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Recent Income Tax Amendments Affecting Charities and Gift Planning

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OVERVIEW OF PRESENTATION

- **Overview of Proposed Changes to the *Income Tax Act***
- **Selected Highlights from the Revised Draft Technical Amendments of February 2004**
- **Selected Highlights from December 2004 Amendments re the March 2004 Budget**

This power point presentation consists of excerpts from a paper entitled "Recent Changes to the Income Tax Act Affecting Charities and Gift Planning" dated March 16, 2005, as well as Charity Law Bulletins #54, #55, #56, #59 and #61, all available at www.charitylaw.ca

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A. OVERVIEW OF PROPOSED CHANGES TO THE *INCOME TAX ACT*

- **December 20, 2002 Draft Amendments**
- **December 24, 2002 Income Tax Technical News No. 26**
- **February 28, 2003 Federal Budget**
- **December 5, 2003 Draft Amendments**
- **February 27, 2004 Revised Draft Technical Amendments**
- **March 23, 2004 Federal Budget**
- **September 16, 2004 Draft Amendments for March 2004 Federal Budget**
- **December 6, 2004 Ways and Means Motion – Bill C-33 (December 2004 Amendments)**

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B. SELECTED HIGHLIGHTS FROM THE REVISED DRAFT TECHNICAL AMENDMENTS OF FEBRUARY 2004

1. New Definition of Gift

- **The traditional common law definition of a gift requires:**
  - **The donor must have an intention to give**
  - **There must be a transfer of property**
  - **The transfer must be made voluntarily without contractual obligation**
  - **No consideration or advantage can be received by the donor**

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- **2002 draft amendments to the *Income Tax Act* create a new concept of "gift" for tax purposes which permits a donor to receive a tax credit under the *Income Tax Act* even though the donor receives a benefit, provided that the value of the property exceeds the benefit received by the donor**
- **However, the idea that a gift can provide a benefit back to the donor is foreign to the common law concept of a gift**

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- **The 2002 draft amendments reflect an importation of the civil law concept of gift which permits a benefit back to the donor**
- **While a gift with an advantage may be deemed a gift under the *Income Tax Act,* it will not necessarily be a gift at common law and therefore should not be identified as a gift in order to avoid subsequent challenges to the validity of the transfer**

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2. New Split-Receipting Rules

- **The key requirements of what will be recognized as a gift for income tax purposes for split receipting based on the new definition of gift reflected above are as follows:**
  - **There must be voluntary transfer of property with a clearly ascertainable value**
  - **Any advantage received by the donor must be clearly identified and its value ascertainable**

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– **There must be a clear donative intent by the donor to benefit the charity**
– **Donative intent will generally be presumed provided that the fair market value of the advantage does not exceed 80% of the value of the gift**
– **The eligible amount of a gift will be the excess of the value of the property transferred over the amount of the advantage received by the donor**

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– **The amount of the advantage is the total value of all property, services, compensation or other benefits to which the donor, or a person not dealing at arms length with the donor, has received or obtained or is entitled either immediately or in the future as partial consideration for or in gratitude for the gift or that is in any other way related to the gift**
– **Excluded from the value of the advantage is token consideration for the gift calculated on the basis of a "*de minimis* threshold" of the lesser of 10% of the value of the gift and $75.00**

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- **The charitable receipt will now need to identify the advantage and the amount of the advantage, as well as the eligible amount of the resulting gift**
- **The advantage can be received prior to, at the same time as, or subsequent to the making of the gift**
- **It is not necessary for a causal relationship to exist between the making of the gift and the receiving of the advantage as long as they are "in any other way" related to each other**

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- Therefore, if a donor makes a gift in consideration of the charity employing his spouse, or the charity hires his spouse in gratitude of the gift being made in the future, then the value of the advantage might include the current value of the employment of the spouse
- In addition, the advantage could even be provided by third parties unbeknownst to the charity, which fact may necessitate that charities make inquiries of donors if they have received a related benefit from anyone

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3. Charitable Annuities:

- CRA indicated in Technical News No. 26 in December 2002 that the previous administrative position with regard to charitable annuities has no basis in law and cannot be continued as a consequence of the amendment to subsection 248(33) of the *Income Tax Act*
- Instead, a new administrative policy has been proposed which provides for a charitable receipt based on the difference between the cost of the annuity and the gift, rather than the difference between the anticipated annuity payments and the amount of the gift

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4. New Definition of Charitable Organizations and Public Foundations

- The definitions of charitable organizations and public foundations have been amended by replacing the "contribution" test with a "control" test
- The rationale for amending the definitions is to permit charitable organizations and public foundations to receive large gifts from donors without concern that they may be deemed to be a private foundation

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- **The previous "contribution" test meant that where more than 50% of the capital of a charity was contributed from one donor or donor group then the charity would be deemed to be a private foundation subject to more stringent activity and disbursement obligations**
- **The new "control" test means that while a donor may donate more than 50% of the capital of a charity, the donor or donor group cannot exercise control directly or indirectly in any manner over the charity or be in a non arms length relationship with 50% or more of the directors or trustees of the charity**

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- **As a result of the introduction of a "control" test, the convoluted business rules in relation to "control" will become applicable as a result of the phrase "controlled directly or indirectly in any manner whatever"**
- **Charities will now need to be careful that they do not unwittingly become designated as a private foundation instead of either a charitable organization or public foundation**

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5. The Evolving Shutdown of Tax Shelter Donation Programs

Definition of Tax Shelter:

- **A tax shelter is defined under the *Income Tax Act* as any property for which a promotion represents that an investor can claim deductions or credits which equal or exceed the actual amount of the investment within four years of its purchase**
- **The definition of tax shelter was amended in the February 2003 Budget to include tax credits on charitable donations and limited recourse debt**
- **This meant that tax shelter donation programs with promises of net return on investments were required to be registered as tax shelters**

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Description of Tax Shelter Donation Programs:

- **The potential misuse of tax shelter donation programs has been identified by CRA in numerous publications**
- **These donation programs turn on the fact that the item in question is purchased at a substantially lower price than its much higher fair market value, and that a donation receipt is issued by a registered charity for the fair market value when the item is donated to it**

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Proposed Amendments to the *Income Tax Act*:

- **The December 2003 and February 2004 proposed amendments to the *Income Tax Act* attempt to shut down tax shelter donation programs by severely restricting the tax benefits from donations made under tax shelter donation arrangements**

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New Deeming Provision:

- **The proposed amendment deems the fair market value of property donated for the purpose of issuing charitable receipts to be the lesser of (i) the fair market value of the property and (ii) the cost (or the adjusted cost base where applicable) of the property to the tax-payer immediately before the gift is made in the following three situations:**

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– If the tax-payer acquires the property through a "gifting arrangement" where it is represented that the acquisition of the property would generate any combination of tax credits or deduction that in total would equal or exceed the cost of acquiring the property in question, whether or not it was acquired within three years
– If the tax-payer acquired the property less than three years before the gift was made

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– If it was reasonable to conclude that when the tax-payer acquired the property, the tax-payer expected to make a gift of the property, with the donor presumably having to prove that the donor did not have an expectation to make a gift when the property was acquired
- The deeming provision does not apply to inventory, real property situated in Canada, certified cultural property, publicly traded shares and ecological gifts

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- The deeming provision also does not apply to situations where the gift is made as a consequence of the donor's death
- The proposed December 2003 amendments with regards to gifts of property, when passed, will apply to gifts made on or after December 5, 2003

Limited Recourse Debt:

- The December 2003 draft amendments also preclude charitable receipts for limited recourse debt in respect of gifting arrangements

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- Limited recourse debt is a form of tax shelter in which the tax-payer incurs a debt for which recourse is limited and which can reasonably be considered to be related to a charitable gifting arrangement
- Even in situations where the recourse is not limited, the debt may be deemed to be a limited recourse debt unless the arrangement is in writing to repay the debt within 10 years and interest is paid annually within 60 days of the debtor's taxation year at not less than CRA prescribed rate

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- If a gift includes a limited recourse debt, then the amount of the loan would be deducted from the amount of the gift

Substantive Gifts:

- Substantive Gift Amendment is intended to prevent a donor from avoiding the application of the Deeming Provision by disposing of property to a charity and then donating the proceeds of disposition, rather than the donor donating the property directly to the charity

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Anti-Avoidance Rule:

- In addition to the deeming provision, the December 2003 draft amendments introduced an anti-avoidance rule

Practical Implications:

- Charities will be required to inquire of donors of gifts in kind when the property donated was acquired by the donors
- Where possible, a written confirmation should be obtained from the donors to evidence the date of acquisition

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- **If the deeming provision applies, then the charity will need to inquire of the donor to determine the amount of the ACB of the gifted property, if applicable**
- **Charities may be required to inquire of donors of gifts in kind to determine whether the donors had an expectation to make a gift at the time when the donor acquired the property**

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- **Charities receiving gifts of private shares will need to determine if the shares were acquired within three years prior to the making of the gift or whether such shares had been exchanged for another class of shares i.e. in an estate freeze, either within three years or for the purpose of making a gift**
- **The proposed amendments in relation to limited recourse debt, if passed, will apply to gifts made on or after February 19, 2003**

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6. Revocation of Registration of Charities

- **Proposed amendments will permit the revocation of the charitable status of a charity if it "*makes a disbursement by way of a gift*" which is not a gift made "*in the course of charitable activities carried on by it*" or not a gift "*to a donee that is a qualified donee*" at the time of the gift**
- **All gifts made by a charity must be made in the course of furthering its charitable activities, transferred in accordance with an authorized agency/joint venture/partnership agreement, or transferred to qualified donees (i.e. generally other registered charities)**

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7. Additional Qualified Donee

- **The February 27, 2004 Draft Amendments expand “qualified donees” to include a municipal or public body performing a function of a government in Canada**
- **This amendment is in response to the Quebec Court of Appeal decision in *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec,* 2001 D.T.C. 5144**

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C. SELECTED HIGHLIGHTS FROM DECEMBER 2004 AMENDMENTS RE THE MARCH 2004 BUDGET

1. Overview

- **The March 2004 Federal Budget (the “Budget”) includes a major initiative by the Federal Government in rewriting the tax rules concerning charities**
- **Draft enabling legislation from the Budget was initially released on September 16, 2004**
- **Ways and Means Motion introduced on December 6, 2004 is the enabling legislation – Bill C-33 (December 2004 amendments)**

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- **The Budget reflects the proposals of the Voluntary Sector Initiative’s Joint Regulatory Table, particularly as it relates to intermediate sanctions for charities**
- **The Budget also rectifies a number of technical problems regarding disbursement quotas involving charities**
- **See Power Point presentation by Elena Hoffstein for a summary of “Penalties, Sanctions and Regulatory Reform” provisions in the December 2004 amendments.**

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2. New Disbursement Quota Rules

a) Overview

- **The December 2004 amendments include significant changes to the calculation of the disbursement quota**
- **It has made an already complicated formula even more difficult and unworkable**
- **The disbursement formula has been amended to provide as follows:**

A + A.1 + B + B.1 (where B.1 =C x 0.035[D – (E + F)]/365)

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b) Proposed changes to Disbursement Quota Formula

Reduction of Disbursement Quota Rate

- **The December 2004 amendments propose to reduce the 4.5% disbursement quota that currently applies to public and private foundations to a more manageable disbursement quota of 3.5%**

Extension of 3.5% Disbursement Quota to Charitable Organizations

- **In the past, only public and private foundations were subject to a separate disbursement quota upon its capital assets not used in charitable activities**

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- **The December 2004 amendments propose that the reduced 3.5% disbursement quota on surplus capital assets will also apply to charitable organizations registered on or after March 23, 2004 (after 2008 for charitable organizations registered before March 23, 2004)**
- **The 3.5% disbursement quota does not apply to charities that hold investments equal to or less than $25,000 in a given year**
- **This *de minimus* threshold is generally considered to be too low to be of much relief**

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Enduring Property

- **The December 2004 amendments propose to combine 10 year gifts and gifts of capital property from estates under the new term of "enduring property"**
- **Enduring property also includes a gift**
  - **received by a charitable organization from another registered charity, and**
  - **where the majority of the directors of the donor charity deal at arm's length with the recipient charitable organization,**

  provided that the gift is subject to a trust or direction that the gift be utilized over a period not exceeding 5 years in its charitable program

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Capital Gains Pool

- **The December 2004 amendments also introduce the concept of a "capital gains pool", which is in essence consists of the amount of capital gains of a charity resulting from disposition of "enduring property" including a ten year gift**
- **A charity will now be able to encroach on the capital gains from enduring property, provided that the terms of the gift permit such encroachment, but only up to the lesser of the amount of the 3.5% disbursement quota and the amount in the "capital gains pool"**

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- **Charities will be able to decide how much to claim within the permitted encroachment limit of the capital gains pool**
- **But charities will need to track their capital gains pool each year on their T3010A**
- **Anything above the permitted encroachment limit will be added back into the 80% disbursement quota for the charity and therefore will have limited benefit in meeting the 3.5% disbursement quota**

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- Previously, 80% of the disbursement of capital gains from a ten year gift had to be added to the disbursement quota of a charity
- Now, a charity can encroach on the capital gain of a ten year gift, as well as capital gains from other enduring property, up to an amount that is the lesser of the 3.5% disbursement quota and the amount in the "capital gains pool"
- However, the combination of the yearly tracking requirement for the "capital gains pool" and the determination of what is a capital gain will make the calculation of the disbursement quota challenging for charities to comply with

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Transfer of "Enduring Property"

- "Enduring property" (which includes 10 year gifts) is not included in the 80% disbursement quota of a recipient charity in the following taxation year
- The December 2004 amendments mean that now "enduring property" received by a registered charity from another registered charity will result in the same treatment of that gift as if the "enduring property" had been received directly from the original donor, i.e. will not need to expend 80% of it in the following taxation year

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Gifts Transferred to Charitable Organizations

- The December 2004 amendments mean that all transfers of funds from one registered charity to another, including transfers to a charitable organization, will be subject to the 80% disbursement obligation, i.e. 80% of the gift must be expended in the following taxation year
- Previously charitable organizations were exempt from the 80% disbursement quota involving transfer of funds from other charities

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- **Now gifts to charitable organizations will need to comply with the specified gift rules in order to avoid having to expend 80% in the following taxation year unless it is a transfer of "enduring property"**
- **There will therefore be three choices in tracking inter-charity transfers**
  - **Specified gifts**
  - **Enduring property (that are not received as specified gift)**
  - **Ordinary gifts (i.e., not specified gifts, not enduring property)**

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- **Specified gifts**
  - **For the transferor charity, the transfer cannot be used to satisfy its DQ obligation (because of 149.1(1.1)(a) exclusion of specified gifts)**
  - **For the transferee charity, there is no obligation to expend the specified gift in the following year (because specified gifts are excluded from A.1 and B of the DQ formula)**

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- **For example: $100 specified gift transferred from Charity A to Charity B**

	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	N/A	--- Charity A cannot use the $100 to satisfy its DQ obligation in year 1	--- Charity B is not obligated to expend any of the $100 in year 2	N/A

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- When Charity B expends the specified gift in the following year, Charity B can use the expenditure to satisfy its other DQ obligations in year 2

	Transferee Charity B	
	DQ obligation	DQ satisfaction
Year 2	N/A	$100 expended can be used to satisfy other DQ obligations in year 2

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- Enduring property
  - The following rules do not apply to enduring property received as specified gifts
  - For the transferor charity, there will be a DQ obligation to expend the enduring property in the year (because of variable A.1(a)(ii) of the DQ formula)
  - The DQ obligation is met by the transfer itself

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- For the transferee charity, there is no obligation to expend the enduring property in the following year (because enduring property is excluded from B of the DQ formula)
- For example: $100 enduring property transferred from Charity A to Charity B

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	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	Charity A will be obligated to expend 100% of the fmv of the enduring property in year 1	The DQ obligation created by the transfer is met by the transfer itself	--- no effect on DQ (b/c enduring property is exempt from B in DQ formula)	--- no effect on DQ until Charity B expends the gift

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- When Charity B expends the enduring property in the following year, Charity B will be obligated to expend at least 80% of the enduring property (because of A.1(a)(i) of the DQ formula)
- The DQ obligation in year 2 would be met by the expenditure of the enduring property

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	Transferee Charity B	
	DQ obligation	DQ satisfaction
Year 2	Charity B will be obligated to expend at least $80 in year 2	The $ expended can be used to satisfy DQ obligation in year 2

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- However, if Charity A designates the enduring property as a specified gift, then Charity A would not be able to use the expenditure to satisfy its DQ obligation in the year of transfer
- Charity B would receive the enduring property as a specified gift, which would not create any DQ obligation to expend the specified gift
- When Charity B expends the gift in year 2, Charity B would be able to use the expenditure to satisfy its other DQ obligations in year 2

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	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	Charity A will be obligated to expend $100 in year 1	Charity A cannot use the $100 to satisfy its DQ obligation in year 1 (b/c 149.1(1.1)(a) exclusion of specified gifts)	Charity B is not obligated to expend any of the $100 in year 2 (b/c specified gifts are excluded from A.1 and B of DQ formula)	N/A
Year 2	N/A	N/A	N/A	$100 expended can be used to satisfy other DQ obligations in year 2

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- Ordinary gifts
  - i.e., neither specified gifts, nor enduring property
  - For the transferor charity, the transfer can be used to satisfy its DQ obligation
  - For the transferee charity, there will be an obligation to expend the gift in the following year (because of variable B in DQ formula)
  - If the transferee charity is either a charitable organization or a public foundation, the DQ obligation is 80% of the gift

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– If the transferee charity is a private foundation, the DQ obligation is 100% of the gift

– For example: $100 ordinary gift transferred from Charity A to Charity B

	Transferor Charity A		Transferee Charity B	
	DQ obligation	DQ satisfaction	DQ obligation	DQ satisfaction
Year 1	N/A	$100 expended can be used to satisfy its DQ obligations of Charity A in year 1	•Charitable organizations and public foundations have to expend $80 in year 2 •Private foundations have to expend $100 in year 2	N/A

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– When Charity B expends the ordinary gift in the following year, Charity B can use the expenditure to satisfy its DQ obligation in year 2 mentioned above

	Transferee Charity B	
	DQ obligation	DQ satisfaction
Year 2	N/A	The $ expended can be used to satisfy DQ obligation in year 2

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Gifts Made By Way Of Direct Designation

- Where an individual has designated in his/her will a charity as a direct beneficiary of the individual's RRSP, RRIF or life insurance policy, the December 2004 amendments propose to treat such gifts as "enduring property" for the purposes of the disbursement quota rules
- This will mean that direct designation of RRSP, RRIF and life insurance proceeds will be subject only to the 3.5% disbursement quota while they are held as capital and then subject to the 80% disbursement quota obligation in the year in which they are disbursed

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