



**NOT-FOR-PROFIT ORGANIZATIONS
IN ONTARIO
REGISTERED CANADIAN AMATEUR ATHLETIC ASSOCIATIONS
AND THE OTHER QUALIFIED DONEES
UNDER THE INCOME TAX ACT**

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RCAAA'S AND THE OTHER QUALIFIED DONEES

Introduction

The *Income Tax Act*¹ provides tax incentives to, and imposes certain compliance requirements on, various organizations which are referred to as qualified donees. While registered charities tend to be the focus of most attention when considering qualified donees, a number of other organizations also merit attention, such as registered Canadian amateur athletic associations (“RCAAA’s”).

This became evident recently when the Supreme Court of Canada dealt with an appeal by an organization formed to promote amateur soccer applied to be registered as a charity.² It was found not to be eligible as a charity and had deliberately taken steps to ensure that it was not eligible to become a RCAAA.

The Act generally provides incentives in the form of tax relief for donors who make financial contributions in the form of property to qualified donees while at the same time generally regulating the activities of many qualified donees, to ensure that they comply with overall policy requirements. The compliance regime for registered charities is extremely complex and the rules applicable to registered charities are beyond the scope of this paper. Many organizations are exempt from tax, but only some of those organizations are recognized as suitable recipients of financial support that provides tax relief to a donor.³

Generally, all qualified donees are exempt from the payment of tax under Part I (and therefore under other provisions of the Act, as discussed below), but not all organizations that are exempt are necessarily qualified donees. Qualified donees generally perform two main functions. First, they permit individuals and corporations to claim tax relief for donations to them, subject to certain restrictions. In addition, they permit registered charities to make grants to them, again subject to certain restrictions.⁴

¹ R.S.C. 1985, c.1 (5th Supp.), as amended, hereinafter referred to as the “Act”. Unless otherwise noted, statutory references herein are to the Act.

² *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*, 2007 DTC 5527 (SCC).

³ Section 149 contains a number of exemptions from tax payable under Part I of the Act. These include, for instance, (a) a municipality in Canada or a municipal or public body performing a function of government in Canada, (b) a corporation, commission or association all of the shares or capital of which are owned by the Crown, (c) certain other corporations, commissions and associations partly owned or indirectly owned by the Crown or by municipalities in Canada, (d) agricultural organizations and boards of trade, (e) The Association of Universities and Colleges of Canada, (f) corporations constituted exclusively to provide low-cost housing accommodation for the aged, (g) corporations constituted exclusively for the purpose of carrying on or promoting scientific research and development, (h) labour organizations and fraternal benefit societies, (i) non-profit organizations, (j) mutual insurance corporations, (k) limited-dividend housing companies, (l) pension trusts and pension corporations and (m) certain insurers providing coverage to farmers and fishermen.

⁴ See, for instance, proposed amendments in former Bill C-10 adding new paragraphs 149.1(2)(c), 149.1(3)(b.1) and 149.1(4)(b.1), which will permit a registered charity to make a disbursement by way of gift to a qualified donee without jeopardizing its registered status. In addition, the complex rules dealing with the disbursement quota for registered charities recognize that registered charities can make transfers to qualified

Many qualified donees are subject to no regulation at all under the Act, particularly those that, while entitling donors to financial incentives under the Act for donations, are beyond the jurisdiction of Canada Revenue Agency (“CRA”) and the reach of Canadian law, because they are foreign organizations with no real nexus to Canada.

In *A. Y. S. A.*, the Supreme Court observed that sections 110.1(1)(a)(ii), 118.1(1)(b), 118.1(3), and 149(1)(l) of the Act afford RCAAAs two benefits that are also given to charities under the Act, namely (a) they pay no tax on their income, and (b) they can issue tax receipts enabling their donors to obtain tax deductions (for corporations) or non-refundable tax credits (for individuals) for their donations. The Court further noted that by contrast, other associations which qualify as non-profit organizations under the Act, but not as registered charities or RCAAAs, receive the first benefit but not the second and therefore pay no tax on their income, but cannot issue tax receipts to donors.

In this paper, I discuss not only RCAAAs but the other types of organizations that are qualified donees, to which gifts therefore enable donors to claim tax relief through deductions (in the case of corporations) or non-refundable tax credits (in the case of individuals).

I do not discuss in any detail the broader issues of how a gift is made, whether a transfer is a gift or planning opportunities for donors, for qualified donees as recipients or for registered charities that make grants to qualified donees. The focus is on the qualified donees themselves, their status as such and some of the issues that arise in determining whether a particular organization is a qualified donee and considering various rules that apply to it, if it is.

Definition of Qualified Donee

In the non-technical sense, a qualified donee is an organization to which a Canadian taxpayer can make a donation that is eligible for tax relief. However, the technical analysis is more complicated.

Under subsection 248(1) of the Act, “qualified donee” has the meaning assigned by subsection 149.1(1). For this purpose, a qualified donee is a donee described in any of paragraphs 110.1(1)(a) and (b) and in the definitions “total charitable gifts” and “total Crown gifts” in subsection 118.1(1). As a result, in order to determine whether a particular entity is a qualified donee, reference must be made to other provisions in the Act.

The donees listed in paragraph 110.1(1)(a) are as follows:

1. a registered charity;
2. a RCAAAs;

donees. There are non-tax issues under charity law that can affect the ability of a charity to transfer funds to, or otherwise support, an organization that is not exclusively charitable, but that is nevertheless a qualified donee.

3. a corporation resident in Canada and exempt under paragraph 149(1)(i) because it is a corporation exclusively constituted for the purpose of providing low-cost housing accommodation for the aged and meets certain other tests;
4. a municipality;
5. a municipal or public body performing a function of government in Canada (as the Act is to be amended by former Bill C-10);⁵
6. the United Nations or an agency thereof (I sometimes refer to these collectively as the “UN”);
7. a university outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada, as listed in the Schedule to the regulations (I sometimes refer to these as a “listed foreign university”);
8. a charitable organization outside Canada to which Her Majesty in Right of Canada has made a gift in the taxation year or in the 12 month period preceding the year, (I sometimes refer to these as a “designated foreign charity”); or
9. Her Majesty in Right of Canada or a province.⁶

The reference in paragraph 110.1(1)(b) is to gifts other than gifts described in paragraphs (c) and (d) (cultural gifts and ecological gifts, respectively) made to Her Majesty in Right of Canada or a province. As a result, there is some potential for duplication between paragraph 110.1(1)(a) and paragraph 110.1(1)(b).

Interestingly, paragraph 110.1(1)(c) refers to gifts to institutions or public authorities that were designated under subsection 32(2) of the *Cultural Property Export and Import Act*.⁷ It appears that technically these are not qualified donees unless they are otherwise included, such as a registered charity or Crown agent, or in other parts of the definition.

The second branch of the definition arises out of the definitions of “total charitable gifts” and “total Crown gifts” in subsection 118.1(1). Total charitable gifts of an individual means gifts

⁵ A number of changes to amend the Act, including those dealing with split-receipting, were announced several years ago. Bill C-33, which had been passed by the House of Commons, was stalled in the Senate when Parliament rose in December, 2007. As a result, the Bill died and was subsequently reintroduced as Bill C-10, which had been before the Senate at the time of the last federal election. The Bill contained other proposed changes dealing with registered charities which are beyond the scope of this paper, although I discuss some aspects of Bill C-10 below. Bill C-10 died on the order paper in Parliament when the election was called, but the Conservative government is expected to re-introduce the provisions in Bill C-10 dealing with charities and qualified donees.

⁶ References to a province in this paper include territories, as the context requires.

⁷ R.S.C. 1985, c. C-51 (hereinafter referred to as the “CPEIA”), which is discussed below in more detail.

(other than a gift included in total Crown gifts, total cultural gifts or total ecological gifts of the individual for the year) made by the individual to:

1. a registered charity
2. a RCAA;
3. a housing corporation resident in Canada and exempt from tax under paragraph 149(1)(i);
4. a municipality in Canada;
5. a municipal or public body performing a function of government in Canada;
6. the UN;
7. a listed foreign university;
8. a designated foreign charity; or
9. Her Majesty in Right of Canada or a province.

On the other hand, “total Crown gifts” is based on gifts to Her Majesty in Right of Canada or a province to the extent that they were not previously deducted. There is a link between these concepts, to avoid double counting.

It is evident from the foregoing that a number of organizations can be qualified donees, many of which are “foreign” and thus not amenable to regulation by CRA or other Canadian authorities. These include the UN, a listed foreign university and a designated foreign charity. In some cases, organizations that are exempt from tax in the United States can also be the equivalent of (but technically not) qualified donees, under the Canada-United States Income Tax Convention (the “Treaty”).⁸

Since the tax incentive for a donor is relatively straightforward, in the sense that if the donor is able to prove the donation and meets the other requirements in the Act, the tax relief (a deduction in computing taxable income for a corporation and a non-refundable tax credit for an individual) should follow, subject to the same limits and restrictions that apply to a donation to a registered charity.⁹

There is a further concept of “eligible” donee, which is used to facilitate transfers of property from registered charities that are otherwise subject to penalties. All eligible donees are

⁸ Canada and the United States have recently agreed that a Fifth Protocol to the Treaty will be enacted. Canada has taken the required steps to put these changes in place and is waiting for the United States to take the final steps, which at the date of writing require signature by the President and the Secretary of the Treasury. The changes in the Protocol include changes that are relevant to United States charitable organizations receiving donations from Canadian residents, as discussed below.

⁹ For instance, there is a limit based on 75% of income for the year in the case of an individual in paragraph 118.1(1)(a), except in the year in which the individual dies and in the preceding year, and 75% of income in the case of a corporation in paragraph 110.1(1)(a).

qualified donees, but not all qualified donees are eligible donees. I do not deal further with eligible donees in this paper.¹⁰

As discussed below (in the context of the proposals in former Bill C-10 to include in the list of qualified list donees a municipal or public body performing a function of government in Canada), issues arise as to whether an Indian Band, as contemplated in the *Indian Act*, will be treated as a municipal or public body performing a function of government.

Unlike registered charities and RCAAAs, which can use their registered status as a form of guarantee that they are qualified donees, other qualified donees are required to meet the relevant test at the time the donation is made. This should be relatively straightforward for listed foreign universities, designated foreign charities, the UN, municipalities, some municipal bodies performing a function of government and the Crown, but it may not be clear for other organizations claiming to be qualified donees, such as low-cost housing corporations for the aged. CRA could allege that, although a corporation had in the past been a qualified donee because it was exempt under paragraph 149(1)(i), at the time a particular donation was made, it had ceased to be exempt and therefore was no longer a qualified donee. In that event, the donor would be disappointed to find no tax relief was available. This issue is discussed below.

Specific Qualified Donees

I turn now to a discussion of each type of qualified donee.

RCAAA's

By definition, a RCAA means an association that was created under any law in force in Canada, that is resident in Canada and that:

- (a) is a person described in paragraph 149(1)(l), and
- (b) has, as its primary purpose and its primary function, the promotion of amateur athletics in Canada on a nation-wide basis, and that has applied to the Minister of National Revenue in prescribed form for registration, that has been registered and whose registration has not been revoked under subsection 168(2).¹¹

The main issue in *A.Y.S.A.* was whether the organization, not being entitled to registration as a RCAA because it was not formed and operated on a nation-wide basis, was eligible to be registered as a charity. This raised questions about the application of common law principles to undefined terms in the Act, such as “charitable”, about the relationship between the RCAA regime and the regime for charities and about the effect of provincial charity legislation and provincial jurisprudence dealing with the meaning of “charitable”.

¹⁰ Eligible donee is defined in subsection 188.1(3). The concept is applied in paragraphs 188(1.1)(c) and 189(6.2)(b) and subsection 189(6.3).

¹¹ Subsection 248(1).

It is beyond the scope of this paper to discuss in detail the arguments raised in that case or the reasoning applied by the Court in dismissing the appeal by A.Y.S.A. and confirming that it was not eligible for registration as a charity, while (in a split decision) overruling the Federal Court of Appeal which had held that the regime for RCAAAs had effectively “occupied the field”, and left no room for an argument that an organization formed for the promotion of sport could ever qualify for registration as a charity on that basis alone.

Rather, the Court held that on the particular facts A.Y.S.A. was not entitled to be registered as a charity since it did not meet the common law test for registration and provincial legislation in Ontario (which expanded the definition of “charitable purpose”) and jurisprudence in the Ontario Courts interpreting that legislation, were not applicable. The Court found that it was up to Parliament rather than the Courts to give sports associations the tax advantages of charitable status, noting that in the United Kingdom, such a change had in fact been brought about by statute.

Paragraph 149(1)(l) refers to a club, society or association that at the relevant time, in the opinion of the Minister of National Revenue,¹² was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada.¹³

It has been held that in order to determine whether in the opinion of the Minister, an organization is or is not a charity for this purpose, the organization could be required to apply for registration as a charity. In most cases this will not be practical.¹⁴

It is evident that to qualify as a RCAA, an association must have been created under Canadian law and must be a “person”. It is not evident that all organizations described in paragraph 149(1)(l) are necessarily persons, since they include clubs and associations that are not incorporated and therefore might not have the legal characteristic of a “person”. The Act provides in subsection 248(1) that any word or expression descriptive of a person includes any corporation and any entity exempt, because of subsection 149(1), from tax under Part I on all or part of the entity’s taxable income. This provision was amended in 1993, apparently to make it clear that entities that are exempt under subsection 149(1), such as clubs and associations, will be regarded as persons. Since unincorporated associations are not entities at common law, the definition appears to be defective. This is discussed below under “Compliance”. Technically, it seems an unincorporated association may not be able to become a RCAA, since it is not an entity and therefore not a person.

¹² Unless otherwise specified, references to the Minister are to the Minister of National Revenue.

¹³ I sometimes refer to an organization described in paragraph 149(1)(l) as a NPO.

¹⁴ See *L.I.U.N.A. Local 527 Members’ Training Trust Fund v. The Queen*, 92 DTC 2365 (TCC). In *L.I.U.N.A.*, the Court dealt at some length with the problems that arise when the opinion of the Minister is a precondition to a determination of the status of an organization as a non-profit organization for purposes of paragraph 149(1)(l).

However, CRA accepts applications from, and is prepared to register, unincorporated applicants, according to the instructions for completing the application form T1189.

While it is beyond the scope of this paper to discuss all of the requirements that must be met to qualify under paragraph 149(1)(l), I discuss some of the issues below. I assume that for purposes of determining whether an association is eligible to become a RCAA, this threshold test will be met.¹⁵

On the assumption that the organization can establish that it is organized and operated exclusively for purposes other than profit, the major requirement to become a RCAA is that its “primary purpose” and “primary function” must be the promotion of amateur athletics in Canada on a nation-wide basis. The fact that the organization in *A.Y.S.A.* was deliberately not organized on a nation-wide basis was critical to the finding that it could not have become a RCAA even if it had wished to do so.

There is a limited amount of jurisprudence dealing with the requirements to become a RCAA. A leading case is *Maccabi Canada v. MNR*.¹⁶ In that case, the Court suggested that the “nation-wide” requirement was “consistent with the legislative intent to ensure that the issuing of receipts to donators (sic) would come from a single organization at the national level and that Revenue Canada would not have to interface in a myriad of provincial, regional and local organizations”. As the Supreme Court noted in *A.Y.S.A.*, the Federal Court of Appeal did not offer any evidence for this description of supposed legislative intent and those statements were found not to be “instructive” in *A.Y.S.A.*

In *Maccabi*, registration had been revoked. On appeal, the Federal Court of Appeal found that the words “the promotion of amateur athletics in Canada on a nation-wide basis” connote a geographic requirement only and therefore by carrying on activities across Canada and not being provincially, regionally or locally limited, an association can comply with the registration requirements. The Court also confirmed that there was no concept of “public benefit” in determining whether an organization is eligible to become a RCAA, unlike the situation involving registration of charities.

In order to become a RCAA, a NPO must submit an application in form T1189 and provide detailed information to CRA. The information is similar to but not as extensive as the information that is required for registration as a charity. The organization must be incorporated or established with a constitution and must file a copy of its governing documents, such as letters patent in the case of a corporation without share capital. If the organization is not incorporated, CRA requires documents which show the name and purposes of the organization and a statement, which is normally included in letters patent for a corporation without share capital, confirming that the organization will carry on its

¹⁵ For a discussion of some of the issues, see, for instance, IT-496R “Non-Profit Organizations”, IT-83R3 “Non-Profit Organizations-Taxation of Income from Property” and Registered Charities Newsletter No. 19, which deals with the difference between a registered charity and a non-profit organization. See also an advance income tax ruling dealing with a foreign organization that was not eligible to be registered as a charity (foreign organizations cannot be registered) but was able to establish to the satisfaction of the Minister that it was not a charity within the meaning in paragraph 149(1)(l), and was therefore able to claim an exemption, subject to meeting the factual requirements. See also CRA document no. 2005-0139001R3.

¹⁶ 98 DTC 6526 (FCA).

activities without the purpose of gain for its members and its profits will be used solely to promote its purposes. A statement of proposed activities must be submitted as part of the application, showing how the activities will relate to the purposes set out in the governing documents. As in the case of an application for registration as a charity, certain financial information must also be submitted. CRA states that the organization must not only be established for the primary purpose of promoting amateur athletics across Canada, but must also carry on broad-based activities of the same nature and states that examples of organizations that would normally qualify to become registered include associations that govern a particular sport throughout Canada. CRA also states that the requirement for a nation-wide basis excludes from consideration clubs and organizations which operate at the local, regional or provincial level.

Unlike all of the other qualified donees that are not registered charities, a RCAA is subject to the revocation procedures in the Act, although there are no sanctions of the type that apply to registered charities and there is no revocation tax, as there is for a registered charity. In particular, registration can be revoked (subject to the usual provisions for objections and appeals) if a RCAA ceases to comply with the requirements of the Act for its registration as such, fails to file an information return as and when required under the Act or a regulation, issues a receipt for a gift otherwise than in accordance with the Act and the regulations or that contains false information or fails to comply with the requirements for record keeping, audits, inquiries, etc.¹⁷

The first requirement for continued registration as a RCAA is that the organization must continue to qualify as a NPO. CRA has made it clear that it considers the circumstances of a particular organization to be based on the relevant facts and, for instance, whether there is an inappropriate accumulation of surplus will be determined based on all of the circumstances.¹⁸ This issue was litigated in the *Canadian Bar Insurance Association* case.¹⁹ The taxpayer made insurance plans and similar plans available to its members and was assessed on the basis that it was not organized and operated exclusively for purposes other than profit. The Court relied to some extent on the letters patent and general by-law and found that there was no evidence indicating that the taxpayer was not organized and operated exclusively for profit, despite the fact that it maintained significant reserves to meet future liabilities. In IT-496R, CRA says that in determining whether an organization is operated exclusively for non-profit purposes, it is important to determine whether it is

¹⁷ Section 168. In this paper I do not discuss registered charities as such, except to the extent they are relevant to other qualified donees, by providing grants, etc. As a result, I do not discuss in any detail the various rules that apply to registered charities, such as rules dealing with related business, incurring debt, acquiring control of a corporation, excess business holdings, carrying on political activities, etc. I also do not discuss the revocation process, the rights of objection and appeal, etc. that apply to a RCAA. A variety of sources are available for more detailed discussions of those issues. CRA revoked the registration of the Canadian Amateur Football Association as a RCAA effective August 30, 2008, stating that it has the authority to do so where a RCAA "issues a receipt for a gift or donation otherwise than in accordance with this Act and the regulations or that contains false information". It appears from contemporary news reports that the organization had issued receipts for donations involving a tax shelter.

¹⁸ See IT-496R, *supra*, note 15.

¹⁹ *The Canadian Bar Insurance Association v. The Queen*, 99 DTC 653 (TCC).

carrying on a trade or business and some of the criteria that are relevant in that regard are whether its activities constitute a trade or business in the ordinary sense and are operated in a normal commercial manner, whether the goods or services are restricted to members and guests, whether the organization operates on a profit basis rather than a cost recovery basis and whether it is operated in competition with taxable entities carrying on the same trade or business.

CRA acknowledges that a NPO can earn income in excess of its expenditures as long as it meets all of the requirements in the Act, but if a material part of its excess is accumulated each year and the balance of accumulated excess is greater than its “reasonable needs” to carry on its non-profit activities, CRA says profit will be considered to be one of the purposes for which it was operated. According to CRA, this will be particularly so where the accumulated excess is used for unrelated purposes, such as:

- (a) long-term investments to produce property income;
- (b) enlarging or expanding facilities used for normal commercial operations; or
- (c) making loans to members or non-exempt persons.

These factors will all be relevant to a RCAA on an ongoing basis, since they are fundamental to its status as a NPO. The further requirement is that no part of the income of the RCAA can be payable to or otherwise made available for the benefit of a member. There is no exception merely because a member is itself exempt or is a qualified donee, such as a registered charity. As a result, membership of NPO's should be carefully structured, taking into account transfers on a dissolution. According to CRA, a problem could occur if the organization distributes income during the year either directly or indirectly to or for the personal benefit of a member or it has the power at any time to declare and pay dividends out of its income. CRA notes that difficulties in this regard can be avoided if the enabling documents provide that on a winding up or dissolution, all of the assets and any accumulated income are to be transferred to an organization with similar objects that is itself exempt, such as a registered charity or another NPO. Certain payments made directly to members or indirectly for their benefit will not in and of themselves disqualify the organization from being tax-exempt as a NPO. These include, for instance, reasonable salaries for services rendered that do not exceed an arm's length equivalent. Reimbursement of legitimate expenses is also permitted. CRA notes in IT-496R that a RCAA can distribute income to or for the benefit of a member that is itself an association, the main purpose and function of which is the promotion of amateur athletics in Canada, so a RCAA can distribute gifts that it receives from donors to its own qualifying members without jeopardizing its tax-exempt status as a NPO or its registered status as a RCAA.

CRA challenged the exempt status of the Canadian Bar Insurance Association (“CBIA”), and alleged that assets that were accumulated, to ensure that its obligations as an insurer could be met, were excessive.²⁰ The organization had entered into complicated retention agreements with insurers and it was recognized that it engaged in a high level of commercial activity. It sent invoices and collected premiums, negotiated lower

²⁰ *Ibid.*

commission rates for its selling agents and carried out a number of activities that were fairly typical of a commercial enterprise.

Nevertheless, after reviewing the relevant jurisprudence dealing with the exemption under paragraph 149(1)(l), and after noting that the Minister of National Revenue may have been influenced by the size of the reserves in question, in considering the activities of the organization in a commercial world, the Court focused on the retained amount (5% of premiums) and the remitted amount (payments under the retention agreements). When it considered the third source of revenue (income earned from investing its funds in stabilization reserves), the Court found there was “even less reason” to regard that third source as evidence of a profit purpose. The Court referred to the *L.I.U.N.A.* case in which a trust was established with a grant from the existing training fund established by the union and an existing recreation fund.

In the *CBIA* case, the Court said that in the *L.I.U.N.A.* case, the problem “seems to arise” from the fact that the trust fund in *L.I.U.N.A.* had accumulated money not used for training purposes in the amounts of \$600,000.00 to \$900,000.00 during the years in question and the issue was whether investment income earned from the use of those funds was subject to tax. The Court in the *CBIA* case quoted with approval the reasoning in the *L.I.U.N.A.* case, in which the judge had stated that:

“For an organization to be operated for the purpose of earning a profit so as to disqualify it for the exemption under paragraph 149(1)(l) it would be necessary that it do more than merely earn passive investment income. The earning of such income would need to be both an operating motivation of the fund and a focus of its activity. The evidence does not support this conclusion. On the evidence the earning of the interest income was not the purpose – primary or secondary – for which the fund was operated. The earning of interest was simply an incident of the only purpose for which the fund was operated, the training of the members of the union; it was a means to an end and not an end in itself.”

The Court also referred to an Ontario Court of Appeal decision dealing with municipal tax.²¹ In the *Hearst* case, the Caisse Populaire was assessed for business tax under the *Assessment Act* on property that it occupied in connection with its operations. The Ontario Court of Appeal stated that:

“Many community and charitable organizations, relying from time to time on what would be termed commercial activity to raise funds for the fulfilment of their objectives, could be classed as businesses by such a test. To attach primary importance to the commercial aspect of an operation in question will offer, in my opinion, no sure or helpful guide. In my view, the commercial

²¹ *The Regional Assessment Commissioner and the Municipal Clerk of the Corporation of the Town of Hearst v. Caisse Populaire de Hearst Limitee*, [1983] 1 S.C.R 57 (SCC).

activity test is too indefinite to allow consistent application. I agree that, in deciding whether or not any activity may be classed as a business under the provisions of s.7(1)(b) of *The Assessment Act*, all relevant factors regarding an operation must be considered and weighed. However, they must be considered weighed in order to determine not whether in some general sense the operation is of a commercial nature or has certain attributes, but whether it has as its preponderant purpose the making of a profit. If it has, it is a business; if it has not, it is not a business.”

In the *CBIA* case, the Court stated that if the preponderant purpose test accepted by the supreme Court in the *Hearst* case has any application in cases dealing with paragraph 149(1)(l) it would have no hesitation in finding that the preponderant purpose of the organization was to facilitate the availability of certain insurance products at cost to the legal community in Canada and because its preponderant purpose was the availability of certain insurance products at cost, it did not have a profit purpose at all.

In commenting on the size of the stabilization reserves, the Court also stated that although it could be said that the organization was “parking money” in those reserves for future use in bad (i.e., negative) years, the large reserves did not reflect a profit purpose, but a “service to members” purpose. It stated that a person with a profit purpose will usually want to use any profit as some method of personal gain by the payment of dividends or salaries or by the increased value of issued shares and the organization taken did none of those things.

More recently, CRA challenged the exempt status of an organization that provided audience measurement data to its members, which included Canadian television and radio broadcasters, advertising and government agencies, colleges and universities, in exchange for fees payable by them as members.²² Those fees were set on a cost-recovery basis based on a projected annual budget and any surpluses realized from the fees were used or held for purposes of funding the activities of the organization. CRA appears to have raised for the first time an assessing position that was at odds with well accepted conventions and its own previous assessing position. The Court rejected CRA’s claim that the exemption was not available because the organization was operated for the purposes of profit for its members, even if not for the purpose of its own profit. The Court referred to the *CBIA* case and an earlier decision in *Gulf Log Salvage*.²³ It stated that the expression “organized and operated exclusively for other purpose except profit” must be read in context, according to its ordinary sense, harmoniously with the scheme of the Act, its object and the intention of Parliament. The Court then referred to the “ordinary commercial meaning” of the expression and dictionary definitions. It stated that in both *CBIA* and *Gulf Log Salvage*, there was no suggestion that in order for the “any other purpose except profit” requirement to be met,

²² *BBM Canada (formerly BBM Bureau of Measurement) v. The Queen*, 2008 DTC 4129 (TCC).

²³ *Gulf Log Salvage Cooperative Association v. MNR*, 60 DTC 239 (TAB).

the organization cannot be engaged in an activity that is for a purpose that is related to a commercial or business activity of its members, since clearly that requirement would not have been met in either *CBIA* or *Gulf Log Salvage*.

The Court said CRA had questioned why the ITA should be interpreted to provide an exemption from tax for a non-profit entity whose purpose is related to the commercial business activities of its members. That question cuts to the very heart of the position advanced by CRA in that case. It also shows that the question itself illustrates how the position advanced by CRA was at odds with well-accepted jurisprudence and CRA administrative policies prior to that time.

The Court stated that the question might be a valid one if the language in the Act were ambiguous, inconsistent or unclear, but found that that was not the case. Therefore the Court was not inclined to read a public purpose requirement into the provision that is not there. It concluded by stating that if the tax authorities are unable or unwilling to persuade the Department of Finance to propose a legislative change, they should not come looking to the Court hoping that, in the guise of interpretation, the Court will usurp the sole jurisdiction of Parliament to write the law.

In response to an argument by CRA that an entity will be established and operated for a purpose other than profit only if its income is use to advance a public purpose of some sort, the Court stated that it is not appropriate for the Court to add a “destination of funds” test or requirement to discern purpose as advocated by CRA. It noted that the Federal Court of Appeal had rejected a “destination of funds” test in finding that an organization was not eligible for registration as a charity.²⁴ The Court noted that the destination of funds test had been rejected in a number of other cases as well. It observed that if the destination of funds test is not a “bright line” test to qualify for charitable purposes or to qualify for a not-for-profit tax-exempt status, it is not obvious why it should be a bright line test for disqualifying non-profit entities for tax-exempt status.

The Court referred to other cases, not dealing with the exemption under paragraph 149(1)(l), in which it was implicitly accepted that the organization was exempt. For instance, it referred to the *Canadian Medical Protective Association*²⁵ case, in which there was a question about GST. It was admitted in an agreed statement of facts that the organization was a “non-profit” organization for GST purposes.

Finally, in the *BBM* case, the Court considered the meaning of “profit” and said that there are two key requirements in paragraph 149(1)(l). The first is that the organization must be organized and operated exclusively for any purpose except profit, and the

²⁴ *Earth Fund v. MNR*, 2003 DTC 5016 (FCA).

²⁵ *Canadian Medical Protective Association v. Canada*, [2008] GTC 461 (TCC).

second is that no part of its income can be paid to or made available for the personal benefit of any member, proprietor or shareholder. There was no issue on the second point and the decision turned on the first point. It acknowledged that the first point requires a focus on purposes and not merely activities. It stated that the language in the ITA does not mandate a qualifying purpose but permits an organization to have any purpose or purposes other than the one disqualifying purpose of profit. The Court noted that earlier jurisprudence establishes that an organization cannot qualify for exemption under paragraph 149(1)(l) if it is unable to accomplish its objectives unless it realizes profits with which to do so. For instance, in *Woodward's Pension Society*²⁶, the organization could not assist in funding pension benefits unless it made a profit from its trading activities and securities. In the *Tourbec* case²⁷, the organization could not provide travel for students at less than cost unless it made a profit from its sales to other customers.

The Court said that CRA had long stated in IT-496R that some things such as the realization of significant profits or the accumulation of unreasonable reserves can be evidence of a unstated profit purpose and other relevant considerations are whether the activities are operated in a normal commercial manner, whether goods and services are sold to non-members, whether the organization is operated on a profit basis rather than a cost recovery basis and whether it operates in competition with taxable entities carrying on the same trade or business. The Court stated that, in appropriate cases, these may be reasonable and relevant considerations but they cannot all be requirements and they must be weighed appropriately in the circumstances of each case and none will be determinates of.

The Court said in particular that caution must be exercised in considering the statement in IT-496R that it is relevant to consider whether the operations are carried out in a normal commercial manner. CRA had argued that BBM produced several internal reports and memoranda that stressed the need to create a business environment within BBM and to conduct its activities in a business-like manner. The Court held that this was not sufficient to cause an organization to lose its exemption. It observed that this is the language typically used by strategic planning reports and action plans and in recent years the phrase "accountable to our stakeholders" would be expected to be used.

The Court stated that operations of non-for-profit entities such as BBM "lack a significant attribute of commercial businesses" and there is no opportunity for their shareholders, members or controlling persons to benefit financially by way of profits, distributions, unrestricted salaries, capital appreciation of the undertaking or its assets or in similar fashion.

²⁶ *Woodwards' Pension Society v. MNR*, 62 DTC 1002 (SCC).

²⁷ *Tourbec (1979) Inc. v. MNR*, 88 DTC 1442 (TCC).

Finally, the Court stated that a public benefit or purpose is not a prerequisite to qualifying for an exemption under paragraph 149(1)(l) and the existence of public purpose is at best debatable in the case of golf clubs and sports clubs, social and dining clubs, many of which are private, condominium corporations and homeowners' associations, advocacy organizations and the myriad of similar Canadian organizations that rely on the exemption.

As noted above, a RCAA must be created under a law in force in Canada and be resident in Canada. Under common law principles for corporations, this generally means that its central control and management must abide in Canada. This central control and management is generally considered to abide where the directors meet and exercise their powers. In addition, a corporation is deemed to have been resident in Canada throughout a taxation year if it was incorporated after April 26, 1965 in Canada.²⁸ The requirement for a Canadian entity that is resident in Canada is aimed at regulation and compliance, notwithstanding that a low degree of compliance is required of a RCAA compared to a registered charity. Unlike the definition of RCAA, the definition of NPO does not refer to a primary purpose or a primary function, and simply requires that the organization be organized and operated exclusively for purposes other than profit. Thus, even if an organization has as its primary purpose and primary function the promotion of amateur athletics in Canada on a nation-wide basis, it cannot be a RCAA if it does not meet the threshold test for a NPO, because it is not exclusively organized and operated for non-profit purposes. This is where the factual determination mentioned above becomes relevant.

In some cases, RCAA's are formed to assist amateur athletes and questions arise about the relationship between donations made to the RCAA by financial supporters and the support provided by the RCAA to the amateur athletes. This issue arose in the *Burns* case²⁹ in which the taxpayer made payments to the Canadian Ski Association during years when his daughter was a member of the training squad in the Southern Ontario Division of the Association. He claimed deductions for his donations and the CRA denied them, on the basis that he had not made a "gift" because there was a benefit to him indirectly, as a result of the fact that his daughter, as a member of the team, was receiving an advantage. While the Tax Court partly allowed the appeal, the Federal Court of Appeal reversed the decision and found that the payments made by the taxpayer were not made without consideration or material benefit and therefore were not "gifts", at least for purposes of the Act. CRA has issued a policy statement dealing with donations to RCAA's and the issuance of receipts.³⁰ In it, CRA states that issuing receipts can only be delegated to a subordinate body at the provincial level and cannot be sub-delegated by a provincial level association to member clubs without the consent of the RCAA. It states further that a local club that has raised funds can receive a percentage of them as financing for its activities that are consistent with

²⁸ Paragraph 250(4)(a).

²⁹ *Burns v. The Queen*, 88 DTC 6101 (FCA).

³⁰ *Charities Policy Statement* CPS-007, "RCAA's: Receipts-Issuing Policy", February 7, 1995. See also *Charities Information Letter* CIL-2002-012, August 6, 2002 which deals with the link between a RCAA and an athlete trust for an individual athlete.

the purposes of the RCAA, but the percentage returned to the local club must not form part of any solicitation for funds by the local club or be part of any agreement with a prospective donor. In addition, a RCAA cannot operate as a conduit for a local club's own purposes and a significant amount of funds raised must be retained by the RCAA for its own use, for contingencies or to be redistributed to other clubs. An administration fee covering the expense of receiving funds raised in issuing receipts is not considered to be a significant amount.

CRA also states that in view of the widespread practice of soliciting contributions from parents whose children receive direct support from local clubs, a RCAA should require, as part of its granting policy, an accounting from local clubs that includes the names of all athletes who receive subsidized training. If a subsequent audit uncovers any substantial abuse at the local level, the RCAA will be deemed to have failed to meet the requirements of the Act and therefore will be subject to revocation proceedings, unless it can demonstrate that it had proper mechanisms in place to issue proper receipts.

According to CRA, to qualify for a registration as a RCAA, an organization must operate mostly, if not entirely, for the following objects:

- (a) to regulate a sport and the way it is played;
- (b) to promote the sport;
- (c) to oversee a structure of local clubs and regional and provincial bodies involved in the sport;
- (d) to operate a training program that brings promising athletes from the grass roots level to national and international levels through various qualifying competitive events;
- (e) to operate a national team to participate at international competitions;
- (f) to stage and sanction local, regional, provincial and national competitions;
- (g) to act as a Canadian representative of an international federation controlling the sport;
- (h) to provide a training and certification program for coaches and referees;
- (i) to carry out fundraising activities and re-distribution of funds for local, regional and provincial member organizations.³¹

CRA also states that the following national organizations are eligible for registration:

- (a) multi-sport, national, international level events, such as the Olympics and the Commonwealth or Canada games;

³¹ *Charities Policy Statement CPS-011*, "Registration of Canadian Amateur Athletic Associations", October 28, 1996. I have been advised in informal discussions with officials of CRA that its only guidelines for RCAA's are set out in CPS-007 and CPS-011.

- (b) facilities for training athletes that are an outgrowth of an Olympic, Commonwealth or Canada games;
- (c) multi-sport training centres which meet certain criteria.

In addition, CRA has stated that the following national organizations are not eligible for registration:

- (a) organizations of a local, regional or provincial character;
- (b) organizations whose primary purpose is to train and field a single team of athletes at international competitions;
- (c) organizations operating a local training or other facility that is not directed towards high-performance athletes, regardless of whether the facility is open to athletes from across Canada in theory or in practice;
- (d) organizations staging a single sport event, such as a gymnastics championship, regardless of whether athletes come from across Canada or whether the event is televised;
- (e) organizations using sports as a medium to achieve another more primary purpose.³²

Since there is a loose tax regulatory environment for RCAAAs, there is more room for uncertainty than there is when dealing with registered charities. For instance, in addition to qualifying at all times as a NPO, the RCAA must be able to establish that it has as its primary purpose and its primary function the promotion of amateur athletics in Canada on a nation-wide basis. This test does not go so far as to say that in addition to having this as its primary purpose and its primary function, the RCAA must limit its activities, including its investments, only to those that are consistent with its primary purpose and primary function. It is unclear how one determines what the “primary function” is although the primary purpose presumably is determined by reference to the constating documents and other material reviewed by CRA at the time the application is submitted and registration is granted. The word “primary” does not imply “exclusively”, and there is room for ancillary activities, which in turn leads to uncertainty.

It is interesting that the closing words in the definition of NPO in paragraph 149(1)(l) refer to an organization the “primary purpose and function” of which was the promotion of amateur athletics in Canada, suggesting that the purpose and function are a combined “thing” which together have a primary purpose, rather than the concept suggested in the definition of RCAA, which clearly separates the purpose and the function and requires that the primary purpose and the primary function must both be the promotion of amateur athletics. Whether this is a distinction without a difference may be academic, but there is a question of interpretation and, if a RCAA were in a situation in which its registration might be revoked, this distinction could perhaps be a factor, depending on the circumstances. At best, the argument would seem to be that the organizations that are mentioned as recipients of

³² *Ibid.*

income in the definition of NPO could be less stringently viewed than RCAAAs, because only their primary purpose and not necessarily their primary function must be the promotion of amateur athletics. Conversely, it could be argued that the entire function but only the primary purpose must be considered. This leaves open whether the function could be something more or less than primarily for the promotion of amateur athletics or must only be the promotion of amateur athletics. In any event, it is clear that both the primary purpose and the primary function of a RCAA are relevant.

The primary purpose will likely be determined largely by the wording in the constating documents and any statements made in the application for registration. In that context, jurisprudence dealing with the general anti-avoidance rule ("GAAR"), which contains an exemption from the recharacterization rules if transactions are undertaken "primarily" for *bona fide* purposes other than to obtain a "tax benefit" may be relevant. In *MacKay et al v. The Queen*,³³ one of the questions relating to the GAAR was whether the primary purpose should be examined by reference to each transaction in a series of transactions or to the series as a whole. The Tax Court found that for purposes of the GAAR, in determining the primary purpose of an individual transaction, the overall purpose of the series of transactions is relevant but not determinative and the test is an objective assessment of the relative importance of the driving forces of the transaction to be achieved, through weighing evidence to determine whether it is reasonable to conclude that a transaction was not undertaken or arranged primarily for a non-tax purpose. The Federal Court of Appeal has just reversed the Tax Court, holding that the purpose of each step in a series must be examined to determine whether the GAAR applies.

In theory, this type of analysis, when applied to a determination of the primary purpose of an organization such as a RCAA, might be relevant, although there is clearly a distinction between determining the primary purpose of an organization and determining the primary purpose of a particular transaction or series of transactions. In *A.Y.S.A.*, the Supreme Court stated that CRA is not only entitled, but obligated, to look beyond the words to the substance of the purposes and activities of an applicant for registered status. This would seem to be the case with RCAAAs as well.

The same reasoning might apply to a determination of the primary function of an organization. Since this would likely be based more on actual activities than stated purposes, the GAAR analysis might be more apposite, as it relates to a determination of what is "primary".

There does not appear to be any jurisprudence on point for RCAAAs and CRA does not publish a list of RCAAAs whose registration has been revoked. Therefore there is limited public information available on these points. I have been advised in informal discussions with officials of CRA that when the successor to former Bill C-10 is enacted, CRA will make available to the public a list of all RCAAAs and previously registered Canadian amateur athletic associations, including its name, registration number, date of registration and

³³ 2008 FCA 105 (FCA), reversing 2007 DTC 425 (TCC). In addition, see *McMullen v. The Queen*, 2007 DTC 286 (TCC) for a further discussion of the GAAR. The Court found that the primary purpose of a series of transactions was to divide a single business into two separate, independently owned businesses, and not to avoid tax.

effective date of revocation, amendment or termination of registration. As noted above, the registration of the Canadian Amateur Football Association was revoked in August, 2008.

Low-Cost Housing Corporations

As noted, a corporation can be a qualified donee if it is constituted exclusively for the purpose of providing low-cost housing accommodation for the aged, as long as it meets certain other tests that are also applicable to a typical NPO governed by paragraph 149(1)(l). This requires that no part of the income of the corporation can be payable to or otherwise available for the personal benefit of any proprietor, member or shareholder. Unlike an organization that is exempt under paragraph 149(1)(l) (and that, unless it is also a RCAA, is not for that reason alone a qualified donee), a low-cost housing corporation need not be “organized and operated” exclusively, and need only be “constituted” exclusively, for the required purpose. This seems to suggest that a corporation could be constituted for the required purpose, without actually being “operated” for that purpose, although this is probably academic in all but extreme situations. I have been advised in informal discussions with officials of CRA that it requires the corporation to be operated exclusively for low-cost housing accommodation for the aged to be exempt and to be a qualified donee. There is no express requirement that the corporation be organized and operated for purposes other than profit, other than the restriction on payment of income to a proprietor, member or shareholder, but this seems to be implicit. For this purpose, as is the case for NPO’s in general, “income” does not include a taxable capital gain.³⁴

CRA has issued a number of technical interpretations dealing with low-cost housing corporations. For instance, it has stated that “low-cost housing accommodation” means comfortable but modest rental accommodation at rent levels which are low relative to rent levels generally available for similar accommodation (other than subsidized or non-profit accommodation) in the same community.³⁵ CRA has also stated that a housing corporation that covers actual documented costs without making a profit would not necessarily be eligible, since it must meet the requirements in the definition.³⁶

CRA has also noted that certain corporations providing low-cost accommodation for the aged might qualify for registration as charities, but an organization established merely to provide housing to the aged under a life-tenancy agreement would not be regarded as a charity.³⁷ According to CRA, “the provision of housing” is only charitable at law when it relieves conditions associated with or resulting from old age, disability or poverty. CRA does not use a technical definition of “aged” or “disabled” to determine whether an organization is pursuing a charitable purpose, but rather focuses on how associated conditions are relieved. It has stated that providing services to people of a certain age is

³⁴ Subsection 149(2).

³⁵ CRA document no. 9819835, September 9, 1998.

³⁶ CRA document no. 9730835, February 2, 1998.

³⁷ *CRA Policy Commentary CPC-004*, April 10, 1992 and *Joseph Rowntree Memorial Trust Housing Association Ltd. et al v. Attorney-General*, [1983] 1 All E.R. 288 (Ch. D).

not charitable and to qualify for registration as a charity, the activities must be geared towards relieving a condition normally associated with aging, such as mobility, deafness, mental confusion or inadequate shelter.³⁸

CRA has stated that the relief of the aged is considered charitable and organizations that are established to relieve a need attributable to old age, including catering to persons both over and under 65 years of age, who require financial relief and/or relief associated with the condition of being aged, can qualify for relief as a charity.³⁹ Although the discussion about issues relating to whether an organization would qualify to be registered as a charity is not relevant to a discussion of other qualified donees, the same principles appear to be relevant in determining whether a low-cost housing corporation would be regarded as exempt under paragraph 149(1)(i), and therefore be regarded as a qualified donee. This is essentially a question of fact and since there is no registration process, it will be important in a specific case for a donor, or a registered charity that makes a grant, to be satisfied that the low-cost housing corporation is in fact a qualified donee.

Unlike NPO's, low-cost housing corporations are not required to establish that they are not in the opinion of the Minister a charity. In fact, as noted above CRA has stated that a low-cost housing corporation might in appropriate circumstances be eligible to be registered as a charity. The corporation must be constituted exclusively for the purpose of providing low-cost housing accommodation for the aged, and no part of its income can be payable to or otherwise available for the personal benefit of a member. Although there is no jurisprudence on point of which I am aware, it seems that CRA's administrative policy dealing with NPO's should be equally applicable to low-cost housing corporations, so that reasonable salaries and reimbursements of expenses are permissible. It seems that CRA might, in what it perceives to be abusive cases, allege that a low-cost housing corporation that accumulates excess surplus is not constituted exclusively for the purpose of providing low-cost housing accommodation and if it carries on a business, the same considerations might apply as would apply in the case of a NPO. Thus, it seems that corporations seeking to be exempt under paragraph 149(1)(i) and to be treated as qualified donees should be careful that they do not overstep any bounds by engaging in activities that are questionable, such as commercial activities or accumulation of excessive surplus. In cases of doubt, it would be prudent for the corporation to check with CRA and for a potential donor to seek assurance from the corporation that it is in fact exempt and thus is regarded as a qualified donee.

Since there is no system of registration for low-cost housing corporations, the onus will be on a donor seeking relief for a donation to be able to establish to the satisfaction of CRA

³⁸ *Charities Information Letter* CIL-2001-019, July 27, 2001 and *Charities Policy Statement* CPS-020, April 1, 2003, "Applicants That Are Established to Relieve Poverty by Providing Rental Housing for Low-Income Tenants".

³⁹ *Charities Summary Policy* CSP-A05, October 25, 2002 and *Charities Policy Statement* CPS-002 July 6, 1990, "Relief of the Aged". CRA has stated that prior to 1990, the standard for charitable relief was set at age 65 when beneficiaries could be presumed to be in need because of old age. However, an arbitrary 65 and over age restriction was subsequently determined not to be the most effective means of measurement, with the result that organizations established for relief of the aged must instead demonstrate that they are relieving a need that is attributable to old age, catering to persons both over and under 65 years of age.

that the corporation is in fact described in paragraph 149(1)(i) and is therefore a qualified donee. In many cases, the corporation itself will seek some type of advance confirmation from CRA to that effect, to assist it in raising funds. However, since there is a factual element involved in determining whether a corporation is eligible, just as there is a factual element in determining whether an organization is exempt as a NPO, there will likely never be the same level of assurance that is available to a donor where the recipient organization is registered. In such a case, until the registration is revoked, the donor can rely on that fact alone, even if the organization is no longer compliant and there are grounds for revocation.

Municipalities in Canada

The Act does not define “municipality”. An exemption from taxation in section 149 is available for a municipality in Canada or a municipal or public body performing a function of government in Canada.⁴⁰ However, until changes were proposed in former Bill C-10, the concept of qualified donee was narrower than the exemption. This was accentuated in jurisprudence involving claims for exemption by corporations owned by First Nations groups recognized as Indian Bands under the *Indian Act*.⁴¹ For instance, in *Otineka Development Corporation Limited and 72902 Manitoba Limited v. The Queen*,⁴² an exemption was claimed on the basis that a corporation was owned by a Canadian municipality or its equivalent. The Court observed that the term “municipality” is not defined in the Act and unless there is a reason to do otherwise must be given its ordinary meaning of a community having and exercising the powers of self-government and providing the type of services customarily provided by such a body. The Court then referred to the definition of municipality that had been accepted in an Ontario Court of Appeal decision, relying on a dictionary definition and also referred to the French version of the word.

Based on all of the evidence, the Court found that it had been “overwhelmingly demonstrated” that the Indian Band in question, through its chief and council both in the powers that it exercised under the authority of the *Indian Act* and in the services that it provided to its members, was a municipality within the meaning in the Act. As a result, although the case did not deal with the Band itself, it held that a corporation owned by an Indian Band was exempt under paragraph 149(1)(d).

This suggested, therefore, that an Indian Band itself might have claimed to be exempt on the basis that it was a municipality or a municipal body performing a function of government in Canada. However, in *Corporation de Développement Tawich v. Deputy Minister of Revenue (Quebec)*,⁴³ it was held that an Indian Band, not having been incorporated under appropriate legislation, could not be regarded as a municipality, notwithstanding that it

⁴⁰ Paragraph 149(1)(c).

⁴¹ R.S.C. 1985, c. I-5, section 87.

⁴² 94 DTC 1234 (TCC).

⁴³ 2001 DTC 5144 (Quebec Court of Appeal).

performed certain functions of or similar to those performed by a government. This effectively reversed the position in *Otineka*.

Leave was granted to appeal to the Supreme Court of Canada in *Tawich*, but the case was ultimately settled after subsection 149(1)(c) and related provisions of the Act were amended to include in the exemption not only a municipality but a municipal or public body performing a function of government in Canada. CRA has confirmed on a number of occasions that this includes eligible Indian Bands.⁴⁴

Under the proposed amendments in former Bill C-10, there will be symmetry between the exemption from taxation in paragraph 149(1)(c) and the status of qualified donee, particularly for First Nations groups as contemplated in the *Indian Act*.

Municipal or Public Bodies Performing a Function of Government in Canada

The proposed changes in former Bill C-10 dealing with qualified donees provide that an entity that is exempt under paragraph 149(1)(c) will also be a qualified donee. It is not clear why the Department of Finance chose to add a separate listing for these qualified donees, rather than simply refer to an organization described in paragraph 149(1)(c), but the result appears to be the same. This drafting approach may reflect a desire to phase in the change for donations made to municipal or public bodies that are not municipalities, after the effective date of the amendment.⁴⁵

United Nations or Agencies Thereof

This category is fairly straightforward. The United Nations is a well-known international organization, as are its agencies. They are outside the ambit of regulation under the Act or by Canada but as a matter of tax policy have been chosen as appropriate recipients of financial support from Canadian taxpayers, in a manner that provides tax relief to donors.

Ted Turner, a well-known United States billionaire (at least at one time), received a fair amount of publicity in 1997 when he pledged a donation of \$1 billion to assist the United Nations. According to information available on the internet, Mr. Turner announced at a dinner of the United Nations Association-U.S.A. in his honour that he would ensure his financial contribution would be used only for United Nations programs, such as programs for refugees, cleaning up landmines, peacekeeping, UNICEF and for diseases. It appears that Mr. Turner in fact established a private foundation exempt under section 501(c)(3) of the Internal Revenue Code, and made or caused contributions to be made to that foundation, which in turn supported programs of the United Nations and its agencies.

⁴⁴ See, for instance, CRA document no. 2006-02021611R3, November 22, 2006 and CRA document no. 2005-0113361R3, November 2, 2005.

⁴⁵ For a recent case dealing with the attempt by an Indian Band to impose its own tax regime, particularly dealing with an alternative to GST, see *Acadia Band v. MNR*, 2008 FCA 1199 (FCA), in which it was held that a commodity tax imposed by the Acadia Band under its own by-laws was not a modern expression of the Communal Sharing Tradition and therefore the Band failed to establish the possible existence of a credible Aboriginal right protected by section 35 of the *Constitution Act*.

The United Nations Foundation apparently works to strengthen the relationship between the United Nations and the United States government, with a focus on inducing Congress to pay more money to the United Nations, an effort also apparently led by a “sister” organization called Better World Fund. In October, 2006, the Secretary-General of the United Nations announced (again at a United Nations Association-U.S.A. dinner) that the United Nations Foundation had delivered \$1 billion of new and additional resources to the United Nations and its causes.

In the Canadian context, the contributions made by Mr. Turner to his private foundation would not be recognized as contributions to the United Nations itself or its agencies, and the question then would be whether an equivalent Canadian organization, registered under the Act, could itself make grants to the United Nations or its agencies. This would clearly be the case, provided that a registered charity (whether a private foundation, a public foundation or a charitable organization) made the grant to the United Nations itself or one of its recognized agencies.

CRA has stated that the United Nations and its agencies are qualified donees, but has provided no elaboration on which agencies are included.⁴⁶ Presumably it will be incumbent on a taxpayer seeking tax relief to establish that a particular organization is a qualifying agency of the United Nations.

Although there appears to be no direct jurisprudence on point dealing with whether an agency of the United Nations would be recognized as a qualified donee, there are cases and guidelines have been issued by CRA dealing with related issues. For instance, under subparagraph 110(1)(f)(iii) of the Act and section 8900(1)(a) of the regulations, international organizations are prescribed so their employees who are ordinarily resident in Canada are not subject to tax while rendering employment services for those agencies in a foreign country. CRA has decided that the United Nations Development Program is a related subsidiary or administrative body of the United Nations and in fact is a part of the United Nations. Although the issue was not raised directly, it appears that this is tantamount to saying that organization is an agency of the United Nations for purposes of the definition of qualified donee.⁴⁷

It is not clear whether the legal concept of agency applies in determining whether a United Nations “agency” is a qualified donee. The concept of agency is well defined in law. For instance, the Supreme Court of Canada dealt several years ago with whether a provincial organization was an agent of the provincial Crown.⁴⁸ The taxpayer had argued that it was not a Crown agent, in order to achieve certain tax result. The Court found that the taxpayer was in fact an agent of the Crown, relying on the general principles that are usually

⁴⁶ *Charities Summary Policy* CSP-U01, September 3, 2003.

⁴⁷ CRA document no. 2000-0004537, February 15, 2000. See also CRA document no. 2002-0143015, August 8, 2002, in which CRA stated that the Economic and Social Council was not a prescribed international organization for purposes of regulation 8900. CRA listed several organizations that appeared to be treated as “specialized agencies” and thus eligible to be prescribed as international organizations (and presumably treated as qualified donees).

⁴⁸ *Nova Scotia Power Inc. v. The Queen*, 2004 DTC 6506 (SCC).

addressed in dealing with issues of Crown agency. It is not clear whether the same concepts would apply to determine whether an organization would be regarded as an agent of the United Nations, on the basis on which an organization might be determined to be an agent of the Crown.⁴⁹ I have been advised in informal discussions with officials of CRA that agencies listed on the United Nations website will be regarded as qualified donees.

It has been held that although an agent acts for a principal, the business of the principal remains the business of the principal and it is “nothing less than a fiction” to say that the carrying of a business by the principal becomes the carrying on of the business by the agent. It has further been observed that the Act “thrives on legal fictions in the form of deeming provisions”, but these do not extend so far as to treat the business of a corporation as if it had been carried on by a director of the corporation.⁵⁰

There is some jurisprudence dealing with the overseas employment tax credit for an individual who is resident in Canada but employed outside Canada for a specific project in certain circumstances. These include, by regulation, work performed outside Canada under a contract under which a specified employer carried on its business outside Canada with respect to a “prescribed activity”.⁵¹ For this purpose, section 6000 of the regulations prescribes an activity to be an activity performed under contract with the United Nations. Not surprisingly, it has been held that NATO is not the United Nations for this purpose.⁵²

Prescribed Universities Outside Canada

Canadian taxpayers can claim deductions for donations to listed foreign universities.⁵³ Qualifying foreign universities are listed in Schedule VIII to the regulations.⁵⁴ These are separately listed according to the country in which the university is located, and the current schedule lists a large number of universities in the United States, a smaller number of universities in the United Kingdom, a much smaller number in France, one university in each of Austria and Belgium, three universities in Switzerland, one university in Vatican City, several universities in Israel, two universities in Lebanon, three universities in Ireland, two universities in Germany, two universities in Poland, one university in Spain, one

⁴⁹ The general concept of agency is that the principal for whom the agent acts remains separate from the agent, and the actions of the agent are considered to be actions of the principal. On the other hand, the concept of a Crown agent is such that the agent may, at least for some purposes, be equated to the Crown itself. It has been held that CRA is, by virtue of section 4(2) of the *Canada Revenue Agency Act*, an agency of the federal Crown. See *Attorney General of Canada v. Klassen*, 2008 DTC 6034 (Sask. Q.B.).

⁵⁰ *The Queen v. Nisker*, 2008 DTC 6102 (FCA). For a more general discussion of the concept of agency, see, for example, *Arpeg Holdings Ltd. et al v. The Queen*, 2007, DTC 131 (TCC).

⁵¹ Section 122.3.

⁵² *Duff v. The Queen*, 2005 DTC 521 (TCC).

⁵³ Technically, the term is “outside Canada”, rather than “foreign”. CRA seems to treat these terms as interchangeable.

⁵⁴ Section 3504 of the regulations provides that the universities outside Canada named in Schedule VIII are prescribed to be universities the student body of which ordinarily includes students from Canada. This is a simple mechanism which, by regulation, prescribes universities from time to time by listing them.

university in China, one university in Jamaica, six universities in Australia, one university in Croatia, three universities in South Africa, three universities in the Netherlands, two universities in Hong Kong, two universities in New Zealand, one university in Hungary, one university in India and one university in Estonia.

CRA has stated that to be considered for prescribed status, a foreign university must meet the following conditions:

- (a) it must maintain academic entrance requirements of at least secondary school matriculation standing;
- (b) it must be organized for teaching, study and research in the higher branches of learning;
- (c) it must be empowered, in its own right, to confer degrees of at least the baccalaureate level according to academic standards and statutory definitions prevailing in the country in which it is situated; and
- (d) it must ordinarily include “Canadian” students⁵⁵ in its student body.

CRA has stated that an educational institution outside Canada that confers only associate degrees, diplomas, certificates or other degrees at a level below that of bachelor or equivalent, will not qualify, and an institution that is affiliated with a university, but which does not have the authority to confer its own degrees, will not qualify.

An educational institution seeking prescribed status must apply to CRA and send a printed copy of its latest calendar, syllabus and/or catalogue containing course outlines, copies of documents issued by the appropriate educational authority in the “country of residence” that confirm the institution is one of higher learning empowered to confer degrees in its own right of at least the baccalaureate level and the number of Canadian students that have attended the institution over a minimum 10-year period and a sampling of information such as names, addresses, dates of birth, Canadian social insurance numbers (if available), years attended and types of degree programs. In that regard, CRA notes that there may be privacy issues and Canadian students may be required to consent to the release of such information but without that information, CRA will not be able to recommend that the institution be prescribed. The reference to the country of residence suggests CRA feels a university outside Canada must be resident in another country. There is no clear authority for this view, as discussed below.

⁵⁵ I have been advised in informal discussions with officials of CRA that in order to be “from Canada”, a student must be resident in Canada. CRA has outlined its policy for reviewing the status of a university seeking to be prescribed. See RC 191, “Donations to Prescribed Universities Outside Canada”, February 29, 2008. See also *Charities Information Letter* CIL-1998-025, September 9, 1998. There is no reference to citizenship and it appears that “Canadian” means “resident” in Canada, rather than holding Canadian citizenship, but this is not clear. For a more detailed discussion, see Robert B. Hayhoe, “A Critical Description of the Canadian Tax Treatment of Cross-Border Charitable Giving and Activities”, (2001) 49 Can. Tax. J. 320 and Arthur B.C. Drache, “Canadian Taxation of Charities & Donations” (Toronto: Carswell) Loose Leaf, 10-18. See also Arthur B.C. Drache, Robert B. Hayhoe and David P. Stevens, “Charities Taxation Policy and Practice”, (Thomson Carswell) Loose Leaf, 15:12.

As noted, a foreign university must apply to CRA to become prescribed. CRA makes annual recommendations for prescribed status and when Schedule VIII is amended, a notice is posted in the Canada Gazette. Status as a prescribed university is generally granted retroactively to January 1 of the year in which the application was received.

CRA has also confirmed that even if a recommendation is made to grant prescribed status, the institution will not become a qualified donee until it is actually granted prescribed status “by an enactment of the Canadian Parliament”. Technically, a regulation is not an enactment of Parliament, but the process clearly does not permit CRA itself to grant prescribed status. An educational institution outside Canada that has been recommended for prescribed status as a qualified donee will also be recognized as a “university outside Canada” for purposes of the tuition, education and textbook tax credits. In a case decided in April, 2008, the Tax Court of Canada discussed the fact that the tuition, education and textbook tax credits are not based on the list of prescribed universities outside Canada and held that the London School of Economics, a part of the University of London, is nevertheless a university outside Canada that offers courses leading to a degree, despite the fact that it is not a prescribed university under Schedule VIII.⁵⁶

For tuition and education tax credit purposes, CRA states that a student can be enrolled on a full-time basis and either physically present on the campus of the “foreign university” or “virtually present” at the university by way of scheduled, interactive, course-related activities conducted via the internet. This confirms recent jurisprudence, in which it has been held that distance education programs are the equivalent of physical presence at a foreign university.⁵⁷ I have been advised in informal discussions with officials of CRA that since “student body” is not defined, CRA accepts a university’s description of its student body, which includes students who remain in Canada but are enrolled in distance learning programs, in determining the eligibility of a university.

For purposes of the Act, “prescribed” means prescribed by regulation or determined in accordance with rules prescribed by regulation.⁵⁸ There is considerable jurisprudence on how a particular matter is “prescribed” and how the fact of such a prescription is to be communicated to the public. There seems to be no real issue about the procedure followed where a university is added to Schedule VIII under section 3504 of the regulations, aside from the fact that CRA itself does not have the unilateral authority to add to the list and the schedule can be amended only by regulation.

Since Canadian universities are generally registered as charities (unless they are “private” or “for profit” universities), it seems that the focus of the listed foreign university category is aimed at comparable universities outside Canada, which require public funding, in the same way that Canadian universities do. It is not clear whether CRA would be inclined to add to Schedule VIII a Canadian university that is not a registered charity, if it has a campus in

⁵⁶ *Shea v. The Queen*, unreported at the date of writing, docket: 2007-3800 (IT) I. CRA argued that LSE did not issue degrees in its own right, but only as a part of the University of London, and was not itself a degree-granting university for purposes of the tax credit provisions. This decision seems to be at odds with CRA’s policy requiring a listed foreign university to confer its own degrees, as set out in RC 191, *supra*, at note 55.

⁵⁷ *McGrath v. The Queen*, 2007 DTC 894 (TCC).

⁵⁸ Subsection 248(1).

another country, and thus is a university with operations outside Canada, the student body of which ordinarily includes students from Canada. This would include, for instance, a Canadian university with a branch in another country, attended by Canadian students, because a particular program of study, such as marine biology, could be better provided in that country. This raises a question that is similar to a question discussed below, with respect to charitable organizations “outside Canada”, to which the federal Crown has made a gift in the preceding year. As a practical matter, although these issues are most likely of academic interest, they illustrate the uncertainty in interpreting terms such as “a university outside Canada” and “a charitable organization outside Canada”. I have been advised in informal discussions with officials of CRA that CRA has not adopted a firm position on this issue.

I understand CRA does not have a formal policy for reviewing the status of universities that are prescribed, to make sure they continue to qualify. As a result, it seems that once a foreign university is placed on the list, there may be no formal process for ongoing audit or review, to confirm that it continues to qualify.

Since there are limitations on the ability of registered charities to support foreign activities, and they are generally limited to carrying on their own charitable activities directly or making gifts to qualified donees,⁵⁹ in some cases, a foreign organization that is not itself a qualified donee may be associated with a listed foreign university. For instance, a major hospital in the United States might have an affiliation with a United States university that is a listed foreign university, so a donation made by a resident of Canada to that listed foreign university could be made available, with appropriate structuring, for the benefit of the United States hospital, whereas a direct donation to the United States hospital would not qualify. There is no “end-use” test imposed on the qualified donee, such as a restriction on making further grants or a disbursement quota. Subject to foreign law, the listed foreign university could support activities in Canada.

Some provinces such as Ontario permit qualifying foreign universities to issue Canadian degrees (subject to meeting various criteria). The fact that a foreign university is operating in Canada and issues degrees in Canada will not, in and of itself, permit the foreign university to be treated as a qualified donee. As a result, foreign universities operating in Canada and issuing degrees in Canada to Canadian students are at a fundraising disadvantage, compared to their domestic “competitors”, unless they are prescribed and listed in Schedule VIII.

The Act does not define what is meant by “university” or what is meant by “outside Canada”. As discussed above, presumably “outside Canada” is intended to refer to universities that are not formed in Canada and subject to Canadian regulation, but this is not clear. There are other provisions in the Act dealing with universities, particularly in the context of financial assistance for students.⁶⁰ In dealing with tuition tax credits and education tax

⁵⁹ For a discussion of some of the issues, see RC4106 “Registered Charities: Operating Outside Canada” and CRA Registered Charities Newsletter No. 20, November, 2004. See also the proposed changes in former Bill C-10 discussed *supra*, at note 5.

⁶⁰ Sections 118.5 and 118.6, dealing with tuition tax credits and education tax credits, for, among other things, amounts paid to “a university outside Canada”. See *Shea, supra*, note 56, which confirms that an independent

credits, CRA provides a considerable amount of commentary in IT-15R2, "Education Tax Credit" and IT-516R2, "Tuition Tax Credit". In particular, in IT-516R2, CRA refers to an educational institution "located" in a country outside Canada, which it states is presumed to qualify for purposes of the credit in section 118.5 if it is recognized by an accrediting body (that is nationally accepted in that country) as being an educational institution which confers degrees at least at the bachelor or equivalent level. It also states that a university that is listed in Schedule VIII will be recognized as satisfying the requirements of section 118.5. In addition, CRA maintains a list of institutions outside Canada that are recognized as universities for purposes of the credits for tuition and education. This was discussed in *Shea*.

It has been held that to be a university for tax credit purposes, an institution must have the ability to grant degrees in its own right.⁶¹ It is instructive that for purposes of the goods and services tax ("GST"), the *Excise Tax Act*⁶² defines "university" to mean a recognized degree-granting institution or an organization that operates a college affiliated with, or a research body of, such an institution.⁶³ In the GST context, it has been held in *City University*⁶⁴ that a university based in the United States with a branch in Canada is a university for this purpose. The Court found assistance in understanding what is meant by the term "recognized degree-granting" institution by reviewing the definitions of "school authority" and "public college" in the *Excise Tax Act*. As a result, the Court rejected the argument on behalf of the Minister that a "recognized degree-granting institution" must have a "Canadian character". This all suggests that CRA should take an expansive view in determining whether a foreign educational institution is a university.

Entities that are affiliated with or agencies of listed foreign universities will not themselves be qualified donees. As a result, it will be important to ensure that a gift or a grant is made directly to the listed foreign university and that it is regarded as a "gift" and not a mere transfer with a direction of funds that CRA might challenge.⁶⁵

Foreign Charitable Organizations to Which the Federal Crown Has Made Gifts

This category is fairly narrow and subject to the whim of the federal Crown. If the federal Crown selects a foreign charity, it can make it a qualified donee for a limited period of time by making a gift to it. This raises questions about the policies behind such gifts and about the organization chosen. CRA periodically publishes a list of those foreign organizations to

examination must be made for a particular university and there is no requirement that the university be prescribed under section 3503 of the regulations for purposes of gifts to qualified donees.

⁶¹ *Gilbert v. The Queen*, [1999] 2 CTC 2127 (TCC). See also *Klassen v. The Queen*, 2007 DTC 5612 (FCA) and *Shea*, *supra*, note 56.

⁶² S.C. 1990, c. 45.

⁶³ Subsection 123(1). There is no requirement that the university be "non-profit".

⁶⁴ *City University v. The Queen*, (1996), 4 GTC 3066 (TCC).

⁶⁵ See *Shea*, *supra*, note 56. In this paper I do not discuss the concept of "directed" gifts and whether a recipient of a transfer would be disregarded, on the theory that it is merely acting as a conduit or agent and not as the legal recipient.

which the federal Crown has made a gift.⁶⁶ However, it appears that there is no formal process through which such gifts are made or through which notification is generally given to the public about such gifts. Unlike listed foreign universities, there is no schedule of prescribed foreign organizations.

The most recent published list of organizations to which the federal Crown has made gifts, with the dates of the gifts, is as follows:

- Aga Khan Foundation
May 17, 2000, May 4, 2001, June 11, 2002, July 9, 2003, June 15, 2004, March 10, 2005, April 7, 2006, April 4, 2007 and April 2, 2008
- Aga Khan University Foundation
May 17, 2000, May 4, 2001, June 11, 2002, July 9, 2003, June 15, 2004, March 10, 2005, April 7, 2006, April 4, 2007 and April 2, 2008
- The American Assembly
July 22, 2004
- Canadian International School of Hong Kong Limited
August 7, 2000 and August 13, 2002
- Cayman Islands National Recovery Fund
June 7, 2005
- Centre For Strategic & International Studies
October 16, 2000, September 21, 2001 and August 9, 2002
- Council for Canadian American Relations, Inc.
April 16, 2002, July 9, 2003, May 27, 2004, July 7, 2005, May 4, 2006, June 21, 2007 and July 3, 2008

⁶⁶ IC 84-3R5, dated May 31, 2000 with a periodically updated appendix, the most recent version of which was revised on September 9, 2008.

- The Foundation For Canadian Studies in the United Kingdom
March 15, 2000, March 30, 2000, August 20, 2001, September 5, 2002, March 11, 2003, March 17, 2003, March 11, 2004, March 30, 2004, February 13, 2006, February 16, 2006, March 15, 2006, July 28, 2006, August 23, 2006, August 31, 2006 and February 25, 2008
- Roman Catholic Archbishop of Kingston
February 6, 2007
- The State Hermitage Museum
July 7, 2003 and December 23, 2005
- Village Focus International
July 31, 2002, October 10, 2002, August 12, 2003 and February 16, 2004
- Woodrow Wilson International Center for Scholars
October 1, 2001, December 3, 2002, October 23, 2003, October 26, 2004, October 26, 2005, October 27, 2006 and October 12, 2007

As noted above, only fairly recent gifts from the federal Crown will be recognized and earlier gifts are of no significance in current planning. Only four of these listed organizations received Crown gifts in 2008 and are currently qualified donees based on those publicized gifts.

I understand that at least one author has made a formal request to CRA under the *Access to Information Act*, seeking information about the origin of the list, how the decisions are made and related information. It appears that CRA is unwilling to divulge this information and in particular will not reveal the government department that makes the decision about a particular gift and communicates it to CRA. CRA apparently has resisted these requests on the basis that the information is “taxpayer information”, which cannot be revealed.

It has been suggested that this category of qualified donees might perhaps be open to abuse, in the sense that if there is no coherent policy within the federal government to determine how, when and why a gift should be made to a particular foreign organization, a lower level official, such as a diplomat in a foreign consular office, might make a relatively insignificant gift, in an official capacity as a government representative, thereby making that organization a designated foreign charity, even if it is not on the published list. This could open the floodgates for Canadian donations, with no regulation of the foreign charity in Canada.

CRA has stated that the onus is on the Charities Directorate to determine whether a foreign organization that had received a gift from the federal Crown is a “charitable organization” according to Canadian law and whether the payment to that foreign entity would be regarded as a “gift” for purposes of the Act. CRA has stated that to make such a determination, it requires the following information:

- (a) a copy of the governing document establishing the foreign entity;
- (b) a copy of the certificate or letter issued by the foreign tax or other authority granting charitable status to the foreign entity; and
- (c) copies of correspondence, agreements and other documents relative to the Crown gift, including the amount and the date of the gift.⁶⁷

I have been advised in informal discussions with officials of CRA that if it determines that the “foreign entity” meets the requirements for registration as a charity in Canada (aside from being established in Canada), it sends a letter to that entity and adds it to the list accompanying IC84-3R5.

Arthur Drache has pointed out that the Auditor General was critical of the lack of supervision over this process and the potential for abuse.⁶⁸ Robert Hayhoe also discusses this point and notes that there are legal issues relating to the position taken by CRA with respect to grants made to CIDA organizations and argues that as a matter of law, gifts that impart qualifying status to a foreign charity, when made by a Canadian foreign ambassador, are gifts made by agents of the Crown, as are all gifts made out of Crown funds by representatives of the Crown acting in their role as representatives of the Crown (i.e. ambassadors and consuls). Hayhoe also notes that in his experience CRA has taken the position that CIDA funding of a foreign charity rarely qualifies as a “gift” because of conditions placed on the CIDA funds, pointing out that this view does not appear to be correct, since a gift is a transfer of property without “consideration” and the imposition of a reporting condition is not necessarily consideration for this purpose.⁶⁹ Although it has been suggested that the view adopted by CRA with respect to a United States organization that is exempt under section 501(c)(3) of the Internal Revenue Code, and therefore a “charitable organization” for purposes of the Treaty, should also govern in determining whether it is a “charitable organization” to which the federal Crown has made a gift and is thus a qualified donee, it appears that this may not be the case. In my view, the fact that CRA recognizes a United States organization as a charitable organization for purposes of the Treaty is not in and of itself conclusive in determining whether CRA would agree that such an organization would be a charitable organization that can be a designated foreign organization, if a gift is made to it by the federal Crown. I suggest a determination should be sought in advance, using the procedure outlined above, if there is any doubt in a specific situation.

⁶⁷ *Charities Information Letter* CIL-1998-025, September 9, 1998. I have been advised in informal discussions with officials of CRA that a federal department making a gift to a “foreign entity” which it wishes Canadian donors to support should also forward a description of its activities and the amount and date or anticipated date of the gift.

⁶⁸ Drache, *supra*, note 55, at 10-20.

⁶⁹ Hayhoe, *supra*, note 55, at page 327 and Drache, Hayhoe and Stevens, *supra*, note 55, at 15:12.

It seems to be assumed that “outside Canada” refers to the jurisdiction in which the organization has been formed or in which it operates. However, this is not entirely clear, just as that term is not clear in the context of universities and Schedule VIII. It seems that a charitable organization formed and operating in Canada, that is not a registered charity and therefore is not a qualified donee on that basis, might have branch operations in another country, and argue that if it receives a gift from the federal Crown, whether attributable to that foreign branch or not, it is a charitable organization “outside Canada”. This is similar to the point discussed earlier about universities “outside Canada”.⁷⁰ A corporation incorporated in Canada will generally be resident in Canada.⁷¹ A trust will generally be resident where a majority of its trustees reside.⁷² A “charity” that is resident in Canada will be taxable on its world-wide income and will not be exempt if it is not a registered charity. It will also not be exempt as a NPO if in the opinion of the Minister it could be registered.⁷³ Some organizations may be able to “taint” themselves, so they are not “charities”, are not entitled to be registered and can be exempt as NPO’s.⁷⁴

As a practical matter, unless the federal Crown were sympathetic and felt there was a good reason why the “Canadian” organization should or could not be registered as a charity and comply with all of the usual strictures in the Act, this point appears to be academic. In any event, unless a gift is received from the federal Crown, the issue is moot.

CRA has confirmed that an organization residing in France is not a “qualified donee” and donations to it are not eligible for tax relief unless it becomes a designated foreign charity or is added to Schedule VIII.⁷⁵

As is the case with listed foreign universities, no Canadian “end-use” test is imposed on a designated foreign charity, and it is free to use the donated funds as it wishes, subject to foreign law.

⁷⁰ In IC 84-3R5, CRA refers to charitable organizations “located” outside Canada and in dealing with the receipting requirements, as discussed below, refers to information that “foreign” charitable organizations must include on official donation receipts that they issue to donors as proof of their gifts. In an earlier version of the circular, IC 84-3R4, CRA referred to charitable organizations “situated” outside Canada rather than “located” outside Canada.

⁷¹ *Supra*, note 28.

⁷² *Dill et al, Trustees of the Thibodeau Family Trust v. The Queen*, 78 DTC 6376 (FCTD). See also IT-447, “Residence of a Trust or Estate”, May 30, 1980. A very recent decision on the residence of a trust for purposes of a tax treaty is *Trevor Smallwood Trust v. HMRC* [2008] UKSPC SPC 00669 (February, 2008), in which a trust that was resident in both Mauritius and the United Kingdom was held to be resident in the United Kingdom because that was its “place of effective management” under the treaty. As a result, gains on sales of shares were taxable in the United Kingdom, despite the fact that the sole trustee was a corporation resident in Mauritius.

⁷³ See the discussion *supra*, at note 15, and following.

⁷⁴ For example, CRA document no. 2005-0139001R3, discussed *supra*, at note 15. For a discussion of some of the implications of changing the residence of a qualified donee, see Hayhoe, *supra*, note 55, at page 335.

⁷⁵ CRA document no. 2005-0126271E5, February 13, 2006. The same point was made with respect to a proposed gift to a university in China. CRA document no. AC58223, August 31, 1989.

The Federal or Provincial Crown

Aside from questions dealing with Crown agency, there are no unusual issues where the qualified donee is the federal or provincial Crown. Subject to receiving an appropriate official receipt (as discussed below), a donor or registered charity making a payment to the federal or provincial Crown should be satisfied that it has made a gift to a qualified donee, if the criteria for a gift are present.

At one time, there was a preference for gifts made to the Crown, since they entitled a donor to claim relief based on 100% of income, when gifts to other qualified donees were eligible for relief based on only part of income. When the playing field was “levelled” a number of years ago, the distinction between gifts to registered charities and other qualified donees, on the one hand, and gifts to the Crown, on the other hand, disappeared. Previously, a practice had developed, supported by provincial legislation, through which provincial “Crown foundations” had been formed, as an alternative to parallel foundations for registered charities. The attraction was that registered charities such as universities and public hospitals were able to raise funds more tax-effectively, since donations to their Crown foundations were treated as gifts to the Crown itself. This was more attractive than a gift to a parallel foundation, which was simply a registered charity. This distinction no longer exists, although Ontario has a more generous approach for gifts made to an Ontario Crown foundation or an Ontario Crown agent by a corporation subject to tax in Ontario.⁷⁶

The discussion earlier in this paper dealing with agency in the context of the UN is relevant here, in particular the Supreme Court of Canada decision in the *Nova Scotia Power* case.⁷⁷ CRA has confirmed that a group of regional colleges, incorporated under a provincial *Regional Colleges Act*, would be regarded as agents of the provincial Crown, given the degree of control and the presence of other factors that met the common law test for Crown agency.⁷⁸

A number of Crown entities, described as Crown corporations in the Act, such as those to which section 27 applies, are not regarded as agents of the Crown and are therefore not the equivalent of the Crown in determining whether they are qualified donees. section 7100 of the regulations prescribes certain Crown corporations for purposes of section 27, including Canada Deposit Insurance Corporation, Canada Post Corporation, Royal Canadian Mint, Canada Mortgage and Housing Corporation and others.⁷⁹

Under the *Museums Act*,⁸⁰ the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature and the National Museum of Science and

⁷⁶ *Corporations Tax Act*, R.S.O. 1990, c. C.40, section 34(1.1).

⁷⁷ *Supra*, note 40.

⁷⁸ *Charities Information Letter*, CIL-2002-011, August 1, 2002.

⁷⁹ See IT-347R, “Crown Corporations” (now cancelled) for a discussion of some of the issues, including the distinction between tax-exempt government organizations and taxable Crown corporations.

⁸⁰ S.C. 1990, c.3. Section 26 provides that each museum is, for all purposes of the *Museums Act*, an agent of Her Majesty in Right of Canada.

Technology are all Crown agents. The Canadian Museum for Human Rights has been added to the list of federal museums governed by the *Museums Act*.

In cases of doubt, it will be prudent to determine advance that a gift to an agency that is thought to be the federal or provincial Crown does in fact qualify as a Crown agent, and is therefore regarded as a qualified donee, if a gift to it is contemplated.

Registered National Arts Service Organizations

Although there is no separate category of qualified donee for registered national arts service organizations (“RNASO’s”), I think it is worth mentioning the regime that was adopted to deal with them. This is different from the regime for RCAAAs and it seems the issues raised in *A.Y.S.A.* about an “occupied field” might not arise in the case of an organization seeking registration as a RNASO, because the rules dealing with registered charities do in fact contain a complete code.

The introduction of the regime for RNASO’s recognized, as had been recognized earlier in the regime for RCAAAs, that while supporting the arts itself is generally a charitable purpose, many arts organizations were not eligible to be registered as charities because they provided support for their members. In addition to changes creating the concept of RNASO, changes were introduced to require that benefits received by members from a RNASO would be subject to tax.⁸¹

By definition, a RNASO is a national arts service organization that has been registered under subsection 149.1(6.4), whose registration has not been revoked. Under subsection 149.1(6.4), to be registered, an organization must make a written application to the Minister of Communications describing all of its objects and activities and must have been designated by that Minister, after approval of those objects and activities, to be a national arts service organization. It must have as its exclusive purpose and its exclusive function, the promotion of arts in Canada on a nation-wide basis, be resident in Canada and be formed or created in Canada and comply with prescribed conditions.⁸²

The prescribed conditions are largely intended to subject a RNASO to a regime that is similar to the regime for registered charities. The NASO, to meet the prescribed conditions and be designated prior to registration, must represent a community of artists from a list of eligible sectors in the arts community, namely theatre, opera, music, dance, painting, sculpture, drawing, crafts, design, photography, the literary arts, film, sound recording and other audio visual arts, and any other sectors of artistic activity related to the creation or performance of works of art that the Minister of Communications may recognize. No part of the income of the NASO can be payable to or otherwise available for the personal benefit of any proprietor, member, shareholder, trustee or settlor except where it is for services rendered or is an amount to which paragraph 56(1)(n) of the Act applies.⁸³

⁸¹ Paragraph 56(1)(aa). For a more general discussion of the background behind the introduction of the regime for RNASO’s, see Drache, Hayhoe and Stevens, *supra*, at note 45, 15-16.

⁸² Regulation 8700.

⁸³ Paragraph 56(1)(n) deals with scholarships, bursaries, prizes, etc.

Under the regulations, all of the resources of the NASO must be devoted to the activities and objects described in its application for designation and more than 50% of its directors, trustees, officers or other officials must deal with each other at arm's length. In addition, no more than 50% of the property of the NASO at any time can have been contributed or otherwise paid in by one person or members of a group of persons who do not deal with each other at arm's length. This test is similar to the test for designating a registered charity as a charitable organization, a public foundation or a private foundation and will likely be amended to reflect the changes in former Bill C-10 in that regard. The regulations also provide that the activities of the NASO must be confined to one or more of the following:

- (a) promoting one or more art forms;
- (b) conducting research into one or more art forms;
- (c) sponsoring arts exhibitions or performances;
- (d) representing interests of the arts community or a sector thereof (but not of individuals) before government, judicial, quasi-judicial or other public bodies;
- (e) conducting workshops, seminars, training programs and similar development programs relating to the arts for members of the NASO, subject to certain restrictions;
- (f) educating the public about the arts community or the sector represented by the NASO;
- (g) organizing and sponsoring conventions, conferences, competitions and special events relating to the arts community or the sector represented by the NASO;
- (h) conducting arts studies and surveys of interest to members of the organization relating to the arts community or the sector represented by the NASO;
- (i) acting as an information centre by maintaining resource libraries and databases relating to the arts community or the sector represented by the NASO;
- (j) disseminating information relating to the arts community or the sector represented by the NASO; and
- (k) paying amounts to which paragraph 56(1)(n) of the Act applies in respect of the recipient relating to the arts community or the sector represented by the NASO.

One main difference between a NASO and a RCAA is that where the Minister grants registration, the organization is effectively treated as if it were a registered charity that is designated as a charitable organization. This means, in effect, that all of the compliance required of a registered charity is equally required of a RNASO, including the disbursement quota, restrictions on carrying on an unrelated business, the requirement to devote all of its resources to its own activities, not devoting excessive resources to political activities, etc. It appears that the intention of subsection 149.1(6.4) is to equate the requirement for a

registered charity, as it relates to charitable activities, to a requirement for a RNASO to carry on the objects and activities that are designated by the Minister of Communications as approved and that consist exclusively of the promotion of arts in Canada on a nation-wide basis.

The concept of a NASO reinforces the concept in the definition of RCAA that the purpose and function are separate things, but unlike a RCAA, which is required to have a primary purpose and a primary function, a RNASO must have an exclusive purpose and an exclusive function. This suggests that the officials in the Department of Finance reconsidered the RCAA concept when creating the RNASO concept, and adopted the registered charity analogy. Whether this “occupies the field” for arts services organizations that do not operate on a nation-wide basis is unclear. A.Y.S.A. (but for the dissenting judgment) suggests it may not.

Under subsection 149.1(6.5), the Minister of Communications can revoke the designation of an organization as a RNASO for purposes of subsection (6.4) if an incorrect statement was made in furnishing information for the purpose of obtaining that designation or the organization has amended its objects after its last designation was made. Where the designation is so revoked, the organization is deemed for purposes of section 168 to have ceased to comply with the requirements of the Act for registration. This allows the Minister of National Revenue to take proceedings to revoke its registration under the Act. In that event, the same procedures apply as would apply in the case of a registered charity, including the sanctions in Part V, such as revocation tax. As noted, these sanctions do not apply to other qualified donees, including RCAA's.

CRA has stated that on occasion RNASO's can represent the interests of their members before government, judicial, quasi-judicial or other public bodies.⁸⁴ CRA has noted that RNASO's are a slightly different creature from charities at common law, in that they are constituted as stated in section 8700(a)(ii) of the regulations to represent the community of artists and “arguably”, since RNASO's are creatures of statute, any common law restrictions on advocacy for charities do not apply to them. However, CRA has also stated that paragraph 9 of Information Circular 87-1 does not prohibit a RNASO from:

- (a) making oral and written representations to the relevant elected representatives or a public servant to present its views or provide factual information;
- (b) making oral and written presentations or briefs containing factual information or recommendations to relevant government bodies, commissions or committees; and
- (c) providing information and expressing non-partisan views to the media.⁸⁵

⁸⁴ *Charities Information Letter* CIL-1998-2001-020, July 31, 2001.

⁸⁵ The current views of CRA on political activities are set out in *Charities Policy Statement* CPS-022, “Political Activities”, September 2, 2003.

Cultural Institutions

In appropriate circumstances, gifts of certain types of cultural property entitle a donor to more tax relief than gifts of other types of property.⁸⁶ Basically, an object must be certified and the recipient must be designated. There are restrictions on the circumstances in which, and the types of property for which, this relief is available. Under the CPEIA, two types of institutions can be designated, namely category “A” and category “B”. In many situations, the institution that has been designated for this purpose will also be a registered charity or perhaps the federal or provincial Crown or a Crown agent, such as a museum.⁸⁷

Under the CPEIA, “institution” means an institution that is publicly owned and is operated solely for the benefit of the public, that is established for educational or cultural purposes and that conserves objects and exhibits them or otherwise makes them available to the public. A “public authority” means the federal or provincial Crown, a federal or provincial Crown agent, a municipality in Canada, a municipal or public body performing a function of government in Canada or a corporation performing a function or duty on behalf of the federal or provincial Crown. For purposes of the Act, the Minister may designate any institution or public authority indefinitely or for a period of time and generally or for a specified purpose.⁸⁸

As a result, cultural institutions are generally not a separate category of qualified donee, but are a subset of qualified donees that in their own right have achieved that status. This would include, for instance, universities, municipalities, museums and art galleries.

Special rules apply to objects acquired by designated cultural institutions, to prevent export or disposition of property that has qualified for tax incentives. Under Part XI.2, institutions or public authorities that dispose of an object within ten years after it became an object described in subparagraph 39(1)(a)(i.1)⁸⁹ must pay a tax of 30% of the fair market value of the object at the time of disposition, unless the disposition is made to another institution or public authority that itself has been designated under the CPEIA either generally or for a specified purpose.⁹⁰ An institution, public authority, charity or municipality that is liable to pay this tax is required to file a return, estimate the amount of tax payable and pay the tax.⁹¹

⁸⁶ Subparagraph 39(1)(a)(i.1), which provides there is no capital gain on a qualifying disposition. In this paper I do not discuss gifts of ecologically sensitive land, for which there are a number of specific provisions, such as subparagraph 38(1)(a.2)(i), which deals with gifts to certain registered charities, the Crown or a municipality. I also do not discuss the recent changes dealing with gifts of medicine by certain Canadian corporations to certain registered charities that receive support from CIDA.

⁸⁷ *Museums Act*, *supra*, note 80.

⁸⁸ Section 32 of the CPEIA, *supra*, note 7.

⁸⁹ This is the reference to the types of cultural objects for which increased tax incentives are available to donors.

⁹⁰ Section 207.3.

⁹¹ Section 207.4.

As discussed below, institutions that receive gifts of cultural property are required to issue official receipts. The type of receipt will depend on whether the institution is a “registered organization” or an “other recipient of a gift”.

International Issues Involving Qualified Donees

Only gifts made to qualified donees are eligible for tax relief under the Act, without regard to the Treaty or special cases involving commuters, as discussed below. This means that Canadian taxpayers can generally donate only to a limited group of non-Canadian organizations if they wish to qualify for a Canadian tax relief. This is the basis for the concept of “qualified” donee” which is a relatively straightforward mechanism to determine the entities to which qualifying gifts can be made and which must, in turn, issue official receipts containing prescribed information.

As a result, other organizations outside Canada cannot offer tax relief for gifts from Canadian taxpayers and frequently this results in the formation of a Canadian fundraising entity, such as a “Friends of” registered charity, which will typically operate as a charitable organization, and enter into an agency, joint venture or other agreement with the foreign organization.

However, there are some exceptions for gifts made to charitable organizations in the United States, under the Treaty, and for gifts by commuters. Under paragraph 6 of Article XXI of the Treaty, for purposes of Canadian taxation, gifts made by a resident of Canada to an organization which is resident in the United States and generally exempt from tax in the United States, and could qualify in Canada to receive deductible gifts if it were created or established and resident in Canada, can be treated as gifts to a registered charity. CRA has confirmed that this does not go so far as to treat the United States charitable organization as a qualified donee, but merely treats a gift made to such an organization as if it were a gift to a Canadian registered charity.⁹²

Relief available under paragraph 6 of Article XXI does not exceed the relief that would be available under the Act if the United States charitable organization were a registered charity, based on taxable income in the year. This is a result of the fact that under the Treaty, no relief is available in any taxation year with respect to such gifts (other than gifts to a college or university at which the Canadian taxpayer or a member of his or her family is or was enrolled) to the extent that the relief would exceed the relief that would be available under the Act if the only income of the Canadian taxpayer for that year were his or her income from sources in the United States. The exception from this restriction based on United States source income is for gifts to a “college or university” that is an organization that is resident in the United States that is generally exempt from United States taxation, if the taxpayer or a member of the family of the taxpayer is or was at any time enrolled as a student. In the technical explanation to the Treaty, “family” is defined to mean an individual’s brothers and sisters, spouse, ancestors, lineal descendants and adopted

⁹² CRA document no. 9428085, December 22, 1994.

descendants. The limit based on 75% of income applies to gifts to such colleges or universities.⁹³

There is a parallel provision in the Treaty for the benefit of United States taxpayers who make contributions to organizations that are resident in Canada and generally exempt from Canadian tax, if they could qualify in the United States to receive deductible contributions if resident there.

CRA generally treats all United States organizations that are exempt from tax under paragraph 501(c)(3) of the Internal Revenue Code as organizations to which such gifts can be made by Canadian resident taxpayers.⁹⁴

In limited circumstances a non-resident taxpayer can obtain relief from Canadian taxation by making gifts to non-Canadian organizations where the subject matter of the gift is real property or an interest in real property in Canada that is capital property. In the case of individuals, this is provided in subsection 118.1(6) and proposed subsection 118.1(5.4), which generally permit a Canadian taxpayer to elect that for a gift of capital property to certain qualified donees the “eligible amount” of the gift (as determined under the new split-receipting rules” in former Bill C-10) is an amount that is not less than the adjusted cost base of the property or greater than its fair market value. The corresponding provisions for corporations are set out in section 110.1(3) and proposed subsection 110.1(2.1).

The gift of real property situated in Canada must be made to a prescribed donee that provides an undertaking, in a form satisfactory to the Minister, that the property will be held for use in the public interest. The only non-resident charities that have been prescribed to date are Friends of the Nature Conservancy of Canada, Inc. and The Nature Conservancy, both of which are charities established in the United States.

The Act provides relief for Canadian commuters who work in the United States but pay tax in Canada.⁹⁵ This rule does not go so far as to make a United States charity a qualified donee, but it does provide relief in limited circumstances to Canadian taxpayers who live near the border. This relief is not limited to income from United States sources, unlike relief under the Treaty.⁹⁶

There are special rules for Canadian taxpayers who have become resident in Canada and are subject to tax in Canada on world-wide income, and/or Canadian taxpayers who cease to be resident in Canada and thereafter are taxed in Canada on a more limited basis, if at all.⁹⁷

⁹³ *Charities Information Letter* CIL-1998-025, September 9, 1998.

⁹⁴ CRA document no. 9900795, April 21, 1999. This seems to be very generous, since merely qualifying for exemption under the Internal Revenue Code would not necessarily seem to require any finding that the United States organization is “charitable”.

⁹⁵ Subsection 118.1(9).

⁹⁶ CRA document no. 9924098, October 7, 1999.

⁹⁷ Section 114. Under subsection 2(1), a resident of Canada is taxable on world-wide income, even if it is not received in Canada. Under subsection 2(3), a non-resident of Canada is taxable in Canada on a more limited

The rules dealing with commuters do not depend on the identity of the recipient of a gift or on whether it is a qualified donee. In fact, for commuters, the assumption is that the United States organization will be a charity that need not be a designated foreign charity.

Qualified Donees and Tax Shelters

Since tax relief is available for a gift made to a qualified donee, a number of structures have been devised by promoters that attempt to provide a leveraged tax advantage, with the result that the amount reflected in an official receipt is generally greater than the amount that is actually paid by the donor to the qualified donee. CRA has made it clear for a number of years that it does not think these tax shelter arrangements are effective and has instituted an extensive audit program and is aggressively challenging many, if not all, of these arrangements.

The proposals introduced in December, 2003 dealing with so-called “buy low-donate high” arrangements signalled an offensive by CRA to attack what it considers inappropriate tax shelters. In this paper I do not deal with the mechanics of such tax shelters and simply note that these arrangements assume a gift is made to a qualified donee. In many circumstances, the qualified donee is not a registered charity. Since only registered charities and RNASO’s are subject to specific sanctions in Part V (and RCAAAs are subject to only limited sanctions), it follows that other qualified donees, particularly listed foreign universities and designated foreign charities, would be more attractive participants from the perspective of promoters and donors.

I understand that in the early years, many of the tax shelter programs involved qualified donees that were not registered charities and included, for instance, RCAAAs, listed foreign universities and in some cases, Indian Bands, based on the *Otinaka* decision, prior to the *Tawich* decision (and prior to the proposed amendments in former Bill C-10 that will include municipal bodies performing a function of government in Canada in the list of qualified donees).

A “tax shelter” for purposes of the Act includes any property in respect of which it is represented that the acquisition of the property will, within four years of acquisition, generate a combination of tax credits or deductions that will be equal to or greater than the cost of the property (subject to certain adjustments described as “prescribed benefits”).⁹⁸ A tax shelter also includes a “gifting arrangement” under which it is represented that a person would, if the person enters into the arrangement, make a gift to a qualified donee of a property acquired under that arrangement. The Act prohibits a person from selling a tax shelter before the Minister has issued an identification number for that tax shelter.⁹⁹

basis. In addition, there is a separate tax on “passive” income paid or credited to a non-resident of Canada under Part XIII.

⁹⁸ Subsection 237.1(1).

⁹⁹ Subsection 237.1(4).

In addition to the definition of tax shelter, other definitions, including “limited-recourse debt” are also relevant.¹⁰⁰ The tax shelter rules have been amended on several occasions, with specific reference to donation structures involving gifts to qualified donees. At one time, the definition did not include a tax credit rather than a tax deduction. This was rectified through an appropriate amendment to the definition several years ago.

CRA has made it clear, and the Courts have confirmed, that merely obtaining an official income tax receipt does not provide any assurance to a donor that a gift has been made or that the eligible amount shown on the receipt will be recognized by CRA or by a Court. The proposals in former Bill C-10 will, among other things, require the determination of the adjusted cost base of certain property, and that adjusted cost base will become the basis for determining the eligible amount of a gift, regardless of its fair market value otherwise determined. This is expressly designed to enable CRA to combat those situations in which donors, promoters and qualified donees were relying on valuations of property that had been purchased at a price that was below an appraised amount, taking the position that the purchase price was less than fair market value.

A variety of arrangements will be treated as tax shelters and a number of proposed amendments in former Bill C-10 are designed to combat what CRA perceives to be inappropriate structures.¹⁰¹

From the perspective of qualified donees other than registered charities, RCAAAs and RNASOs, there seems to be little that CRA can do as a practical matter, given its lack of jurisdiction over those qualified donees, to prevent their participation in tax shelters. CRA has said it will continue to deny relief to donors and may assess civil penalties against promoters. I have been advised in informal discussions with officials of CRA that although it may be “somewhat more challenging” to obtain information or apply punitive sanctions, CRA has a wide variety of tools and will use all sanctions available against qualified donees, whether registered charities or RCAAAs or not, to curb abusive donation tax shelters. In particular, CRA has confirmed that donors and promoters participating in tax shelters involving foreign qualified donees risk having their donations allowed (in the case of donors) and being subject to penalties.

¹⁰⁰ Section 143.2. For a discussion of the limited-recourse debt rules see *Tolhoek v The Queen*, 2008 FCA 128 (FCA) and *Sherman v The Queen*, (TCC) unreported, at the date of writing, docket: 2005-1604 (IT)G. See also proposed subsections 248(32) and 248(34) to be added by the successor to Bill C-10, which include in the amount of an advantage, and therefore reduce the eligible amount of a gift by, the amount of limited recourse debt determined under subsection 143.2(6.1).

¹⁰¹ See for instance, CRA News Release, “Beware of Tax Shelter Gifting Arrangements”, August 13, 2007 and CRA Taxpayer Alert, “Warning: Participating in Tax Shelter Gifting Arrangement is Likely to Result in a Tax Bill!”, August 13, 2007. See also Registered Charities Newsletter No. 29, Winter 2008, in which CRA states that it has reassessed over 26,000 taxpayers and denied about \$1.4 billion in donations claimed, another 20,000 taxpayers, involving \$550 million in donation claims, are being reassessed and audits are beginning on arrangements involving over 50,000 additional taxpayers. CRA has noted that the three common types of tax shelter arrangements are “buy low – donate high” arrangements, “gifting trust” arrangements and “leveraged cash” donations. It also noted that new arrangements are being marketed that claim to be different from those for which CRA has previously issued warnings and it reiterates its warning that taxpayers should be wary of all arrangements that promise a donation receipt in excess of the cash payment.

Compliance Issues

As discussed above, the compliance provisions in the Act do not contain any special rules dealing with qualified donees other than registered charities, RCAAAs and RNASOs. The revocation provisions and intermediate sanctions in Part V apply only to registered charities and indirectly, by way of the provisions dealing with RNASOs, to them as well. There is no revocation tax applicable to a RCAA.

I understand that CRA would likely take the position that a RCAA that has entered into allegedly inappropriate arrangements, such as a tax shelter, would be regarded as having ceased to be organized and operated exclusively for purposes other than profit or as having ceased to be an organization whose primary purpose and primary function were the promotion of amateur athletics in Canada on a nation-wide basis, so that it would no longer be eligible for registration. In that event, CRA could take revocation proceedings

Presumably, CRA would take the position that a low-cost housing corporation had ceased to be eligible for exemption and therefore had ceased to be a qualified donee, if it engaged in conduct such that it was no longer constituted exclusively for the purpose of providing low-cost housing accommodation for the aged. For instance, participation in an allegedly inappropriate tax shelter arrangement could cause CRA to take this position, and allege that gifts made to the corporation were not eligible for tax relief and that the corporation itself was no longer exempt. In that event, the loss of exempt status would result in the application of subsection 149(10), as discussed below. In late 2007, CRA suspended the registered status of International Charity Association Network, a registered charity.¹⁰² The sanction of suspension is not available against a qualified donee that is not a registered charity, such as a RCAA and a low-cost housing corporation. Under subsection 149.1(6.4) of the Act, Part V applies with such modifications as the circumstances require to a RNASO as if it were a registered charity that is a charitable organization. As a result, all of the sanctions that can be applied against a registered charity can be applied against a RNASO, including suspension.

The provisions in the Act dealing specifically with registered charities (and RNASOs), such as the disbursement quota, limitations on the acquisition and retention of non-qualified investments, carrying on business, engaging in political activities, the provision of undue benefits, excess business holdings, etc. do not apply to a RCAA or to any of the other qualified donees. This may result in abuses and CRA would presumably attack them with the available weapons, which are not as extensive as those that are available against registered charities and RNASOs.

Registered charities that are corporations are required to file an annual form T3010A but are not required to file a T2 return ordinarily required for a corporation.¹⁰³ RCAAAs must

¹⁰² 2008 FCA 62 (FCA), affirming an earlier decision of the Tax Court on procedural grounds. The practical result of this decision is that the ability of the charity to issue receipts was suspended, prior to revocation of registration. In 2008, CRA has revoked the registration of several charities on the basis that they participated in tax shelters and issued official receipts that were not in accordance with the Act or contained false information, or otherwise did not comply with the requirements of the Act.

¹⁰³ Paragraph 150(1.1)(a).

file an annual form T2052, which is quite straightforward, compared to the T3010A. Although it is not clear, it appears that a registered charity that has been formed as a trust is not required to file an annual T3 return, because it is not taxable, and it is required to file a form T3010A.¹⁰⁴ The T3 return itself and the T3 guide clearly require some trusts that are exempt from tax to file a T3 return, such as a NPO that is a trust. A NPO that is a trust may also be required to file form T1044, the “Non-Profit Organization (NPO) Information Return”. CRA has confirmed that registered charities, RCAAAs and RNASOs are not required to file form T1044.¹⁰⁵ CRA has also stated that a corporation incorporated exclusively to provide low-cost housing for the aged is not required to file form T1044 as long as no part of its income was payable to or otherwise available for the personal benefit of any proprietor, member or shareholder, and it is therefore exempt under paragraph 149(1)(i). Corporations that are not registered charities, such as RCAAAs and low-cost housing corporations, are required to file a T2 return, despite being exempt from tax.¹⁰⁶ Associations that are not corporations or trusts do not seem to be “entities” as contemplated in the definition of “person”, but CRA apparently treats them as persons that are required to file form T1044 under subsection 149(12).¹⁰⁷

A number of record keeping requirements apply. In this paper, I deal only with records that must be kept under the Act. There are other record keeping requirements, depending on the particular qualified donee.¹⁰⁸ CRA generally does not specify the particular records that must be kept but notes that persons required to keep records include registered charities, NPOs, RCAAAs, universities, colleges, municipal corporations, hospitals and school authorities. This list seems to be somewhat redundant, since generally universities, colleges and hospitals will likely also be registered charities.

A RCAA must maintain records that confirm its qualification for registration under the Act and that will allow CRA to verify all charitable and athletic donations that entitle donors to tax credits or deductions, as well as minutes of meetings of executives (presumably directors in the case of corporations and trustees in the case of trusts), minutes of meetings of members and copies of documents and by-laws that govern the organization. CRA has stated that books and records that must be kept include those that will verify that the purposes and activities continue to satisfy the requirements of the Act for the particular qualified donee, written agreements, contracts, annual reports, bank statements, expense accounts, investment agreements, accountant’s working papers, payroll records, promotional materials and fund raising materials. In addition, source documents such as

¹⁰⁴ The exemption from filing in paragraph 150(1.1)(b) for certain individuals (which will include a trust) appears to apply to a trust that is a registered charity. The T3 return is also an information return for purposes of section 204 of the regulations. CRA states in its T3 Guide, T4013(E), that certain trusts need not file an information return. I have been advised in informal discussions with officials of CRA that a registered charity is not required to file a T3 return.

¹⁰⁵ T4117(E).

¹⁰⁶ See CRA T2 Guide, T4012(E).

¹⁰⁷ See the discussion about “persons”, *supra*, under “RCAAAs”.

¹⁰⁸ For a discussion of those record keeping requirements, see, for instance, RC4409(E), “Keeping Records”.

invoices, vouchers, formal contracts, work orders, delivery slips, purchase orders and bank deposit slips must be kept.¹⁰⁹

If a RCAA or other qualified donee has employees, or is required to collect or remit GST, other compliance obligations will arise. It is beyond the scope of this paper to deal with those compliance requirements.

If a listed foreign university or a designated foreign charity operates in Canada in a manner that exposes it to Part I tax in Canada, it will have additional compliance obligations, unless it is exempt under the Treaty or a reciprocal tax treaty between Canada and the country in which it is resident. Where an exemption is claimed under a treaty because the foreign organization has no permanent establishment in Canada, it will generally be required to file a T2 return in any event, if it is a corporation.¹¹⁰

In Ontario, a corporation that is exempt from federal tax under the Act as a municipality in Canada or municipal or public body performing a function of government in Canada, a registered charity or a low-cost housing corporation, and certain other corporations, are exempt from provincial tax.¹¹¹ There is a similar exemption for a NPO governed by subsection 149(1)(l) of the Act, with specific rules that apply if the corporation distributes any part of its income to a proprietor, member or shareholder, in which event the exemption is no longer available. A corporation that is exempt from the payment of tax under section 57 is not required to file a corporation tax return.¹¹²

Receipting Donations

The Act requires a donor to submit proof that a donation has been made, to claim a deduction. Although there is one jurisprudential exemption to this requirement, in a case involving a testamentary gift of a remainder interest in an estate,¹¹³ the general requirement

¹⁰⁹ *Charities Summary Policy* CSP-B01, October 25, 2002 (revised June 14, 2007), and the references listed therein. See also CRA website "Books and Records", which deals with the retention period, the means of keeping records, including electronic format and the place where the records must be maintained.

¹¹⁰ See, for instance, CRA document no. 2005-0139001R3, *supra*, at note 15, in which a foreign organization received confirmation that it was exempt as a NPO but was required to file a T2 return.

¹¹¹ *Corporations Tax Act*, *supra*, note 76, section 57.

¹¹² *Ibid.*, section 75.

¹¹³ *O'Brien Estate v. MNR*, 91 DTC 1349 (TCC). The Tax Court held that the legislators could not have intended to deny a deduction in special circumstances where a gift is made to a charity by will and deemed to have been made in the year of death by subsection 110(2.1) because the charity had not in fact received the residual interest in the property and would not receive it until the death of the person with the intervening life interest. The Court stated that the form of receipt required by paragraph 110(1)(a) need not be filed as a condition of the taxpayer's entitlement to a deduction for the years in which the gift is deemed to have been made since, since to hold otherwise would permit the administrative requirement for a receipt to thwart what it regarded as the obvious substantive purpose of subsections 110 (2.1) and 110 (1.2). The reference now is to subsection 118.1(5) rather than subsection 110(2.1) and 110 (1.2), which deems a gift by will to be made immediately before death.

is that a receipt must be filed with the return for the year in which the deduction in computing income or claimed non-refundable tax credit is claimed or made.¹¹⁴

Part XXXV of the regulations deals with receipts for donations and gifts. It defines “official receipts” as a receipt for purposes of subsection 110.1(2) or (3) or 118.1(2), (6) or (7), containing information required by sections 3501 and 3502 of the regulations.

The regulations define “registered organization” as a registered charity, a RCAA or a RNASO and define “other recipient of a gift” as a person to whom a gift is made by a taxpayer referred to in subparagraphs 110.1(1)(a)(iii) to paragraphs 110.1(1)(b) and (c) and subparagraph 110.1(3)(a)(ii), paragraphs (c), (g) of the definition “total charitable gifts” in subsection 118.1(1), the definition “total Crown gifts in subsection 118.1(1), paragraph (b) of the definition “total cultural gifts” in subsection 118.1(1) and paragraph 118.1(6)(b). Reducing this to relatively plain English, the second term means organizations other than registered charities, RCAA's and RNASO's.

There is no time limit within which official receipts must be issued although CRA has “suggested” that they be issued by the end of February in each year, to provide donors with the information they require in order to file their returns for the year in which the gift was made.¹¹⁵ In a former information circular, which has now been cancelled, CRA had listed a number of situations in which official receipts should not be issued by a qualified donee. Notwithstanding the cancellation of that circular, and recognizing that many of the statements in it have now been repeated in other publications, the following situations should be recognized as those in which official receipts should not be issued:

- (a) payments for membership that convey an advantage of material character to the member;
- (b) tuition fees, except as expressly permitted, or other payments for which any right, privilege, benefit or advantage may accrue to the donor (the proposed new rules dealing with split-receipting in former Bill C-10 also addressed this point);
- (c) amounts received by loose collection; and
- (d) donations of services.

CRA has published a series of guide books and other helpful information dealing with registered charities, receipting, bookkeeping, auditing and other general issues, that to some extent are also relevant to other qualified donees. RC4108, “Registered Charities and the *Income Tax Act*” may be of some assistance to other qualified donees in dealing with receipts and the eligible amount of a gift, under the new split-receipting rules.¹¹⁶ CRA has

¹¹⁴ See, for instance, subsection 118.1(2) which states that a gift shall not be included in total charitable gifts, total Crown gifts, total cultural gifts or total ecological gifts of an individual unless the making of the gift is proven by filing a receipt that contains prescribed information.

¹¹⁵ CRA document no. 2003-0181975, June 27, 2003.

¹¹⁶ See also CRA Technical News No. 26 and CRA website, “What information must appear on an official donation receipt?”, which contains detailed information as well as four samples of official receipts, dealing with

adopted an administrative policy that in appropriate circumstances permits anonymous donations. If appropriate procedures are followed, a donor can make a gift to a qualified donee through an intermediary, such as a lawyer, to whom the official receipt will be issued, as long as it can be established that the donor was the source of the funds.¹¹⁷

In this paper, I do not deal at any length with the implications of the changes dealing with split-receipting or any of the other changes in former Bill C-10 or earlier amendments that are generic in nature and not specific to qualified donees.

Since the categories of qualified donees include organizations outside Canada, it is not always a simple matter to ensure that they will provide a sufficient form of official receipt as required by section 3501 of the regulations. Presumably, at least for significant donors, those qualified donees will be prepared to issue receipts, even if on a "one-off" basis, to satisfy their donors and therefore maintain a potential source of future support. While in this paper I do not deal at length with the requirements for receipts, since they are equally applicable to registered charities and RCAAAs, on the one hand, and other qualified donees, on the other hand, it is worth noting that the substantive information required is largely the same. Under sections 3501(1) and 3501(1.1) of the regulations, every official receipt, whether issued by a registered organization or "another recipient of a gift" must contain a statement that it is an official receipt for income tax purposes and show clearly, in a manner that cannot readily be altered, the following information:

- (a) the name and address in Canada of the organization as recorded with the Minister (in the case of non-registered organizations such as RCAAAs, the requirement is simply to provide the name and address);
- (b) the serial number of the receipt;
- (c) the place or locality where the receipt was issued;
- (d) where the donation is in cash, the day on which or the year during which it was received;
- (e) where the donation is property other than cash, the day on which it was received, a brief description of the property and the name and address of the appraiser, if an appraisal was done;
- (f) the day on which the receipt was issued, if that day differs from the day on which the donation was received;
- (g) the name and address of the donor, including the first name and initial in the case of an individual;

cash gifts with no advantage, cash gifts with an advantage, non-cash gifts with no advantage and non-cash gifts with an advantage.

¹¹⁷ *Charities Information Letter* CIL-1994-006, May 20, 1994.

- (h) the amount of a cash donation or, where the donation is a gift or property other than cash, the eligible amount of the donation (this is a result of proposed changes in former Bill C-10);
- (i) the signature of a responsible individual authorized by the qualified donee to acknowledge donations; and
- (j) the name and internet website of CRA.

It has been held that if the qualified donee fails to provide the required information in the official receipt, the claim by the taxpayer for a deduction or credit is invalid.¹¹⁸ There are technical requirements for signatures on receipts, for replacing damaged or lost receipts and administrative policies dealing with facsimile signatures, internet donations and other technical matters, which are not limited to registered qualified donees.

The new split-receipting rules, and in particular those deeming the fair market value of a gift in kind to be less than its actual fair market value if the property was acquired within the previous three years or the previous ten years, depending the circumstances, will apply for gifts to all qualified donees and not merely registered qualified donees such as registered charities and RCAAAs.

This could present some problems for foreign organizations, which will not necessarily be acquainted with the niceties of Canadian tax law. The fact that those organizations are immune from sanctions under the Act certainly does not help in inducing them to comply.

There are some technical concerns about the proposals in former Bill C-10, including those that exclude certain transactions from some of the new rules (such as the rule that “saves” an otherwise tainted gift because of consideration, by overruling the common law result, if the amount of an advantage does not exceed 80% of the fair market value of the property otherwise determined or the transferor can establish to the satisfaction of the Minister an intention to make a gift). For instance, proposed new subsection 248(40) will provide that subsection 248(30), which provides that an advantage in respect of a transfer of property does not in and of itself disqualify the transfer from being a gift to a qualified donee in certain circumstances, will not apply in respect of a gift received by a qualified donee from a registered charity. Some commentators have noted that the already very complex disbursement quota rules are made even more complex (and perhaps not effective) as a result of this proposal.

CRA has stated that where relief is sought for a gift to a United States charitable organization under the Treaty, a receipt need not necessarily be filed but should be obtained and retained in case CRA requires proof that the gift was made.¹¹⁹

¹¹⁸ *Trottier v. The Queen*, 2004 UDTc 130 (TCC). I have been advised in informal discussions with officials of CRA that it has no specific policies on the allowance or disallowance of claims for gifts made to “non-Canadian” organizations and it reserves the right to challenge a gift. I understand many foreign organizations or other qualified donees approach CRA and seek approval of sample receipts.

¹¹⁹ CRA Registered Charities Newsletter, Special Release No. 6-1, Fall 1996.

Non-Tax Issues

Unless a qualified donee has purposes that are charitable at common law, and thus for instance, subject to the jurisdiction of an appropriate government agency (the Public Guardian & Trustee (“PGT”) in Ontario), the non-tax issues will generally be fairly straightforward. These will include, for instance, corporate record keeping and compliance, an audit of the financial statements where appropriate, and filing appropriate notices with relevant government agencies, at least in the case of corporations.

If a qualified donee is charitable at common law, as might be the case with a low-cost housing corporation, it might find that it is subject to the jurisdiction of the PGT in Ontario and equivalent authorities in other provinces.¹²⁰ The *Charitable Gifts Act* provides that wherever an interest in a business that is carried on for profit is “given to or vested in” a person in any capacity for any religious, charitable, educational or public purpose, the person is required to dispose of that interest in excess of 10%, although there is a seven year grace period and there are also provisions under which an extension can be obtained by way of court order in appropriate circumstances.

This issue of provincial law arose in the *Laidlaw Foundation* case,¹²¹ one of the leading Canadian cases dealing with the pursuit of amateur sports and whether that pursuit is a charitable purpose under the law of Ontario. The main issue was whether a charitable foundation properly expended funds by making grants to RCAAAs. The Divisional Court stated that promotion of amateur athletic sports under controlled conditions promotes health and is akin to those cases which have decided that the promotion of health is a charitable purpose and participation in organized competitive amateur sports is in itself educational, both in the sense of training and discipline and maintenance of a healthy body and in respect to education resulting from the interchange of people from different cultures in cases where the competitions involve more than local participants.

While *Laidlaw* also dealt with the fact that the *Charities Accounting Act*¹²² broadens the common law definition of “charitable purpose”, to include public benefits that would not necessarily be charitable at common law, it seems clear that there is now a disconnect between the law in Ontario and the federal law of charities resulting from the decision of the Supreme Court of Canada in *A. Y. S. A.*

From a structural viewpoint, other issues arise, particularly with respect to RCAAAs and fundraising. It is not clear whether a RCAA can hold an endowment fund, either by using restricted gifts received for that purpose or by creating its own restrictions, in light of the requirements under paragraph 149(1)(l) for all NPOs and the specific requirements in the definition of RCAA dealing with its primary purpose and primary function. It seems that

¹²⁰ For instance, the definition of “charitable purpose” is broader than the common law definition, and legislation such as the *Charitable Gifts Act*, R.S.O. 1990, c. C.8. may be applicable.

¹²¹ *Re Laidlaw Foundation* (1984), 13 D.L.R. (4th) 491 (Ont. HCJ Div. Ct.)

¹²² R.S.O. 1990, c. C.10.

the maintenance of an endowment fund, particularly at the direction of a donor, is not inconsistent with a primary purpose and primary function of promotion of amateur athletics and the accumulation (or retention) of funds should not be regarded as inappropriate, using the tests set out in IT-496R and based on the decisions in the *CBIA* and *BBM* cases.

Municipalities will be subject to the usual requirements of municipal law, which I do not discuss in this paper. Similarly, municipal bodies performing a function of government in Canada will be subject to their own non-tax compliance requirements. This would include for instance, First Nations groups such as Indian Bands.

It is beyond the scope of this paper to discuss the various rules dealing with anti-terrorism, but I note that the provisions in the Act are limited to registered charities.¹²³

Since only registered charities (and by extrapolation, RNASO's) are subject to the revocation sanction, these rules do not apply to other qualified donees, such as RCAAAs or low-cost housing corporations and particularly do not apply to foreign charities such as listed foreign universities or designated foreign charities. To the extent the registered status of a charity is thought to be an inducement to assist terrorist fundraising, there is obviously a gap in the legislation.

Exemptions from Tax

As long as a RCAA remains registered, and as long as a low-cost housing corporation meets the requirements in paragraph 149(1)(i), it will continue to be exempt and continue to be a qualified donee. Other qualified donees, particularly those that are not resident in Canada, but have Canadian operations, may be required to seek other bases for exemption from tax in Canada.

Parts IV, IV.I, VI and VI.I do not apply to a corporation while it is exempt from tax under section 149.¹²⁴ Part IV deals with tax on dividends received, Part IV.I deals with tax on dividends paid, Part VI deals with capital tax on certain financial institutions and Part VI.I deals with a tax on corporations paying certain dividends. It is unlikely that any of these other provisions in the Act will be relevant since qualified donees that are corporations will generally be exempt under section 149 as noted above.

CRA has confirmed in several technical interpretations that a non-resident NPO can be exempt from tax under Part I of the Act, as long as it is not in the opinion of the Minister a charity and therefore disqualified from being exempt. In addition, there are exemptions under the Treaty for certain United States-based charitable organizations that meet certain criteria.

¹²³ For instance, subsections 171(3.1) and (4.1), which deal with the *Charities Registration (Security Information) Act*. See also Registered Charities Newsletter No. 12, Spring 2002. For a very interesting and detailed discussion of some of the issues arising with respect to qualified donees other than registered charities, see Blake Bromley, "Funding Terrorism and Charities", a paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. That paper is available at www.beneficgroup.com.

¹²⁴ Subsection 227.1(14).

Tax is imposed on a NPO that is a corporation (and thus on an incorporated RCAA) if it ceases to be exempt and has unrealized gains. Where a corporation ceases to be exempt (there is a similar rule for a corporation that first becomes exempt, which I do not discuss here) from tax under Part I, it is deemed to have a new tax year beginning at that time.¹²⁵ There are rules for the computation of income and a deemed disposition of each property owned by the corporation at its fair market value and a deemed reacquisition at that value immediately after the relevant time. This requires the corporation to recognize all accrued gains in the year in which it ceases to be exempt.¹²⁶ The corporation is for certain purposes deemed to be a new corporation as well. There is no equivalent deeming provision for a NPO that is not a corporation. Under provincial law, there are similar provisions, although in Ontario the tax is more punitive, since it can in some cases tax income that was previously exempt.¹²⁷ There are separate rules in Ontario for taxation on winding up or discontinuance of a business if the corporation has distributed any of its income or distributed or otherwise appropriated any of its funds or property for the benefit of any proprietor, member or shareholder on the winding up or discontinuance of its business.¹²⁸ As is the case under the Act, in computing income, taxable capital gains are excluded.¹²⁹

Conclusion

The regimes for qualified donees other than registered charities raise a number of issues, which are relevant to both donors (or organizations such as registered charities supporting qualified donees) and the qualified donees themselves. Some qualified donees are subject to Canadian law, such as low-cost housing corporations, municipalities and municipal or public bodies performing a function of government in Canada. Others, such as listed foreign universities, designated foreign charities and the UN and its agencies are outside the regulatory reach of Canada, although clearly listed foreign universities and designated foreign charities would be well-advised, if they wish to continue their status as such, not to provoke adverse reactions from CRA.

¹²⁵ Subsection 149(10).

¹²⁶ CRA has confirmed that it is not necessarily abusive if subsection 149(10) is avoided through creative structuring. See, for instance, CRA document no. 2006-0198211R3, which dealt with an indirect acquisition of assets by a municipality, avoiding tax that otherwise would have been payable by a corporation, if its shares had been acquired by the municipality and the corporation had therefore become exempt.

¹²⁷ *Corporations Tax Act*, supra, note 76, subsection 57(2), which provides that where a corporation that would be exempt otherwise as the equivalent of a NPO under the ITA has distributed any part of its income or distributed or otherwise appropriated any of its funds or property to or for the benefit of any proprietor, member or shareholder, the corporation is liable to pay tax for the taxation year in which the distribution is made and for subsequent years, and in computing its income for the year in which the distribution is made, it is required to include all of the income from previous years. This seems to create an open ended potential liability back to the date of incorporation.

¹²⁸ *Ibid.*

¹²⁹ *Corporations Tax Act*, supra, note 76, subsection 57(3).

Donors wishing to make gifts to qualified donees have more protection when dealing with RCAAAs and RNASOs, because registration is a form of guarantee, as long as the other requirements for a gift are met. On the other hand, gifts to other qualified donees depend on the facts, without any assurance that the necessary factual situation is present. Comfort is generally available where a foreign university is listed in Schedule VIII or a foreign charity has been identified by CRA as having received a federal Crown gift, but is less apparent in the case of the UN or its agencies.

In cases involving Crown agents and municipal or public bodies performing a function of government, there may be doubt and it would be prudent for donors to proceed carefully if that is the case.

While the bulk of financial support from donors in Canada is provided to registered charities, I have tried to provide some useful information about alternatives for donors, and the choice of qualified donees, both in Canada and outside Canada. There are a number of restrictions and potential limits where the qualified donee is not registered under the Act. Where it is registered, until that registration is suspended (in the case of a RNASO that is treated as a registered charity) or revoked (in the case of a RCAA or a RNASO) donors need not worry about the status of the qualified donee and can focus on the nature of the financial support itself and whether it meets the requirements in the Act. Where support is provided to other qualified donees, such as municipal or public bodies performing a function of government or a low-cost housing corporation, due diligence will be required and it would be prudent to check with CRA in many cases to confirm that an organization is a qualified donee. There is some relief for Canadian commuters and some additional relief under the Treaty, limited by United States source income, unless the donor qualifies under the "college or university" exception.

Many qualified donees are not regulated at all in Canada and others are subject to a much less stringent regime than registered charities. This has led in some cases to the selection of qualified donees as participants in tax shelters. Donors will be well advised to heed the warnings from CRA if participating in aggressive tax shelters.

It is difficult to find a cohesive overall policy in the way in which the concept of qualified donee has evolved, particularly with reference to donations by Canadian taxpayers to foreign charities. There seems to be a great deal of arbitrariness in the selection of foreign charities that receive federal Crown gifts and the narrow concept of a gift to a college or university in the Treaty is in many cases overridden by the more generous treatment for gifts made to a foreign university listed in Schedule VIII.