

Changes to the Law in 2006 Affecting Charities & Looking Ahead to 2007

In 2006 both legislative changes and court decisions impacted the body of Canadian law that affects charities. This article (written as of January 15, 2007) looks at some of these decisions and legislative changes, including some changes to the Income Tax Act, Excise Tax Act (i.e. GST), and Lobbying Act.

A) Changes to Income Tax Act Legislation

1) Gifts of listed securities or ecological lands.

These two giving incentives were first introduced on May 2, 2006 in the federal budget and became law on June 22, 2006 with an effective date of May 2, 2006. As a result of these changes in the Income Tax Act (ITA), the capital gain on either listed securities or ecological lands is no longer subject to any tax if the donor gifts the securities or lands to a registered charitable organization or public foundation. (This provision does not extend to private foundations). To take advantage of this provision, a gift of ecological lands must be given to a pre-approved organization. If a charity does not have the internal capacity to liquidate publicly listed securities, the CCCC Community Trust Fund is available to facilitate such gifts of shares between donors and charities.

More information on the donation of listed securities is available in:

- CCCC's 2006 Bulletin, Issue 4; and
- CCCC's News Update at <http://www.cccc.org/contents.php?area=y&id=6510&nid=45>.

2) Receipting Gifts over \$5,000

Proposed amendments to the ITA in July, 2005 would have required charities to ask particular questions of a donor before issuing him or her a charitable tax receipt over \$5,000. The questions were intended to help the charity in determining whether the amount on the receipt should be reduced (see CCCC's 2005 Bulletin, Issue 5 for more background). CCCC and others were concerned about the burden this rule imposed on charities. The Department of Finance said it was prepared to recommend that the Minister withdraw this particular proposed rule in a November 22, 2005 letter. This provision was in fact withdrawn and replaced in the proposed legislative changes released by the Government on November 9, 2006. (Note: Notwithstanding this development, charities must still comply with the many remaining split-receipting rules.) It is not clear yet what the replacement clause (ITA s. 248(40)) means or how it will work, but CCCC will make that information available as clarity is provided. The bulk of the November 9, 2006 legislative changes simply brought forward ITA changes that have been proposed over the years, but have not yet been formally made law (for example all of the other split-receipting rules in ITA s. 248).

More information on split-receipting is available in:

- CCCC's 2005 Bulletin, Issue 5; and
- CCCC's News Update at <http://www.cccc.org/contents.php?area=y&id=6510&nid=38>.

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B) Court Case Decisions & the Income Tax Act

1) *Benqueses et al. v. Her Majesty the Queen*, 2006 T.C.C. 193

In this case a father sent large sums of money to an Educational Foundation as loans on behalf of his children. The Foundation was to repay the loans to the children, with any amounts that a particular child forgave to be considered that child's donation to the Foundation. Various children did forgive parts of the loans and claimed those amounts as donations. The Minister of Revenue alleged an abuse of the ITA and denied the donation claims on the basis that the father and not the children had made a gift to the Foundation. The Tax Court of Canada judge was persuaded on the facts of this particular case, that the children had met the criteria of giving a gift and consequently of making a donation. While not the point of this case, the decision supports the position that the forgiveness of a loan without an exchange of cheques can be treated as a gift eligible for a charitable tax receipt.

For the full decision see:

- <http://decision.tcc-cci.gc.ca/en/2006/html/2006tcc193.html>.

2) *Minister of National Revenue v. Redeemer Foundation*, 2006 FCA 325

Canada Revenue Agency's authority to audit individuals and organizations including charities is set out in the ITA. Part of this provision requires Canada Revenue Agency to get a court order before asking for documents during the audit that relate to unnamed persons (e.g. donors). This provision is generally seen as protecting individuals' privacy and putting a check on the audit powers of Canada Revenue Agency and their ability to go on a 'fishing expedition'. The Federal Court Trial Division in 2005 held that Canada Revenue Agency had acted inappropriately in asking the Redeemer Foundation for information relating to its donors, and ordered Canada Revenue Agency to return certain information received from the Foundation and to vacate various donor reassessments of the Foundation's donors based on information received. Canada Revenue Agency appealed this decision to the Federal Court of Appeal. The Federal Court of Appeal in October 2006 came to the exact opposite decision and determined that it was appropriate for Canada Revenue Agency to ask for the documents in question, and that they were not obliged to first obtain a court order. An application for leave to appeal this decision to the Supreme Court of Canada has been filed.

As an aside, Canada Revenue Agency has increased its budget for audits of charities and is aiming to double the current number of charity audits conducted to approximately 1% of the roughly 80,000 charities in Canada.

For the decision see:

- <http://decisions.fca-caf.gc.ca/en/2006/2006fca325/2006fca325.html>.

3) *Nassar et al v. The Queen*, 2006 CAF 58

This was one of multiple cases over many years that involved false receipts issued for gifts over several years to the Order Antonien Libanais de Maraonites. The Order had issued charitable tax receipts that were either an average of five times greater than the amount of the donation or for the full amount of cash amounts received but where 80% of the cash was returned to the donor. The Order's charitable status was revoked effective September 18, 1999. Not surprisingly these donation claims were denied and penalties were assessed, and in this particular case these results were upheld. This group of cases was an unsuccessful appeal of a 2004 Tax Court of Canada decision which upheld the Minister of Revenue's reassessment and refusal to accept these donations made to the Order.

For the full decision see:

- <http://decisions.fca-caf.gc.ca/en/2006/2006fca58/2006fca58.html>.

4) *Richert v. Steward's Charitable Foundation*, 2006 BCCA 9

This 2006 BC Court of Appeal decision upheld an earlier 2005 BC Supreme Court decision. The donor, Richert, had purchased a \$1,000 ticket for a fund-raising lunch. The Foundation issued Richert a charitable receipt with an eligible amount of \$855. They had reduced the ticket price amount by the value of the collective advantages, namely \$45 for the lunch and \$100 for a giveaway coffee table book. The donor was very upset by these deductions and wanted the \$1,000 back. His technical argument was that the \$1,000 was not a gift, but a transfer by mistake. The 'split-receipting' rules the Foundation followed were not disputed, with the judge commenting that it was reasonable for the Foundation to have followed these rules notwithstanding that the Federal Government has not formally made these rules part of the ITA. Note: it is not uncommon for ITA amendments to be applied retroactively to the date they were first introduced versus the date they actually became law. Richert was unsuccessful in getting the \$1,000 back. The practical lesson here is that charities should be up front about the eligible amount of the charitable tax receipt that the donor will receive.

For the decision see:

- <http://www.courts.gov.bc.ca/jdb-txt/ca/06/00/2006bcc0009.html>.

5) *Lepletot v. Minister of National Revenue* (March 28, 2006) 2006 F.C.A. 128

Bayit Lepletot in Canada was challenged on whether or not it carried out its own activities. Basically a Canadian charity is required to spend all of its resources on its own activities with one exception being a transfer to another qualified donee (typically another Canadian registered charity). Such transfers are deemed by the ITA to be expenditures on the charity's own activities. Charities, particularly those that do work overseas, often use agents or joint ministry arrangements in carrying out their activities.

Bayit Lepletot of Canada claimed it was 'carrying on the operation of three institutions for orphans in Israel' through an agent. The individual agent was part of the "Directorate in residence" of the related Israeli organization. The court stated that it found no evidence the agent exercised any control over this charitable work in his capacity as Bayit Lepletot Canada's agent, and consequently Bayit Lepletot of Canada was not carrying out its own activities. In the

appeal to the Federal Court of Appeal, the Federal Court stated that a registered charity must be able to show their agent is carrying on charitable work on its behalf, and that it is not enough to show that the agent is part of another charitable organization. Bayit Lepletot of Canada's charitable status was revoked on August 19, 2006. Charities working overseas must take care to show they are exercising real control and supervision over their foreign projects and that they have good records to substantiate this.

For the decision see:

- <http://decisions.fca-caf.gc.ca/en/2006/2006fca128/2006fca128.html>.

C) GST Legislation

1) The May 2, 2006 federal budget reduced GST/HST rates from 7%/15% to 6%/14% effective July 1, 2006. In addition to changing the percentage of tax to be charged, these changes will affect all charities' rebate calculations and rebate amounts. This transition seems to have taken place quite smoothly for charities. For more information on GST and these changes please see

For more information see the CCCC's News Update at:

- <http://www.cccc.org/contents.php?area=y&id=6510&nid=47>.

D) GST Court Case Decisions

1) As of December 18, 2006 it is clear that the courts do not see camping fees as a bundle of supplies to which the combined supply rule would apply (meaning the overall determination of the supply as not taxable would depend on the extent to which the taxable components of the bundle are an incidental part of the whole supply). In *Camp Mini-Yo-We Inc. v. The Queen*, the Federal Court of Appeal determined that the camping program was one supply, and as it included a component that however incidental was taxable on its own, the whole supply was taxable.

For more information on this issue please see the following CCCC News Updates:

- <http://www.cccc.org/contents.php?area=y&id=6510&nid=52>; and
- <http://www.cccc.org/contents.php?area=y&id=6510&nid=53>.

E) Lobbying Act

1) While lobbying is recognized as a 'legitimate activity', Parliament also states in the preamble to the Act that "it is desirable that public office holders and the public be able to know who is engaged in lobbying activities". Consequently this Act sets out: when someone is classified as a public office holder; when an organization is considered a lobbyist; when someone has to register as a lobbyist; and what information has to be filed.

Charities who 'lobby' the federal government are not exempt from this Act. While businesses and unions who lobby are subject to this Act, so are trusts, associations, charitable societies and charitable corporations. A charity might lobby using either a paid consultant lobbyist or an in-house lobbyist. If a 'significant part of an employee's duties' is lobbying then the most senior employee (i.e. CEO, President, Executive Director) of the organization must ensure that all those

involved in lobbying activities are registered. The term 'lobbying' has been very broadly defined, to basically communicating with a public office holder.

This Act was significantly amended in 2005 and again in 2006 by the *Federal Accountability Act*. Charities that qualify as lobbyists need to register and to meet regular reporting requirements. For a summary of when the Act applies, including the 2006 changes see CCCC's Bulletin 2006, Issue 4.

F) Looking Ahead to 2007

In contemplation of the 2007 federal budget, the Federal Government's House of Commons Standing Committee on Finance issued Pre-Budget Report in December 2006. The report made the following two recommendations in respect of the charitable sector. Whether they will actually be included in the 2007 federal budget remains to be seen.

RECOMMENDATION 20

The federal government amend the Income Tax Act to eliminate, on a five-year trial basis, the capital gains tax on donations of publicly listed securities and ecologically sensitive lands to private foundations. The extent to which charitable giving to these foundations has increased should be assessed after five years, and the measure should be made permanent if suitable.

The government should also amend the Income Tax Act to eliminate the capital gains tax on donations of real estate and land to public charities as well as to private foundations during the five-year trial period and beyond if deemed to be appropriate.

Finally, the government should allow donors to make charitable contributions for 60 days beyond the end of the calendar year for inclusion in the previous year's income tax return.

RECOMMENDATION 21

The federal government study the feasibility of a tax measure that would recognize and reward the hours of volunteer activity. This study should be completed no later than 30 September 2007.

For the full text of the report see:

- <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=187764>.

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