporation in the course of the application for registration. At present, CCRA will not permit an appeal of an adverse decision prior to incorporation. If the charitable purpose is regarded as the relevant benchmark in determining whether registration will ultimately be granted, it seems to be inappropriate to penalize an applicant by insisting that letters patent be obtained before any appeal can be launched.

In addition, we submit that there should be more flexibility in permitting the transfer of disbursement excesses where registered charities are reorganized. At present, the rules do not permit any transfer of a disbursement excess from one registered charity to another, except perhaps in the case of a statutory amalgamation that results in the continuance of the amalgamating entities into a single amalgamated entity. This is relatively rare and does not address most situations in which disbursement excesses are encountered.