Comments on Certain Proposed Tax Rules Applicable to Charities: Gifts to Foreign Entities, Large Gifts and "Split Receipts"

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Introduction

On December 20, 2002, the Department of Finance made its annual Christmas gift to tax practitioners by transferring, without consideration, a 560-page tome containing detailed amendments to the *Income Tax Act*[1] together with so-called "explanatory notes."[2] The December 20 Draft Legislation proposed to amend three subjects relevant to charities: it added an explicit prohibition on gifts to foreign entities; it amended the provisions of the *Act* dealing with large gifts; and it created a new "split-receipt" regime.[3] On December 5, 2003 and February 27, 2004, the Department of Finance released draft legislation that, among other things, amended the December 20, 2002 Draft Legislation. This article reviews these amendments and analyzes them against the background of the *Act*'s existing rules and relevant case law. In particular, it will provide a detailed analysis on the meaning of key concepts such as "arm's length," "control-in-fact," and "consideration" as they apply to charities and charitable gifts under the proposed changes. It will also offer criticisms of the Draft Legislation and suggestions for changes to it.

Although it appears that the Department of Finance believes that, by and large, it is helping registered charities with the Draft Legislation, in certain respects the Draft Legislation may represent a step backward. First, it makes liberal use of anti-avoidance concepts and factually driven tests derived from the *Act*'s rules for the for-profit sector. The application of these concepts could prove uncertain and problematic. Second, because of its all-encompassing definition of what constitutes a benefit in respect of a charitable gift, the Draft Legislation could inadvertently authorize significant changes to the way the Canada Customs and Revenue Agency (the "CCRA")* administers the application of the Act to religious organizations and independent religious schools.

* On December 12, 2003, the Canada Customs and Revenue Agency (CCRA) became the Canada Revenue Agency (CRA). It is using its new name, but this name has yet to be officially modified by an act of Parliament. As such, this article refers to the Agency as CCRA.

Gifts to Foreign Entities

Before examining changes whose application or impact is unclear or problematic, we should review one change that would appear clear and straightforward, although controversial in the eyes of some. Before the advent of the Draft Legislation, the CCRA took the view that a registered charity could not donate or otherwise transfer property to a foreign entity that was not a qualified donee unless the transfer occurred in the context of the charity's own charitable activities.[4] The CCRA's motive for taking this position is obvious: charitable deductions[5] represent foregone tax revenue and, as a result, the government of Canada has an interest in ensuring that a deductible donation will be used for purposes that Canadian law considers charitable. If gifts could be made outright to foreign charities, there would be no way to ensure that the gifts were being used for charitable purposes, or so the CCRA appeared to believe. By contrast, Canadian registered charities are subject to scrutiny from the CCRA, which presumably helps to ensure that donated funds are used to further the charities' purposes.[6]

The tax courts seemed to share the concern underlying the CCRA position. In *The Canadian Committee for the Tel Aviv Foundation v. R.*,[7] the CCRA de-registered a charity because, among other things, it did not control sufficiently the funds that it disbursed overseas. The Federal Court of Appeal agreed that a charitable organization must carry on its own charitable activities directly or through an agent or restrict itself to making gifts to a qualified donee: "[I]t cannot merely be a conduit to funnel donations overseas."[8]

Nevertheless, several practitioners argued that a charitable foundation, once it had met its disbursement quota, was free to pay amounts to entities that were not qualified donees, provided the payments were made to organizations that were also charitable. The practitioners argued that nothing in the *Act* prohibited a gift to such an organization if the funds paid would be used for purposes congruent with the foundation's objects. The practitioners also pointed out that, even if the CCRA felt it could not properly regulate such gifts and the uses to which they would be put, provincial regulators responsible for the oversight of charities would still have the jurisdiction to do so. One Toronto private foundation felt so strongly about the matter that it commenced an action in the Ontario Superior Court of Justice for a declaration that such gifts were legal and that the CCRA administrative position was wrong.[9]

The Department of Finance response to this debate appears to be contained in the Draft Legislation: it proposes to amend subsections 149.1(2) to (4) to provide that the Minister may de-register a charitable organization, a public foundation, or a private foundation respectively if it makes a gift otherwise than to a qualified donee or in the course of its charitable activities. Finance's technical notes do not provide any guidance on the meaning of this new rule, but the intent appears clear enough: Finance, in effect, wishes to uphold the CCRA's interpretation of the unamended *Act* to prevent charities from making

outright gifts to non-qualified donees. Gifts are still permitted if made in the course of a charity's own activities, which conforms to the CCRA's old position as set out in Registered Charities Newsletter No. 9 (Spring, 2000):

> A registered charity can undertake direct program activities through its employees or volunteers, *or under certain conditions, through agents or contractors*. A charity can transfer funds to organizations that are not qualified donees only if these latter organizations are using the funds on behalf of the charity and to carry out the charity's own activities. In this case, the charity should have a formal written arrangement with individuals or organizations that act on its behalf, which spells out the particular duties or activities that the charity wishes them to perform. Such arrangements should also make it clear that the charity continues to direct and control the resources it is transferring. [Emphasis added.]

The key is that the donee must be responsible to the charity under the written agreement so that the charity in turn remains responsible—and can be held accountable—for the use of its funds.

Large Gifts

The application of the new prohibition on gifts to foreign entities appears clear, at least on paper. Certain proposed changes to the *Act*'s regime governing large gifts to registered charities are less clear and their application more problematic.

To understand the changes relating to large gifts, it is necessary first to understand the general scheme of the *Act* for regulating registered charities. Under the *Act* there are three classes of registered charities: charitable organizations, public foundations, and private foundations. Compared to the other two classes, private foundations are treated less favourably under the statutory scheme.[10] The *Act* imposes extra burdens on private foundations to limit their utility as tax-planning vehicles. These extra burdens mean that public foundations and charitable organizations will wish to avoid being designated by the Minister as private foundations.

Private foundations, however, are the "default" class for registered charities. If a charity does not qualify as a public foundation or a charitable organization, it will be classified as a private foundation. Currently under the *Act*, one of the requirements for status as a public foundation or charitable organization is that not more than 50% (75% in certain cases) of the capital contributed or otherwise paid in to the charity can come from one person or from members of a group of persons who did not deal *with each other* at arm's length.[11] This restriction had the virtue of being relatively clear, but it also proved somewhat onerous, especially during the stock market bubble of the late 1990s. Very large donations, which other amendments to the *Act* had sought to encourage,[12] could endanger the status of a public foundation or charitable organization, with undesirable results.

The Draft Legislation purports to make large donations easier for public foundations and charitable organizations to accept. Under the Draft Legislation, a large donation will not cause a public foundation or charitable organization to lose its status if each of the following conditions is satisfied:

1. More than 50% of the "directors, trustees, officers or like officials" (the responsible persons) of the charity deal at arm's length with each other and with each other responsible person.
2. More than 50% of the responsible persons deal at arm's length with each person who, and each member of a group of persons who do not deal with each other at arm's length that, has contributed or otherwise paid into the organization more than 50% of the capital of the organization.
3. The organization or foundation, if it were a corporation, would not be *controlled directly or indirectly in any manner whatever* by
   - (1) a person who has contributed or otherwise paid into the organization more than 50% of the capital of the organization, or
   - (2) a group of persons who do not deal at arm's length with each other, if any member of the group does not deal at arm's length with a person described in 3(1).[13]

The first thing to note about these tests is the drafting of the third condition of the test, which appears to leave open the possibility that a related group could both control a charity *and* contribute more than 50% of the charity's capital as long as no one person in that group contributed more than 50% of the capital and as long as the group dealt at arm's length with the officers and directors of the charity. For example, two brothers could each donate 35% of the capital of a charity and control it, and the charity could still qualify as a public foundation or a charitable organization, provided the brothers dealt at arm's length with the foundation's officers and directors. It is unclear whether this result is intended.[14]

Leaving aside this puzzle, the test relies on two key concepts—"arm's length" and "controlled directly or indirectly in any manner whatever"—that deserve to be examined more closely in the charities context.

Factual Arm's Length

The arm's length concept is no stranger to the *Act*'s provisions on gifts and charities. The concept, among other things, plays a key role in the current rules relating to large gifts. Unfortunately, the arm's length concept and its application to gifts and charities are problematic, and the continuing or, rather, the expanded, role of the arm's length concept in the Draft Legislation's rules for large gifts renders these new rules less helpful than they would be otherwise.

It is not necessary to dwell on the basic meaning of "arm's length" for the purposes of the *Act* generally because several writers have already provided valuable commentary on the subject.[15] A brief summary will suffice for the purposes of this paper. In the *Act*, two persons are deemed not to deal at arm's length if they are related.[16] The *Act* contains detailed rules for determining when two persons are related, and in general such a determination is quite mechanical and the application of the rules clear.[17] Unrelated persons can also be found to be dealing not at arm's length: where two persons are not related, it is "a question of fact whether [such] persons … are at a particular time dealing with each other at arm's length."[18] Parliament has left it to the courts to develop the meaning of arm's length between unrelated persons.

The courts have developed, and the CCRA has accepted, certain tests or indicators for determining whether as a matter of fact two persons are not dealing at arm's length. In *M.N.R. v. Merritt Estate*[19] the Exchequer Court enunciated one of the key indicators:

> [W]here the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. In other words where the evidence reveals that the *same* person was "dictating" the "terms of the bargain" on behalf of *both* parties, it cannot be said that the parties were dealing at arm's length.[20]

The notion of the "controlling mind" lies at the heart of the factual arm's length concept, but the courts have expanded on the controlling mind test to develop other criteria that will help determine whether parties are acting not at arm's length as a matter of fact. The CCRA has summarized these tests as follows:

> The following criteria have generally been used by the courts in determining whether a transaction has occurred at "arm's length":
>
> - was there a common mind which directs the bargaining for both parties to a transaction;
> - were the parties to a transaction acting in concert without separate interests; and
> - was there "*de facto*" control.[21]

The first criterion is a direct reference to the controlling mind concept; the third, in the opinion of one commentator, is equivalent to the first:

> The fact that there can be no directing mind in a transaction if there is no control of that transaction means that the existence of one of these factors necessarily implies the existence of the other. Thus, the cases cited as examples of *de facto* control are just as illustrative of the directing mind principle. Conversely … the jurisprudence regarding the directing mind is equally applicable to situations involving *de facto* control. Consequently, there does not appear to be any real distinction between these tests.[22]

The controlling mind and *de facto* control criterion of the arm's length test would appear to provide useful tools for analyzing transactions that should be re-characterized for income tax purposes. It will be argued below, however, that appearances can be deceiving, particularly in the charities and gift context. The "acting in concert" criterion of the arm's length test is even more problematic. Arguably, the acting in concert doctrine began as nothing more than a coda to the controlling mind concept: if a group acted in concert to control the actions of another person, then the members of the group, even if they dealt at arm's length with each other, would nevertheless be considered to deal not arm's length with the controlled person.[23] Unfortunately, in the hands of the CCRA and in certain judgments, the doctrine has evolved to the point where "highly interdependent" *cooperation*, even among parties with distinct interests, can result in the parties being considered to deal not at arm's length with each other. The CCRA summarizes the acting in concert doctrine as follows:

> The courts have expanded [the arm's length test] to include the concept of "acting in concert" with respect to an element of common interest. Therefore, even when there are two distinct parties (or minds) to a transaction, but these parties act in a highly interdependent manner (in respect of a transaction of mutual interest), then it can be assumed that the parties are acting in concert and therefore are not dealing with each other at arm's length.[24]

For charities, the difficulty with all of the factual arm's length criteria is that they were developed in the context of litigation involving commercial transactions. It is not apparent how well the criteria will translate into the gift and charities context. It is submitted that underlying the criteria is an assumption that in ordinary commercial transactions parties deal with each other at arm's length because, at least on some level, their economic interests are opposed. Anna may want to buy a car from Harold, the local used-car dealer, and Harold may want to sell it, but their interests are opposed when they negotiate the price, delivery terms, and financing. As a result, when they negotiate these terms, they deal with each other at arm's length.

In the charity or gift context, when a donor wishes to make a gift to a charity, the donor generally wishes to benefit the donee and the donee wants to be benefited: they are of one mind on the subject. The fact that a person wishes to make a gift to someone else is sometimes taken as a sign that the person and the recipient do not deal at arm's length.[25] The *Act* deems related persons not to deal at arm's length precisely because their interactions are so often governed by a "gift economy" rather than the economy of self-interest that generally obtains among the unrelated. Considered from an economic perspective, related persons—because of the trust and affection that subsist between them—generally cannot be depended upon to act only in their own best interests in their dealings with one another. As a result, in many cases it would be inappropriate to levy an income tax based only on the form of their transactions with one another. In other words, because related parties usually

do not deal at arm's length, the *Act* in many cases must ignore the form of their transactions and impose tax on some other basis. It does this by means of bright line tests that define when persons are related to each other. The arm's length concept, it is suggested, merely expands upon the related person concept to include within its scope persons who are acting as if they were related even though they are unrelated for the purposes of the *Act*.[26]

What does this mean for charities given the new rules for large gifts in the Draft Legislation? The Draft Legislation, for the first time, requires that a large-gift donor must deal at arm's length with the donee charity's responsible persons. In the old large-gift rule, the arm's length concept merely applied to the relationships within the memberships of two different groups: (1) the responsible persons of a charitable organization or a public foundation and (2) the large gift donors (if there was more than one). The concept did not apply to the relationships *between* responsible persons and large-gift donors. Under the Draft Legislation, the test must now be applied between the donor and the responsible persons of the recipient of the large gift. It has been shown above, however, that a gift from one person to another is a strong indication of a non-arm's length relationship. As a result, the courts and the CCRA will need to be very careful about how they use the arm's length concept in applying the second condition of the large-gift rule.

Consider the following hypothetical case:

X wishes to donate $10 million in cash to the Zilch Foundation, a public foundation for the purposes of the *Act*. This gift would constitute more than 50% of Zilch's capital. Will Zilch's status as a public foundation be jeopardized by the gift? Assume that X is unrelated to Zilch's officers and directors. Nevertheless, could it not be said that X and Zilch's officers and directors are "acting in concert with respect to an element of common interest " to achieve a purpose, which is the transfer of a gift to Zilch? If it cannot, why not? It would not help to say that this is a kind of acting in concert that the *Act* sanctions. That merely implies that there are (as yet unspecified) types of acting in concert that the *Act* does not sanction without providing any guidance on what constitutes unsanctioned acting in concert. Moreover, where are the separate interests that would indicate that X and the officers and directors of Zilch are acting at arm's length? Where is the "bargaining" in this set of facts? There are unlikely to be separate interests and there likely will not be any bargaining. Moreover, the size of the gift, and the natural desire of the Zilch officers and directors to accommodate X, could be interpreted as circumstances giving X influence or control over the Zilch officers and directors such that they do not deal at arm's length.

"Directing mind," "influence," and "control"—these words of power are sometimes helpful in describing circumstances when the parties to a commercial transaction do not deal at arm's length because one of them obviously can

dictate the actions or decisions of the other so that tax savings will result for the controlling party. John Owen, however, has argued persuasively that the record of the courts in applying the arm's length concept even in the commercial context has been less than successful.[27] The example above shows that the potential for mischief in the charities context is even greater. In the charity or gift context there is a danger that the words of power will be misapplied or that they will function only as labels that are used to justify a result where the courts have decided that they do not like the "smell" of a transaction. A court would probably refuse to conclude that X and Zilch dealt not at arm's length if X merely wished to donate $10 million cash to Zilch, even though Zilch's officers and directors would likely accommodate X in any way possible to facilitate such a gift. However, a court might approach the matter differently if Zilch accommodated X in some way that permitted him to save tax otherwise than as a result of the charitable deduction to which he would be entitled.[28] The degree of X's influence in the two cases would not differ, however, only the purposes to which he put that influence.

Seen in this light, the words "control," "directing mind," and "influence" appear problematic and of limited use because they do not provide guidance in determining what circumstances will create difficulties for charities under the *Act*. The acting in concert criterion of the arm's length test, as it has evolved under the hand of the CCRA and some judges, could be even more problematic. As John Owen has argued:

> A major drawback of the application of the [acting in concert criterion] .. is that it provides no guidance as to the circumstances in which persons acting in concert will be found not to deal at arm's length. Interpretation Bulletin IT-419 suggests that such a finding will obtain where the parties act in a highly interdependent manner in respect of a transaction of mutual interest. No indication is given, however, as to what constitutes a "highly interdependent manner."[29]

Obviously, by using the arm's length concept, the Department of Finance wished to combat tax avoidance involving the misuse of the *Act*'s generous provisions for tax deductions for charitable gifts. Unfortunately, as defined by the case law and the CCRA's administrative positions, the arm's length concept is vague and, more seriously, its application will likely prove problematic in the charitable context. Perhaps the Department of Finance should employ instead the concept of related persons as defined in subsection 251(2). For example, the second element of the proposed test could be re-drafted so that it reads as follows:

> More than 50% of the responsible persons are related to each person who, and each member of a related group of persons that, has contributed or otherwise paid into the organization more than 50% of the capital of the organization.

The related persons concept is well defined and well understood. Its application would involve much less uncertainty and would eliminate much of the abuse at which the arm's length concept is apparently aimed. The general anti-avoidance rule (GAAR) or, if necessary, a new, special anti-avoidance rule, could be employed in those circumstances where taxpayers contrive to perpetrate abuses involving unrelated persons. Charities and their donors would be better served by a bright line test and, where necessary, a frank discussion in the case law and the CCRA's publications of the kinds of transactions and activities that constitute a "misuse of the provisions of this Act or an abuse having regard to the provisions of this Act … read as a whole."[30]

It appears unlikely, however, that the Department of Finance will amend the Draft Legislation in this manner. Therefore, to avoid anomalies and inappropriate results in the charities context, the Courts and the CCRA should adopt a broader approach in using the arm's length test. In applying this test, the focus should shift from behaviour to tax avoidance. After all, if the real concern is tax avoidance, why not just say so, and analyze the circumstances on that basis?

> [Certain questionable CCRA technical interpretations that purport to apply the acting in concert doctrine] again illustrates the basic weakness of the acting in concert test. In order to avoid "inappropriate" applications of the test, the department must rely upon artificial distinctions between the behaviour of taxpayers in specific fact patterns. The Supreme Court's approach in *Swiss Bank* avoids the need for these distinctions by focusing on the acceptability of the behaviour from a tax policy perspective and not from the perspective of the taxpayers' interests. Hence, the taxpayers in the RRSP cases [cases where unrelated taxpayers purported to loan money to each others' RRSPs where the loans were secured by mortgages] would almost certainly be found not to deal at arm's length under the Supreme Court's approach, without the need to distinguish their behaviour from that of the shareholders in the reorganization scenario, on the highly subjective basis of distinct or common interests, or interdependent actions.[31]

De Facto Control

If the application of the arm's length test could prove problematic in the charities context, will the application of its counterpart, the *de facto* control test, be any less unhelpful?

With the Draft Legislation, the phrase "controlled directly or indirectly in any manner whatever" makes its debut in the *Act*'s rules governing registered charities. This phrase, however, represents a familiar concept to corporate tax practitioners. Subsection 256(5.1), which was enacted in 1988, defines the phrase:

> For the purposes of this Act, where the expression "controlled, directly or indirectly in any manner whatever," is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection

> referred to as the "controller") at any time *where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation...* [Emphasis added.]

As with "arm's length," the *Act* does not provide a detailed definition of *de facto* control or control in fact: the provision instead refers only to "any direct or indirect influence" that, if exercised, would result in *de facto* control. Again, charities must refer to the case law and CCRA administrative pronouncements for further guidance.

In Interpretation Bulletin IT-64R4, the CCRA describes *de jure* or legal control:

> The general test for *de jure* control was established by the Exchequer Court in *Buckerfield's Limite v. M.N.R.*, [1964] D.T.C. 5301, [1964] C.T.C. 504, to be whether the shareholder enjoys "effective control" over the affairs and fortunes of the corporation, as manifested in the ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors...[32]

> *De facto* control includes *de jure* control. If someone has *de jure* control of a corporation because he owns more than 50% of the voting shares of the corporation, that person will be considered to have *de facto* control as well.[33] *De facto* control, however, is a broader concept, and a controller can have *de facto* control of a corporation at the same time that another person has *de jure* control of the same corporation. All of the circumstances of the putative controller and the controlled corporation must be considered to determine whether someone has *de facto* control. As a result, *de facto* control can change because of circumstances beyond the control of both the corporation or entity that is controlled and the shareholders or other stakeholders who control the corporation. For example, a slump in business could suddenly put a major debt holder in a position of *de facto* control under the debt's covenants because of the influence that they would give to the debt holder.[34]

How have the courts approached *de facto* control as defined in subsection 256(5.1)? There are relatively few decided cases, but the approach taken is instructive. In *Mimetix Pharmaceuticals,* the Court was asked to determine whether Mimetix Canada was a Canadian-controlled private corporation (a "CCPC") throughout 1996. If it were, it would be entitled to claim certain investment tax credits and refundable investment tax credits. However, it would be a CCPC only if it were not controlled directly or indirectly in any manner whatever by a non-resident. The parties agreed and the Court accepted that no one had *de jure* control of Mimetix Canada, although Mimetix Inc., a U.S. corporation, owned 50% of the voting shares of Mimetix Canada at the relevant time. In addition, at all relevant times, a majority of the board of directors of Mimetix Canada were residents of Canada. Nevertheless, the question to be answered was whether Mimetix Inc. had *de facto* control of Mimetix Canada in 1996.

The trial judge carefully examined Mimetix Canada's day-to-day operations. He remarked that the administration of the taxpayer was conducted from the offices of Mimetix Inc. in San Francisco. He found that while legal control of Mimetix Canada rested with a board and slate of officers dominated by Canadians, real day-to-day control and ultimate control rested with two Americans who worked from San Francisco.[35] For example, the U.S. director hired a key employee, another American, for the Canadian corporation without consulting the other two (Canadian) directors. Meanwhile, the Canadian directors had never met one another. The Canadian who was the president and a director of Mimetix Canada revealed at trial that he did not know significant details about its operations. He knew nothing about contracts that the Americans had signed on behalf of Mimetix Canada and did not know who were the authorized signing officers of the corporation. Based on this evidence, the Court concluded that "the non-resident corporation Mimetix [Inc.] was, through [the two Americans], both non-residents of Canada, the *controlling mind* of the appellant" [emphasis added].[36] The Court's conclusion was reinforced by a finding that Mimetix Canada was economically dependent on Mimetix Inc. and that the two corporations did not deal with each other on a commercial basis in several important respects.[37]

The Tax Court adopted a similar approach to *de facto* control in *Rosario Poirier Inc. v. R.*[38] The Court in that case had to determine whether two CCPCs, RPI and Trab, were associated such that they would have to share the $200,000 small business deduction. The two corporations were legally controlled by a father and his son respectively. Father owned 80% of the common shares of RPI; son owned the other 20% and all of the shares of Trab. Son was also the sole director of Trab at all relevant times. Father, then, did not have *de jure* control of Trab. Nevertheless, RPI and Trab would be associated if father had *de facto* control of them, and the CCRA assessed RPI and Trab on that basis. Judge Archambault of the Tax Court agreed with the CCRA. He noted that under a Trab directors' resolution, father was authorized to sign all documents and make any decisions pertaining to Trab. He found that Trab was economically dependent on RPI because RPI was effectively Trab's only customer. He also found that Trab's activities were highly integrated with RPI's: Trab's personnel were RPI employees, Trab reimbursed RPI for providing all of Trab's personnel and administration, and Trab's only place of business was on RPI property. Next, the Judge noted that father handled what dealings Trab had with third parties; son had nothing to do with these contracts. In addition, the son's only source of employment income was from RPI; he did not earn employment income from Trab. Moreover, while he was a full-time employee of RPI, his daily work had very little to do with Trab. In fact, son told a CCRA auditor that his father was the one "who looks after Trab."[39] Finally, the court noted that father and son were related and that father had legal control of RPI. Based on these findings, the Court had little difficulty concluding that father had *de facto* control of both RPI and Trab.[40]

What were the common elements in these cases? In each case, the Court found a contrast between the *legal* position of those who supposedly controlled the corporation in question and the reality of their involvement with its day-to-day and strategic management. The directors who were legally responsible for the corporation were, in fact, displaced by others who operated the corporation and determined its strategic direction. The persons who actually controlled the corporation negotiated key contracts on its behalf and concluded those contracts without reference to the views or wishes of the directors. The directors, on the other hand, knew little about the corporations they supposedly controlled. They did not know the other directors on the board of the corporation; they were ignorant about important matters of corporate governance; and they did not hire key employees (the decision to hire was taken without reference to their opinion). Finally, the controlled corporation was usually economically dependent on the controller or an entity with which the controller was associated.

This summary of *de facto* control cases seems to yield a useful lesson for charities that wish to avoid the clutches of the large-gift test, namely that the people charged with governing the charity should actually fulfill that responsibility. They cannot and should not delegate their authority except in accordance with the charity's constating documents. If they delegate their authority, they must still maintain supervisory control over the charity. This means that the directors must remain informed about key aspects of the operation of the charity, including its finances, gift acceptance and receipting practices, fundraising and development efforts, and grant-making activities.

Nevertheless, the *de facto* control test could prove just as problematic for charities as the arm's length test. Like the arm's length test, the *de facto* control test originates from the commercial context. A review of the factors that the CCRA uses in determining whether *de facto* controls exists, as set out in Interpretation Bulletin IT-64R4, reveals that a number of them do not apply in the charities context. Charities generally do not have shareholders; they are not governed by shareholder agreements; they generally do not depend on one or two suppliers for the success of their "business"; and they generally do not depend on the expertise of a single person for their continued operation.[41] The decided cases on *de facto* control also evince a tendency to focus on behaviour and circumstance that is reminiscent of the factual arm's length cases. Indeed, some of the buzz words from the arm's length test make an appearance in the *de facto* control cases: for example, in *Mimetix Pharmaceuticals,* the court calls the U.S. corporation and its key employees "the controlling mind" of Mimetix Canada.[42] This focus appears to be required by the definition of *de facto* control, which, after all, makes *de facto* control dependent on whether any person or group of persons has "any direct or indirect influence that, if exercised, would result in control in fact of the corporation."

The unfortunate result of this focus, however, may be that the jurisprudence on *de facto* control will come to resemble the factual arm's length cases. The

concepts are so similar that such an outcome is a distinct possibility.[43] Can "acting in concert," then, or something like it be far behind? If not, then perhaps charities would be better off if the Department of Finance were to use *de jure* control, supplemented by GAAR or a special anti-avoidance rule, instead of the *de facto* control test. The third criterion of the large-gift test could be re-drafted to read as follows:

> The organization or foundation, if it were a corporation, would not be controlled
>
> (1) by a person who has contributed or otherwise paid into the organization more than 50% of the capital of the organization, or
>
> (2) a related group of persons, if any member of the group is related to a person described in (1).

Compared to *de facto* control, *de jure* control is a well-defined and well-understood concept (albeit one that also has its origins in commercial law). The Department of Finance could substitute *de jure* control as a bright line test to winnow out a whole class of cases where tax avoidance might be an issue without resorting to "stealth" anti-avoidance concepts such *de facto* control. When tax avoidance, or the possibility of it, raises its ugly head, the GAAR (or a specially drafted anti-avoidance rule) can be applied, and a frank discussion of appropriate and inappropriate avoidance can ensue.

As has been noted above, however, it appears unlikely that Finance will amend the Draft Legislation as suggested. Accordingly, to avoid anomalies and inappropriate results in the charities context, the Courts and the CCRA should adopt a broader approach in using the *de facto* control test. Again, for the reasons outlined and as suggested by John Owen in his analysis of the arm's length test, the focus in applying the *de facto* control concept should shift from behaviour to tax avoidance. Charities and the public would be better served by a frank discussion of the policy concerns that these anti-avoidance concepts seek to address.

Split Receipts

The Draft Legislation's last major amendment to the Act's rules on charities implements a "split receipt" regime that will apply to all gifts. Before the Draft Legislation, the CCRA took the position generally that a donor could not derive a benefit from his gift and still claim a tax deduction for it. According to the CCRA, for there to be a gift, "no benefit of any kind may be provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value."[44] The CCRA's own administrative positions, however, and certain Canadian court cases—notably those dealing with tuition paid to independent religious schools—did not always follow this simple rule. In some cases, taxpayers were permitted to claim a tax deduction for a donation even though they derived a benefit from it. The principles underlying these exceptions were not always easy to discern, and perhaps for this reason the Depart-

ment of Finance thought it should legislate a "split receipt" regime to provide consistency and certainty.[45]

The idea behind the new split receipt regime is simple enough: if a taxpayer donates property to a charity, and a benefit is provided in return, then the amount of the tax benefit available to the taxpayer should be reduced accordingly. The provisions of the Act permitting a deduction for a donation have, therefore, been amended to ensure that a deduction can be claimed only in respect of the "eligible amount" of a gift.

The heart of the new split receipt regime can be found in proposed subsections 248(31) to (33). The February 27, 2004 version of these subsections read in part as follows:[46]

> (30) *Eligible amount of gift or monetary contribution* — The eligible amount of a gift or monetary contribution is the amount by which the fair market value of the property that is the subject of the gift contribution exceeds the amount of the advantage, if any, in respect of the gift.
>
> (31) *Amount of advantage* — The amount of the advantage in respect of a gift or monetary contribution by a taxpayer is the total of
>
> (a) the total of all amounts […] each of which is the value, at the time the gift or monetary contribution is made, of any property, service, compensation or other benefit that the taxpayer, a person or person [sic] who does not deal at arm's length with the taxpayer, or another person or partnership who does not deal at arm's length with and holds, directly or indirectly, an interest in the taxpayer, has received, obtained or enjoyed, or is entitled, either immediately or in the future and either absolutely or contingently, to receive, obtain or enjoy
>
> (i) that is consideration for the gift or monetary contribution,
>
> (ii) that is in gratitude for the gift or monetary contribution, or
>
> (iii) that is in any other way related to the gift or monetary contribution; and
>
> (b) […]
>
> (32) *Intention to give* — The existence of an amount of an advantage in respect of a transfer of property does not in and by itself disqualify the transfer from being a gift to a qualified donee if
>
> (a) the amount of the advantage does not exceed 80% of the fair market value of the transferred property; or
>
> (b) the transferor of the property establishes to the satisfaction of the Minister that the transfer was made with the intention to make a gift.
>
> (33) *Cost of property acquired by donor* — The cost to a taxpayer of a property, acquired by the taxpayer in circumstances where subsection (31) applies to include the value of the property in computing the amount of the advantage in respect of a gift or monetary contribution, is equal to the fair market value of the property at the time the gift or monetary contribution is made.[47]

In other words, if Anna transfers real property with a fair market value of $200,000 to a charity, and the charity transfers to her another piece of real property worth $30,000, then (in all likelihood) she will still be considered to have made a gift for the purposes of the *Act*, and the "eligible amount of the gift"—the amount in respect of which she will be entitled to claim a deduction—will be $170,000. Moreover, the cost to Anna of the real property that she received will be $30,000.

The devil, however, is in the details, and these details are worth reviewing at length because of the difficulties they might create for registered charities.

Difficulties with Subsections 248(30) and (32)

There appear to be several inconsistencies between the December 5, 2003 version of subsections 248(30) and (31) and the version in the February 27, 2004 Draft Legislation.

The December 5, 2003 version of subsection 248(30) referred to a "gift or monetary contribution" three times. The February 27, 2004 version of the subsection omits "monetary contribution" after its first appearance. Technically, the approach in the December 5, 2003 Draft Legislation appears correct. Without the subsequent references to "monetary contribution," the predicate in subsection 248(30) does not refer properly to the subject. Moreover, the February 27, 2004 version of 248(31) defines "the amount of the advantage in respect of a gift *or monetary contribution*" [emphasis added], but the February 27 version of subsection 248(30) refers only to "the amount of the advantage, if any, in respect of the gift."

The December 5, 2003 version of paragraph 248(31)(a) reads in part "…the taxpayer, a person or partnership who does not deal at arm's length with the taxpayer…" The February 27 version reads as set out above, which does not make sense. Again, the December 5 version appears correct.

Finally, the December 5, 2003 version of paragraph 248(31)(a) provided that a person or partnership who held an interest in the donor could deal with the donor at arm's length, and benefits conferred on the person or partnership would still reduce the eligible amount of any gift made by the donor. The February 27 Draft Legislation specifies that the person or partnership must *not* deal at arm's length with the donor before any benefits conferred would reduce the eligible amount. From a practical point of view, the latter version is preferable, for reasons to be outlined below, but the December 5, 2003 version seems correct. Finance, it appears, was borrowing language from already-enacted tax shelter rules, and that language specifies an arm's length, not a non-arm's length, relationship. In any case, the non-arm's length version would be redundant: according to the language that immediately precedes the phrase in question, any benefit conferred on a person or partnership dealing not at arm's length with the donor will reduce the donor's eligible amount regardless

whether the person or partnership holds an interest in the donor. Again, it would appear that the December 5, 2003 version is to be preferred.

The drafting of subsection 248(30) and its related subsections, particularly subsection 248(32), also create several interpretive difficulties.

First, it seems that the word "gift" in subsection 248(30) must bear a special meaning, or else the subsection is nonsense to a common law lawyer. "Gift" is not defined in the *Act*, and so ordinarily the word would have its common law meaning.[48] Subsection 248(30), however, refers to a gift in respect of which an advantage has been received, as specified in subsection 248(31). Under the (traditional) common law definition, however, it makes no sense to refer to a gift where a benefit has been received in connection with the gift.

Subsection 248(32) appears intended to supply this special meaning. The subsection states that an advantage "in and by itself" will not disqualify a transfer of property as a gift if one of two conditions is met. The first condition, in paragraph 248(32)(a), perfects an otherwise suspect gift if the amount of the advantage does not exceed 80% of the fair market value of the transferred property. The second condition, in paragraph 248(32)(b), perfects the gift if the transferor can prove to the Minister that the transfer was made with the intention to make a gift. If one of these two conditions is met, a transfer of property that would otherwise qualify as a gift will be a gift even though it is accompanied by an advantage. The common law definition of a gift remains relevant, then, but it has been modified in this one particular by subsection 248(32).

Subsection 248(32) presents several problems, however. The drafting of the subsection, when read in light of subsection 248(31), is puzzling. Subsection 248(32) refers to "an advantage in respect of a transfer of property." Subsection 248(31) also refers to an advantage, but it refers to an "advantage in respect of a gift." Some commentators have claimed that these references render the subsections circular, and if both phrases refer to the same advantage then they would be. Subsection 248(32) purports to perfect an otherwise suspect gift. How then can it make use of a definition in a subsection, 248(31), that assumes and depends for its operation on the existence of the suspect gift? On the other hand, if the advantages in the two subsections are distinct—and the wording would suggest that they are meant to be—then how is the advantage referred to in subsection 248(32) defined?

There are other, less technical, issues with subsection 248(32). The Department of Finance says the following about the subsection in its technical notes to the Draft Legislation:

> For the transfer of property to qualify as a gift, it is necessary that the transfer be voluntary and with the intention to make a gift. At common law, where the transferor of the property has received any form of consideration or benefit, it is

> generally presumed that such an intention is not present. New subsection 248(32) of the Act, which applies in respect of gifts made after December 20, 2002, allows the opportunity to rebut this presumption. New paragraph 248(32)(a) provides that the existence of an amount of an advantage to the transferor will not necessarily disqualify the transfer from being a gift if the amount of the advantage does not exceed 80% of the fair market value of the transferred property.

The Department of Finance, then, in drafting subsection 248(32), appears to have assumed that the common law required a donor to have "donative intent" before a transfer of property would be recognized as a gift. The CCRA appears have made the same assumption. In Income Tax Technical News No. 26, the CCRA provides an example of when it will consider the "presumption" rebutted. The CCRA takes the position that in general no donation receipt can be issued to a person who bids on an item at a charity auction because the successful bid price establishes the fair market value of the auctioned item. The CCRA, however, states that a receipt can be issued for the purchase of an item at a charity auction if

1. the value of the item is clearly otherwise ascertainable (perhaps because it has a retail value); and
2. that value is made known to all bidders in advance.

The CCRA states that

> an eligible amount would be present where the amount bid is in excess of the posted value. *Where donative intent can be established*, which may be the case where the posted value of the item does not exceed 80% of the accepted bid, a tax receipt may be issued for the eligible amount. [Emphasis added.]

The corollary according to the CCRA appears to be that, if the value of the item is not conveyed to bidders beforehand, and a person overpays for the item, then no donation receipt will be available. According to the CCRA, even if a bidder overpays for the item (by at least the requisite 25% as per paragraph 248(32)(a)), he will not be entitled to a receipt if he did not know the price in advance because he is merely a sucker rather than somebody who intended to make a gift. In the CCRA's view, Canada's tax law wishes to reward certain feelings of generosity, not mere carelessness in the marketplace.

There are a number of problems with the approach taken by Finance and the CCRA. If the interpretation of the CCRA's position in the last paragraph is correct, one might query whether subsection 248(32) supports the position. The test set out in paragraph 248(32)(a) appears to be a black line. If the benefit received is less than 80% of the amount paid (in the CCRA example of the charity auction, if the bidder overpays by more than 25%), the benefit (the value of the item purchased) does not prevent the transfer of property being a gift. It is difficult to see how the subsection authorizes any further inquiry by the CCRA into the intention of the donor.

More seriously, an examination of the Canadian tax cases on gifts does not support the assumption that, where a benefit is received, there is a presumption that the donor did not intend to make a gift. Many tax cases on the law of gifts begin and end with an analysis of whether a benefit was received, which is in accordance with the definition of "gift" used in these cases.[49] If a benefit was received, then the courts have generally held that no gift was made. There is no discussion of a "presumption" and no discussion or analysis of evidence lead by the taxpayer to rebut the presumption. If there is a "presumption" in these cases, it would appear that it is not rebuttable, which really means that the absence of the condition giving rise to the presumption—that is, the absence of a benefit—is something like a condition precedent to making a gift under the traditional definition of a gift.

Subsection 248(32), it is submitted, introduces a presumption about intention that did not exist at common law,[50] and this is unfortunate. Charities, their advisers, and the courts would likely prefer to avoid dealing with intention in the gift context. Intention has proved a slippery customer in other areas of Canadian tax law: for example, intention has proved unsatisfactory as a determinant for whether a gain is on income or capital account.[51] The Federal Court of Appeal, in a famous passage from *Friedberg*, a gift case, proclaimed a strong preference for form in tax transactions because of the difficulty of dealing with intention:

> In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *R. v. Irving Oil* [1991] D.T.C. 5106, per Mahoney, J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. Taxpayers and the Crown would seek to restructure dealings after the fact so as to take advantage of the tax law or to make taxpayers pay tax that they might otherwise not have to pay.[52]

Subsections 248(31) and 248(32) authorize endless inquiries into the subjective state of mind of a donor, in a quest to ascertain whether the requisite but elusive donative intent existed, but it is to be hoped that in practice Canadian courts will avoid any such inquiry and instead concentrate on the questions raised by an inquiry about benefits under subsection 248(31).

Analysis of Proposed Subsection 248(31)

The eligible amount of a gift is the amount by which its fair market value exceeds the "amount of the advantage in respect of [the] gift," as defined in subsection 248(31). What are the components of the definition of "the amount of the advantage"?

For the purposes of analysis, subsection 248(31) can be broken down as follows:

1. The amount of the advantage *in respect of* a gift or contribution by a taxpayer is
2. the total of all amounts, each of which is the *value*, at the time the gift or contribution is made,
3. of any property, service, compensation or other benefit
4. that
   (a) the taxpayer,
   (b) a person or partnership who does not deal at arm's length with the taxpayer, or
   (c) another person or partnership who deals at arm's length with and holds, directly or indirectly, an interest in the taxpayer
5. has received or obtained or enjoyed or is entitled, either immediately or in the future and either absolutely or contingently, to receive or to obtain or enjoy
6. that is
   (a) consideration for the gift,
   (b) in gratitude for the gift or
   (c) in any other way related to the gift.

This section of the article considers each of these components in turn. After pulling apart the definition, it will be possible to put it back together to assess its impact on charities.

"In respect of"

The opening words of subsection 248(31) refer to "the amount of the advantage *in respect of* a gift or contribution by a taxpayer." It is trite tax law that "the words 'in respect of' are … words of the widest possible scope."[53] But care must be taken with these words as they are used in subsection 248(31). It is tempting to conclude that any advantage "in respect of" a gift will reduce the eligible amount of a gift, but on a careful reading of the subsection it appears that such an interpretation would be incorrect. From the wording of subsections 248(30) and (31), it appears that "in respect of" do not operate as part of the predicate of the definition. Rather, the words form part of what is being defined in subsection 248(31). Subsection 248(30) refers to "the amount of the advantage, if any, *in respect of* the gift" (emphasis added); subsection 248(31) then defines "the amount of the advantage in respect of a gift." "In respect of," then, should not be taken to define or describe the scope of the relationship that must exist between a gift and an advantage before the eligible amount of the gift will

be reduced. Rather, the definition of that scope must be found in the remaining words of subsection 248(31).

Meaning of "value"

Subsection 248(30) states that the eligible amount of a gift for income tax purposes is the "fair market value" of the gift less the amount of any advantage conferred in respect of it. Subsection 248(31) says that the amount of the advantage is the "value" of any benefit. Is there a distinction between "fair market value" and "value"?

The juxtaposition of "fair market value" and "value" in such close proximity to each other would appear to be deliberate; it might be an attempt to incorporate the distinction between the two terms drawn by the Federal Court of Appeal in several cases dealing with subsection 15(1). In *R.* v. *Fingold*,[54] the Federal Court of Appeal dealt with the application of subsection 15(1), the shareholder benefit provision, to a taxpayer who controlled a corporation that had bought and renovated a luxury apartment that the taxpayer used mainly for personal purposes. Subsection 15(1) provides in part as follows:

> Where at any time in a taxation year a benefit is conferred on a shareholder … by a corporation … *the amount or value thereof* shall … be included in computing the income of the shareholder for the year. [Emphasis added][55]

One of the questions confronting the Court was whether the amount of the benefit conferred on the taxpayer should be measured by the fair market value rent that the apartment could have fetched during the time that it was used for personal purposes by the shareholder (the taxpayer's preferred method). "Fair market value" is ordinarily defined as:

> The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.[56]

The taxpayer had presented evidence that the apartment would have fetched a certain rent in the market during the time that it was available for use by the taxpayer. The CCRA, on the other hand, had assessed a much higher amount because it measured the value of the benefit by reference to the interest that the corporation could have earned on the amount spent on the apartment (representing a supposedly reasonable rate of return on the corporation's investment) plus the cost of certain operating expenses. The Court held that the CCRA's method was more accurate and cited its own decision in *Youngman v. R.*[57]

The Court in *Fingold,* then, held that the value of the benefit should not be measured only by reference to the market. In certain cases, the market will not be an appropriate measure of value, and some other method should be used.

Based on these cases, it would appear that "fair market value" has a narrower meaning than "value" and that the latter might be assigned a higher dollar amount than the former in a particular case. It appears that the Department of Finance wishes to restrict the value of a gift for the purposes of the charitable deduction, but it wishes to expand, possibly, the dollar amount that might be assigned to a benefit conferred in respect of the gift.

The foregoing conclusion is tentative because, on the one hand, the case law on the meaning of "fair market value" makes it clear that the courts feel able to ignore "market" prices if there is no market or if market conditions render such prices suspect. On the other hand, in at least one decided case, a judge has opined that in the *Act* "value" by itself usually means "market value" or "fair market value."[58] Still, the apparently deliberate juxtaposition of the two terms in such close proximity suggests that the drafter was attempting to distinguish value and fair market value for the purposes of subsections 248(30) and (31), as suggested above.

"Property, service, compensation or other benefit"

What constitutes a benefit that must be valued and that will reduce the eligible amount of a donor's gift? Subsection 248(31) refers to "any property, service, compensation or other benefit." With this wording, the Department of Finance appears to be concerned to ensure that every conceivable benefit, of whatever kind, is caught by subsection 248(31). It is hard to imagine how the phrase could have been drafted more broadly: each of the constituent words itself has a broad meaning. "Property" for the purposes of the *Act* is defined broadly in subsection 248(1).[59] The courts have also ascribed a wide meaning to the term "benefit."[60] Both "services" and "compensation" are defined in the *Act* for certain purposes, and both definitions appear to restrict the ordinary meaning of these terms.[61] These definitions do not appear to be relevant to the Draft Legislation, however, and, accordingly, both terms should bear their ordinary meaning. *Chambers 20th Century Dictionary*[62] defines the words as follows (in part):

> **compensation** … amends, esp. financial, for loss, injury, etc. sustained … payment, remuneration …
>
> **service** …the act or mode of serving … that which is required of a feudal tenant … performance of a duty or function … a good turn, good office, benefit to another … availability … disposal … supply, as of water, railway-trains, etc. … supplementary activities for the advantage of customers … cost of interest and sinking fund charges … of industry, etc., providing services rather than manufactured products…[63]

Both of these terms, then, appear to have a broad meaning. The combination of these words with property and benefit is obviously meant to catch any conceivable type of return made for a donation. This wording is so broad that it raises the question whether it might effect changes to certain long-standing

CCRA administrative positions on gifts to religious schools. This question will be addressed in more detail below.

Entities on Whom a Benefit is Conferred

The benefit that will reduce the eligible amount of a gift must be received by the donor, a person or partnership who does not deal at arm's length with the donor, or another person or partnership who deals at arm's length with and holds, directly or indirectly, an interest in the taxpayer. The drafting of this portion of subsection 248(31) creates a number of difficulties. It uses, again, the arm's length concept in the charities context; and it contemplates an advantage that will reduce the eligible amount of a gift even where the advantage is conferred on an arm's length person.

The utility of "arm's length" in the present context is apparent: the term establishes a well-defined class of people—related persons—in respect of whom any benefit conferred will constitute an advantage. The concept, as has been noted already, also operates as an anti-avoidance tool, so that even benefits conferred on an unrelated person or partnership will be an "advantage" if the person or partnership does not in fact deal at arm's length with the taxpayer.

Is the arm's length concept appropriate for subsection 248(31)? The meaning of "arm's length" and some of the difficulties that might accompany its use in the charities context have already been examined above. It would appear that some of these same problems could likewise attend its application in subsection 248(31). It has been noted that the making of a gift is often taken as a sign that the donor does not deal at arm's length with the recipient. Assume that a donor makes a gift to a charity and, as a result, another person who is somehow connected with the donor receives a benefit from the donee charity. It seems likely that the CCRA will take the position that the other person—as the recipient of an indirect gift from the donor—dealt not at arm's length with the donor. In many cases, such a finding might be appropriate and just; but in other cases the fact of the gift itself could lead to a conclusion that is not really justified by good tax policy or by the relationship between the donor and the benefit recipient. The problem is that the arm's length concept does not provide the analytical tools necessary to arrive at reliable answers to the questions implicitly posed by subsection 248(31).

The December 20, 2002 Draft Legislation defined the amount of an advantage only by reference to benefits obtained or received by a donor or a person not dealing at arm's length with the donor. Apparently, this language was not broad enough for the Department of Finance. The December 5, 2003 Draft Legislation amended proposed subsection 248(31) to include another class of persons on whom a benefit might be conferred and that will reduce the eligible amount of a gift: "another person or partnership who deals at arm's length with and holds, directly or indirectly, an interest in the donor."

Yet again the Department of Finance has borrowed language from anti-avoidance rules in the *Act*, and in this case the borrowed language comes from rules that are aimed at tax shelters. Identical wording can be found in subparagraph 143.2(6)(b)(iii) (in rules relating to the amount of taxpayer's cost or expense in connection with a tax shelter) and in proposed paragraph 18.1(16)(c) (the rules on matchable expenditures). The language is quite broad in its scope. "Person or partnership" can include the entire universe because it will not matter whether the person or partnership deals at arm's length with the donor. Moreover, "a direct or indirect interest" can include many types of relationships with a donor, not just an equity ownership interest, at least according to the CCRA. The word "interest" appears in subsection 55(3), and the CCRA has consistently taken the position that the word should not be restricted to the ownership of shares, that it could include the ownership of debt, for example, and that it might be broad enough to include *any* economic interest in an entity.[64]

The practical difficulties for charities inherent in this language are obvious. Under the *Act*, charities are responsible for issuing receipts that show the eligible amount of a gift, and a charity that issues a receipt improperly is subject to de-registration or, if the 2004 Budget proposals are enacted, to penalty "taxes."[65] But how is a charity to issue a receipt properly where a person, about whom the charity *and* the donor might know nothing, enjoys a benefit that the charity did not contemplate conferring?

"Has received or obtained ..."

Obviously under proposed subsection 248(31), before an advantage will have been conferred, someone must have "received, obtained or enjoyed" a benefit. Originally, the Draft Legislation required only that benefit was "received or obtained" before it would reduce the eligible amount of a gift. The December 5, 2003 Draft Legislation amended subsection 248(31) to add "enjoyed." Apparently, the Department of Finance was concerned that "received or obtained" was too narrow, perhaps because the language could exclude services or benefits to which a taxpayer did not have a legal right. In any case, the Department drafters, like good lawyers, took refuge in a triplet to solve the perceived problem.

Subsection 248(31), then, catches benefits that have been received, obtained or enjoyed. The subsection, however, does not catch only those benefits that have been conferred in the past; it also catches benefits that *might* be conferred in the future. Moreover, subsection 248(31) does not require that the charity confer the benefit directly.

The phrase "either immediately or in the future and either absolutely or contingently" appears in a number of other places in the *Act*.[66] Its use is generally associated with anti-avoidance provisions. The words of the phrase are broad in scope: they will catch present and future benefits, even if those

benefits are contingent in nature. That is, even if a benefit may not materialize because there is a possibility that certain pre-conditions to its conferral will not be fulfilled, the benefit will still be considered to have been conferred for the purposes of subsection 248(31).

There are a number of problems associated with the appearance of this phrase in subsection 248(31). First, the formulation appears to include within its scope benefits that the donor might have contemplated but did not regard as a serious possibility. The CCRA, notoriously, does not always recognize when its own judgment has been clouded by hindsight. It is possible then that a contingent benefit that the donor contemplated but, acting reasonably, dismissed as remote will nevertheless materialize to the detriment of the donor because the CCRA, in hindsight, will refuse to believe that the donor did not intend to benefit or confer a benefit by making a gift. Such a results-oriented approach seems inappropriate and unnecessary. The concluding words of subsection 248(31) require that a benefit must be related to a gift. Why was it thought necessary to include language relating to contingency?

The second problem with this language relates to the valuation of benefits. It might be difficult or impossible to assign a value to a contingent benefit, but it appears that in the CCRA's view a charity should refuse to issue a receipt where the contingency of a benefit makes its valuation difficult.[67] A donor, then, might be deprived of a receipt for a charitable gift even though the likelihood is remote that any benefit will accrue to the donor as a result of making the gift.[68]

This portion of subsection 248(31) would seem to create difficulties, then, for donors because of the language relating to contingency. It should also be noted that this language, more appropriately, does not require that the charity directly confer a benefit on a donor for that benefit to be deductible in computing the eligible amount of the donor's gift. Accordingly, if a donor makes a gift to a charity, and as a result some other entity confers a benefit on the donor, the donor's eligible amount will still be reduced.[69] For example, consider the case of a public foundation that is associated with a nursing home that is a charitable organization for the purposes of the *Act*. Assume that the foundation and the nursing home have boards of directors and memberships that overlap and that the two entities share common objectives and cooperate closely. If a donor who is also an occupant of the nursing home makes a gift to the foundation, and the foundation in return "persuades" the nursing home to reduce the fees otherwise payable by the donor for services rendered to her as an occupant, then the fee reduction should be deducted from the eligible amount of the donor's gift (assuming that the donation will still qualify as a gift) even though the gift recipient, the foundation, did not confer the benefit directly.

"That is consideration for ..."

From the analysis so far, three conclusions can be drawn about the interpretation of subsection 248(31). First, the subsection is drafted to ensure that any benefit, of whatever kind, whether present or future, whether absolute or contingent, will be characterized as an advantage. Second, the drafting uses concepts that are typically found in anti-avoidance provisions in the *Act*. Finally, the subsection's scope, in general, is very broad. Indeed, it will be argued below that the scope of the provision is, at least potentially, too broad.

Is the scope of subsection 248(31) restricted by the concluding words of paragraph 248(31)(a)? These words read as follows::

> (i) that is consideration for the gift […],
>
> (ii) that is in gratitude for the gift […] or
>
> (iii) that is in any other way related to the gift […].

This wording limits the application of subsection 248(31) by requiring that there must be some nexus or connection between the gift and the benefit before the amount of the benefit will be deducted in computing the eligible amount of the gift. What is the nature of that connection?

"Consideration" is a word derived from contract law that, in general, describes the value that the parties to an enforceable contract provide to each other as part of their bargain. *Black's Law Dictionary* provides a more formal definition:

> The inducement to a contract. The cause, motive, price or impelling influence which induces a contracting to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.[70]

Does the use of the word "consideration" imply that, before the eligible amount of his gift will be reduced, the donor must have a legal right to the benefit he expects to receive for making it? The use of such a well-worn word from contract law would suggest that he must. The Supreme Court of Canada has held that, in interpreting the *Act*, a court must ascribe to a well-known legal term its ordinary legal meaning as opposed to the meaning that a layman might ascribe to the term.[71] This conclusion would also explain why the Department of Finance thought it necessary to add subparagraphs 248(31)(a)(ii) and (iii). It would clearly be inappropriate to reduce the eligible amount of a gift only in those circumstances where the donor had a legally enforceable right to the benefit he received as a result of making his gift.

On the other hand, Finance's technical notes suggest that it might have intended to use "consideration" more loosely. In general, a taxpayer cannot make a gift pursuant to a contract because, among other things, the transfer is not volun-

tary. In its technical notes to the Draft Legislation, Finance acknowledges this point. The notes go on to say that subsection 248(32) permits a taxpayer to rebut the presumption that he did not intend to make a gift where he receives a benefit for the gift. The notes are silent on the connection between subsection 248(32) and the receipt of an advantage that is consideration implying that, even if subsection 248(32) applies, a transfer of property for legal consideration will not constitute a gift for the purposes of the *Act*. The CCRA's Income Tax Technical News No. 26 would seem to confirm this interpretation: the document states that one of the key elements of its interpretative approach to the Draft Legislation is that "there must be a voluntary transfer of property to the donee." Of course, if the voluntary transfer of property to a donee remains an essential element of the definition of a gift, then "consideration" in subsection 248(31) cannot mean legal consideration. It would make no sense to speak of an advantage in respect of a gift that was "consideration" if the presence of consideration would negate the existence of the gift.

Can this interpretation be right? Finance's technical notes also suggest that the Draft Legislation was meant to facilitate "bargain purchases" that confer a benefit on a charity. But a bargain purchase is carried out pursuant to a contract; the transfer to the charity is not "voluntary" (the "donor" will have a legal obligation to complete the purchase). If subsection 248(32) does not negate the requirement that a transfer must be voluntary, it would appear that bargain purchases remain an impossibility in the common law provinces.

It is suggested that subsections 248(31) and (32) can be interpreted in a manner consistent with "consideration's" meaning under ordinary contract law and that, accordingly, the latter meaning should be ascribed to the term in accordance with the rule of interpretation set out in *Will-Kare Paving*.[72] Canadian tax courts generally define a gift as "a voluntary transfer of property from one person to another gratuitously and not as the result of a contractual obligation without anticipation or expectation of material benefit."[73] In this general definition, that a gift is voluntary, that it is not the result of a contractual obligation and that it is made without the expectation of a benefit appear to be separate requirements. It is submitted, however, that where a "gift" is made for consideration under a contract, these requirements merge, logically, into one because consideration is generally something that is valuable and the something that is valuable *is* the consideration.[74] If the latter proposition is true, then subsection 248(32) could be read as negating the requirement that a gift be voluntary. Subsection 248(32) may define as a gift for the purposes of the Act property transferred to a charity "involuntarily" pursuant to a contract as long as the advantage conferred (the consideration) is less than 80% of the fair market value of the property subject to the "gift" or the donor is able to establish his or her intention to make a gift.

This discussion of consideration, however, suggests another example of a potential difficulty posed for charities by the Draft Legislation. A benefit could

reduce the eligible amount of a gift even if the charity did not reasonably contemplate that such a benefit might be conferred. Suppose that A, an individual who has nothing to do with the charity, promises to confer a benefit on B if B promises to makes a donation to a charity. B is also a stranger to the charity. A and B have entered into a binding contract, so B has a legal obligation to make the "gift," and B will receive consideration and a benefit for making it.[75] Presumably, under the Draft Legislation, the charity is required to issue a receipt for an amount equal to the value of B's "gift" less the value benefit that A conferred on B. The difficulty, of course, is that the charity may not know about the arrangement between A and B.[76]

Paragraph 248(31)(a) also uses the word "gratitude," which generally sees little use among tax professionals. The *Act* does not define "gratitude"; in fact the word does not appear anywhere else in the *Act*. Chambers defines the word as "warm and friendly feeling towards a benefactor: thankfulness." Finance, of course, wishes to ensure that the eligible amount of a gift will be reduced even if the donor receives a benefit to which he or she had no legal right. The use of the word "gratitude" appears aimed at achieving this result. Accordingly, even where a charity has no legal obligation to provide a benefit, if it does provide a benefit in thanks for a gift, the benefit will reduce the eligible amount of a gift.

Under the December 20, 2002 Draft Legislation, a benefit reduced the eligible amount of a gift only if the benefit was provided as consideration or in gratitude for the gift. As a result, arguably, under the unamended Draft Legislation, some the religious schools cases discussed below might have been decided differently. It was argued above that "consideration" should be given its ordinary legal meaning, which is the benefit that parties to an enforceable contract must provide to each other to fulfill their bargain. In several of the religious school cases, the courts accepted that the parents who had made donations to support their children's education at the schools were not legally bound to do so. There was no enforceable contract between the parents and the school. The parents merely felt a moral obligation to donate, and there was evidence that the schools would accept their children even if they did not donate. The schools were not providing "consideration," then, when they provided educational services to the children of donors. At the same time, it would stretch the language of old subsection 248(31) to say that the schools were providing educational services "in gratitude" for the donations. The schools had no legal obligation to provide an education to the children of donors, but apparently they regarded themselves as morally bound to do so, even if the child or her parents were unable to afford the school's fees. Describing this moral sense of obligation as "thanks" or "gratitude" does not seem quite right either.

The December 5, 2003 and February 27, 2004 Draft Legislation, however, added subparagraph 248(31)(a)(iii), which appears intended to address the concern outlined in the previous paragraph. Under subparagraph 248(31)(a)(iii),

a benefit need only be "in any other way related" to a gift before its eligible amount is reduced.

In other words, Finance expanded the scope of subsection 248(31) even more. Arguably, under the unamended Draft Legislation, the use of the words "consideration" and "gratitude" implied that a relationship among persons had to exist before the conferral of a benefit in connection with a gift would reduce its eligible amount. It is submitted that subparagraph 248(31)(a)(iii) removes any such implication. An example might help to clarify the latter point. In *Rickerd v. M.N.R.*[77] the taxpayer was an employee of the Department of National Defence. To gain exposure for his writing on aviation issues, he donated articles and rights in respect of those articles to a magazine published by that Department. The taxpayer tried to deduct amounts in connection with the articles by arguing, among other things, that he had made a gift to the Crown of the articles and rights. The Tax Review Board (per Cardin, Member) disagreed, in part because the taxpayer had not made the gift without an expectation of return: he had donated the articles to acquire exposure and publicity for the sale of other articles. It is suggested that, if the case turned on this point, *Rickerd* would be decided in the same manner under the Draft Legislation (although it might have been decided differently under proposed subsection 248(31) before it was amended by the December 5, 2003 Draft Legislation). No person conferred a benefit on the taxpayer—either as consideration or in gratitude—by giving him exposure or publicity or by causing other parties to buy more of the taxpayer's articles. Nevertheless, it could be argued that there was a relationship between the "gift" and the "benefit" enjoyed by the taxpayer. Certainly, it appears that the taxpayer intended such a relationship. Accordingly, under the Draft Legislation, such a benefit might reduce the eligible amount of the taxpayer's gift.

Consider another example. Suppose that a provincial government wished to give a tax credit to parents who send their children to independent religious schools. Currently, the parents are entitled to a donation receipt for a portion of the amounts they pay to the schools so that their children can attend them.[78] The provincial credit is calculated in such a way that it is reasonable to conclude that a portion of the credit is available in respect of amounts paid that are also eligible to be treated as charitable gifts under the *Act*. Should the amount of the credit attributable to the gift reduce the eligible amount of that gift? The drafting of subsection 248(31) suggests that it should. The credit arises as a result of the making of the gift; there is a nexus or relationship between the gift and the credit. While nobody provided the credit as consideration for the gift (the government and the donor have not entered into a contract) or in gratitude for making the gift (the government cannot be described as grateful for the donor's gift to the school), nevertheless, it would appear that the credit and the gift are related. This relationship suggests that the credit would reduce the eligible amount of the gift.

In fact, one might query whether the use of "consideration" and "gratitude" remain necessary in light of subparagraph 248(31)(a)(iii). "Related in any way" would seem broad enough to encompass those circumstances where a benefit is conferred as consideration or in gratitude for a gift.

In any case, given its broad wording, subsection 248(31) could potentially apply in a wide variety of circumstances. But what are those circumstances? In what situations will this nexus be found? A review of some of the Canadian cases on benefits accruing to donors will help to answer these questions and, perhaps, expose a lacuna in the current drafting of subsection 248(31) and the troublesome questions that the subsection poses for certain kinds of charitable gifts.

Nexus Cases

Canada's tax courts have considered on a number of occasions the question of whether a taxpayer, by making a gift to a charity, received a benefit in return that should either vitiate the gift or reduce the portion of the gift eligible for a donation deduction.

In *No. 688 v. M.N.R.*,[79] the Tax Appeal Board considered the position of a taxpayer who had "donated" funds to a Jewish day school that three of his children attended. The school did not charge set fees, but parents of the school's pupils were expected to make donations to the school in accordance with their means. In fact, representatives of the school would visit parents who, in the opinion of the school, were not contributing enough. While the school tried to impose a sense of obligation on the parents to give, up to 10% of the parents did not do so. The taxpayer gave significant amounts to the school and its supporting agency, but he was not so generous with other organizations. The taxpayer's children received food and transportation, as well as a secular and Jewish religious education. The Board held that the "donations" were not gifts. The taxpayer donated amounts to the school to secure food, transportation and an education for his children. According to the Board, it was irrelevant that the taxpayer was not under any legal obligation to make the payments.

In *R. v. Zandstra*[80] and *R. v. McBurney*[81] the Federal Court confronted similar fact patterns. In *McBurney*, the taxpayer parents sent their children to Christian schools because the public schools did not teach Christian values "hour by hour"; because they did not teach history by reference to God's plan for the world; and because they did not require Christian service of their pupils. The schools sent letters to the parents charging them "donation fees" for their children's education. The amounts charged were calculated based in part on family income. The Court accepted that the parents were not under any legal obligation to make the payments set out in the letters. Nevertheless, the Federal Court of Appeal held that the payments were not donations because the parents received something in return for their payments, namely the Christian education of their children. The parents tried to dispute the link between the payments

and the attendance of their children at the school. The Court responded by noting that after their children stopped attending the school, the taxpayers' donations declined. The link was established by the pattern of payments to the school.

In *Woolner v. Canada (A.G.)*,[82] the CCRA had reassessed several taxpayers who had donated funds to a church. The church had established a student bursary fund, and the donors designated their donations for that fund. Each of the donors also had a child attending the church school. Sexton, J.A. noted the following:

> The Church had established a Student Aid Committee (the "Committee") to determine which students should be provided with church-sponsored bursaries to attend various educational institutions, including Mennonite junior and senior high schools. The Committee determined as a policy matter that every student who was a member or the child of a member of the Church and who applied for a bursary should receive one. Parents of children have always been represented on the Committee. It is also significant that a very small percentage of the Church congregation, all of whom were parents of children who obtained bursaries, donated a large part of the money contributed to the fund out of which the bursaries were paid.[83]

The Court held that the parents had not made a gift.[84] The parents received a benefit in return for their gift: the education of their children. That the parents could have sent their children to a public school was irrelevant: they chose to send their children to a separate Christian school because that was their preference. The satisfaction of that preference was the benefit. The parents had tried to argue that there was no link between the gifts they had made and the bursaries their children had received. Mr. Justice Sexton responded by noting that

> there is clear evidence that such a link existed. When bursaries were being applied for, a request was made that a pledge form also be filled out at the same time. Further in a report by the Student Aid Committee it is stated, "It is assumed that the student and/or parents will contribute as much as they are able to the fund." In addition, after pledges were made, donors were reminded of their pledge when it had not been fully fulfilled.[85]

What this summary of the cases reveals is that the courts took a pragmatic approach to the question of whether a donation was linked to a benefit that the donor received from the donee. In these religious schools cases, which occupy a key position in the jurisprudence in this area, the courts were bound neither by the manner in which the parties described the transactions that they entered into nor by their account of their subjective intentions. Instead, all of the surrounding circumstances were reviewed including the donor's pattern of giving to charities generally; the donor's record of giving to the school (did the person donate to the school only when he or she had children attending the school?); the identity of donors and their relationship with persons attending

the school; the school's sources of income; whether parents were required to donate to the school to ensure that their children could continue to attend it; and whether the school pressured parents to donate to the school.

It is suggested that these cases will continue to provide guidance to how the courts will approach the nexus question under subsection 248(31). Of course, the cases do not provide an exhaustive list of the factors that will be weighed by a court in determining the nexus issue, but they serve as a useful indication of the approach the courts have taken and will take under the new legislation. These cases, however, also serve as a useful background to a discussion of some of the problems inherent in the Draft Legislation.

The Case Law and Subsection 248(31)

The religious schools cases provide a useful indication of how the courts might approach the nexus problem under the Draft Legislation. But the cases also highlight some of the potential problems created by that legislation. The Draft Legislation was drafted with the intention of ensuring that every kind of benefit would reduce the eligible amount of a gift. Does it cast too wide a net?

In *McBurney,* at the Federal Court Trial Division,[86] the court found in favour of the taxpayer and overturned a Revenue Canada reassessment that had denied the taxpayer a deduction in respect of a portion of his donation to a religious school. Mr. Justice Muldoon held that the donations made to the school could not be characterized as being partly for religious purposes and partly for secular purposes, with only the former portion authorizing the issuance of a charitable receipt. He found that the evidence before him did not permit such a neat delineation between the religious and the secular:

> Studies of the Bible and of the Christian religion are not merely core subjects of those schools, because, transcending the teaching of particular subjects, Christian thought, perceptions, values and works permeate the entire educational formation of the young people who are enrolled in those schools. The charitable quality of the schools operated by the three non-profit corporations could well be characterized as *both educational and religious*.[87]

Mr. Justice Muldoon proceeded to draw an analogy between these religious schools and a parish church. He noted that both were supported by voluntary contributions; that some members gave more than others; that neither a religious school nor a parish would turn away members who did not contribute enough; and that *both provide benefits to their members.* The learned Justice wrote:

> It is worth emphasizing that according to the state of the law today, contributors to parish churches are rightly entitled to full income tax deductions, up to the prescribed limits, for their contributions even though they receive the manifest and multifold benefits of their parish worship, instruction, pastoral services and coun-

> selling, year in and year out, for themselves and their children … There can be no doubt that the sermons and homilies, the Bible study groups and the Sunday schools, the adult counselling and marriage preparation courses can be characterized as both educational and religious, but nothing about that characterization entitles the Department of National Revenue to vivisect the parishioners' contributions for income tax purposes. Parliament has not authorized the Minister of National Revenue to do that.[88]

Mr. Justice Muldoon implicitly posed a difficult question—one which the Federal Court of Appeal, when it overturned his decision, dodged: if a religious school confers benefits, why does not a parish church also confer benefits? Why are parishioners entitled to a full donation receipt and not parents of children who attend a religious school? Both are deriving benefits from their donations. A religious school, it is true, provides an education, a component of which has a secular counterpart. But among the many benefits provided by a parish are services that have a secular counterpart. For example, many couples who attend a parish and are having marital difficulties will turn to their parish priest for advice and counsel. They could just as easily pay for secular counselling, but their faith prompts them to turn to the church first. And the church will not charge for these counselling services. The church will exhort them to support their parish's ministry through donations, but it will not turn them away from counselling because their contributions have not been large enough. But, if the couple have made donations, it is hard to see how they have not derived a benefit—in the form of counselling services—from having done so, especially given the broad definition of benefit contained in subsection 248(31). The words of the subsection are clear and their scope is broad: the eligible amount of a gift must be reduced by the value "of any property, service, compensation *or other benefit*" received by the taxpayer.[89]

Indeed, perhaps the words of the subsection cast such a wide net that all of the benefits conferred by parish life and all of the religious benefits provided as part of an independent religious school education, should also reduce the eligible amount of a gift. Perhaps spiritual benefits should be taken into account as well. Their value could be measured by reference to the value placed on them by the donors, which is to say that the amount of the donation itself would be the best evidence of the value of the spiritual benefits conferred by parish or religious school activities. What reason is there for excluding such benefits from the purview of subsection 248(31)?

There is no authority in Canada for adopting such an approach, and no public statement by either Finance or the CCRA would suggest that they are even contemplating it. Nevertheless, such an approach is not beyond imagining: the Supreme Court of the United States, when confronted with the same question, answered that there was no rational basis for distinguishing between spiritual or religious benefits on the one hand and secular benefits on the other. In *Hernandez v. Commissioner of Internal Revenue*,[90] the Court had to consider

whether payments made to the Church of Scientology for "auditing" and training sessions were deductible contributions within the meaning of §170 of the *Internal Revenue Code* (the Code).

> The Church of Scientology (Church) provides "auditing" sessions designed to increase members' spiritual awareness and training courses at which participants study the tenets of the faith and seek to attain the qualifications necessary to conduct auditing sessions. Pursuant to a central tenet known as the "doctrine of exchange," the Church has set forth schedules of mandatory fixed prices for auditing and training sessions which vary according to a session's length and level of sophistication, and which are paid to branch churches.[91]

The record before the Court made it clear that the auditing sessions were always one-on-one between a donor and an auditor and that the donor was required to pay fixed amounts for the sessions according to the set schedule. The Internal Revenue Service (IRS) had denied participants in such sessions a deduction for "donations" that paid for the sessions. The Court, by a 5-2 majority, upheld the IRS position because "the payments were part of a quintessential *quid pro quo* exchange: in return for their money, [the taxpayers] received an identifiable benefit, namely, auditing and training sessions."[92] The taxpayer pointed out that the benefit received in return for the donations was purely "religious" in nature. The majority responded that the language of §170 of the Code did not authorize such a distinction among benefits,[93] that accepting the taxpayer's distinction would expand the scope of the deduction "far beyond what Congress has provided," and that making such a distinction among benefits would risk entangling church and state as the IRS sought to distinguish religious and secular benefits.[94] The majority pointed out that if the taxpayer's distinction were accepted then

> some taxpayers might regard their tuition payments to parochial [religious] schools as generating a religious benefit or as securing access to a religious service; such payments, however, have long been held not to be charitable contributions under §170.[95]

In a powerful dissent, Justice Sandra Day O'Connor pointed out that the IRS had accepted as deductible other payments for religious purposes that were in the nature of *quid pro quo* exchanges:

> There can be no doubt that at least some of the fixed payments which the IRS has treated as charitable deductions … are as "inherently reciprocal" … as the payments for auditing at issue here. … A Mass stipend—a fixed payment given to a Catholic priest, in consideration of which he is obliged to apply the fruits of the Mass for the intention of the donor—has similar overtones of exchange. According to some Catholic theologians, the nature of the pact between a priest and a donor who pays a Mass stipend is "a bilateral contract known as *do ut facias*. One person agrees to give while the other party agrees to do something in return." … A finer example of a *quid pro quo* exchange would be hard to formulate.[96]

All of the judges of the Court, then, agreed that in certain circumstances donors received religious benefits as a direct result of making donations. The majority held that such a benefit—at least in the case of fees paid for auditing sessions—constituted a benefit that should be taken into account in determining the amount, if any, deductible by the payer. The minority dissented because it could not reconcile the IRS position on auditing donations with its position on other forms of religious exchange.[97]

Under the Canadian cases decided before the advent of the Draft Legislation, religious benefits were not considered to be benefits that should matter from an income tax perspective. The courts that considered the deductibility of "donations" to independent religious schools appeared to accept that part of the amounts paid were donations for which a deduction could be claimed.[98] Has the Draft Legislation changed Canada's law on the tax treatment of "donations" to religious schools? It does not do so explicitly, and neither the Department of Finance nor the CCRA has made any public statement that would suggest a change in approach from a policy perspective. Nonetheless, it is submitted that the wording of the Draft Legislation is so broad that it will be open for a court in Canada to refuse to follow the Canadian cases to date and instead opt for the approach taken in the U.S., which is to disallow as deductions *all* payments made to independent religious schools that are really tuition. The Draft Legislation could even permit a court to question whether the eligible amount of donations made to a parish church should not be reduced or eliminated by the spiritual and other benefits received by donors who are members of the church.

Conclusion

In general, with the exception of the provisions on foreign charities, which are clearly aimed at ending a practice that the Department of Finance regards with suspicion (the making of gifts to foreign charities that are not qualified donees), the Draft Legislation appears to be an attempt by the Department to legislate changes that will make operating a charity easier. Unfortunately, in trying to be helpful, the Department may have created other problems. The Draft Legislation uses concepts—such as the arm's length concept, *de facto* control and the phrase "either immediately or in the future and either absolutely or contingently"—that are typically found in anti-avoidance or tax shelter provisions in the *Act*. Their employment in the *Act*'s rules on charities could prove problematic, at the very least. Moreover, the very broad language of certain portions of the Draft Legislation, in particular the definition of an advantage in subsection 248(31), could permit courts to ignore long-established Canadian cases and adopt instead a new approach to religious charities in particular that would radically alter the treatment of donations to such charities. The Draft Legislation does not require a new approach, and there is no evidence to suggest that the Department of Finance intended any such radical changes, but the

language of the new rules, as interpreted in light of Canadian case law and some U.S. precedents, leaves open the possibility.

NOTES

1. R.S.C. 1985, c. 1 (5th Supp.) (the "*Act*"). All statutory references are to the Act unless otherwise noted.
2. In this article, the draft legislation discussed is referred to as the Draft Legislation. Where it is necessary to distinguish between different versions of the Draft Legislation, the version referred to will be distinguished by the date on which it was released.
3. The December 5, 2003 draft legislation also added new rules to the Act restricting the amount of a receipt that can be issued where a taxpayer acquires limited-recourse debt as part of a donation scheme or where the taxpayer acquires property and then donates that property to a charity immediately thereafter. This paper will not examine these new rules.
4. See Registered Charities Newsletter No. 9 (Spring 2000):

   > A registered charity can only transfer funds to other registered charities and similar qualified donees (other organizations to which an individual can make a contribution and receive a tax credit for income tax purposes).

   See also RC4106, "Registered Charities: Operating Outside Canada," online: CCRA Web site <http://www.ccra-adrc.gc.ca>.
5. Technically, a corporation is entitled to a deduction in computing taxable income in respect of a charitable gift and an individual is entitled to a deduction in computing tax payable. In this article, both such deductions are referred to generically as "deductions" or "charitable deductions."
6. For a discussion of these and other related issues, see E. Blake Bromley, "Political, Foreign and Business Activities: Problems in the Law of Charities" in *Report of Proceedings of the Forty-First Tax Conference,* 1989 Conference Report (Toronto: Canadian Tax Foundation, 1990), 36:1-35.
7. [2002] D.T.C. 6843, 2002 FCA 72, per Malone J.A. [hereinafter "*Tel Aviv*"].
8. *Tel Aviv*, *supra* note 7 at ¶¶6 and 30. See also *Canadian Magen David Adom for Israel v. R.,* [2002] D.T.C. 7353, 2002 FCA 323.
9. See Wolfe D. Goodman, "Some Issues Relating to the Treatment of Private Foundations Under the *Income Tax Act*" (2001) 16 The Philanthropist 100 at 102 and James M. Parks, "New Developments and Challenges with Canada Customs and Revenue Agency" (2001) 16 The Philanthropist 175 at 178-79.
10. For example, in the rules relating to the donation of non-qualifying securities, a gift to a private foundation can never be an "excepted gift" that is not subject to the rules, but such a gift to a public foundation or a charitable organization might be. See subsection 118.1(19). For a critique of the treatment of certain gifts to private foundations from a policy perspective, that also summarizes well some of the comparative disadvantages faced by private foundations, see Wolfe D Goodman, "Tax Column" (1997) 16 Estates and Trusts J. 357.
11. See subsection 149.1(1), the definitions of "charitable organization," paragraph (d), and "public foundation," subparagraphs (a)(ii) and (b)(ii).

12. For example, Finance amended the *Act* to reduce the inclusion rate for capital gains realized in respect of a gift of publicly traded securities.
13. For the purposes of this discussion, I have ignored the exceptions for large gifts from the Crown and certain other organizations that appear in the *Act* and the Draft Legislation.
14. It might be argued that if a related group controls a charity in fact, then it must deal not at arm's length with more than 50% of the charity's directors or officers. If this proposition were true, however, it would appear to make the third branch of the test superfluous: that is, it can be shown that, assuming that the previous sentence is true, then the full test contained in the Draft Legislation (with three branches) is logically equivalent to a test that contained only the first two branches of the full test.
15. For detailed discussions of the arm's length concept generally, see Evelyn P. Moskowitz, "Dealing at Arm's Length: A Question of Fact," in *Report of Proceedings of the Thirty-Ninth Tax Conference,* 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988), 33:1-24; Susan Eng, "The Arm's-Length Rules," in *Report of Proceedings of the Fortieth Tax Conference, 1988 Conference Report* (Toronto: Canadian Tax Foundation, 1989), 13:1-31; and John R. Owen, "Acting in Concert: Fact or Fiction," (1992) 40 Can. Tax J. 829.
16. Paragraph 251(1)(a).
17. See subsection 251(2) for the rules on when two persons will be considered related for the purposes of the *Act.*
18. Paragraph 251(1)(c).
19. [1969] D.T.C. 5159 (Ex. Ct.), per Cattanach, J [hereinafter *"Merritt Estate*"].
20. *Merritt Estate,* supra note 19 at 5165.
21. Interpretation Bulletin IT-419R, "Meaning of Arms' Length", at ¶16.
22. Moskowitz, *supra* note 15 at 6. Moskowitz, it should be noted, was writing before the enactment of the definition of *de facto* control in subsection 256(5.1). See also the discussion in note 43 below and its related text.
23. See Eng, *supra* note 15.
24. Interpretation Bulletin IT-419R at ¶17.
25. For example, the CCRA presumes that a settlor and the trust she settles will not deal at arm's length. See Interpretation Bulletin IT-419R at ¶22.
26. See *Viking Food Prod. Ltd. v. M.N.R.*, [1967] D.T.C. 5067 at 5070, [1967] C.T.C. 101 at 106 (Ex. Ct.) per Jackett, P. cited in J Owen, "Acting in Concert" *supra* note 15. The phrase "arm's length" is sprinkled liberally throughout the *Act* to achieve precisely this purpose. See, for example, subsection 7(1), subsection 15(2.1), subsection 18(5), paragraph 39(1)(c), section 69, subsections 78(1) and 78(2).
27. Owen, *supra* note 15.
28. See *Jabs Construction Limited v. R.,* [1999] D.T.C. 729 at ¶45 where the CCRA attempted to apply the *Act*'s general anti-avoidance rule (the "GAAR") in part because of a loan-back.
29. Owen, *supra* note 15 at 854.
30. See subsection 245(4).

31. John Owen, *supra* note 15, note 71. The factual arm's length test, including the "acting in concert" branch, is alive and well. See, for example, *Peter M. Brown v. R.*, [2001] D.T.C. 1094 (T.C.C.). For a recent, and problematic, example of the use of the "acting in concert" doctrine, see CCRA technical interpretation 2002-0166655 dated March 28, 2003. In this technical interpretation, the CCRA resorts to "artificial distinctions between the behaviour of taxpayers in specific fact patterns" to ensure that section 84.1 will apply in the circumstances considered by the interpretation. On the other hand, some recent judgments seem to question the most controversial facet of the acting in concert doctrine (the common interest doctrine). See *McCoy v. R.*, 2003 TCC 332, ¶66-71 and *Lenester Sales Ltd. v. R.*, 2003 TCC 531, ¶35 [hereinafter "*Lenester Sales*"].

32. IT-64R4 at ¶13.

33. For a case that considers whether a person had *de jure* control of a non-share corporation, see *HSC Research Development Corporation v. R.* (1994), [1995] D.T.C. 225 (T.C.C.). For a recent decision reviewing the meaning of *de jure* control, see *Silicon Graphics Ltd. v. Canada*, [2003] 1 F.C. 447, 2002 FCA 260 [hereinafter "*Silicon Graphics*"].

34. See *Mimetix Pharmaceuticals Inc. v. R.,* [2001] D.T.C. 1026 (T.C.C.), aff'd 2003 FCA 106 [hereinafter *"Mimetix Pharmaceuticals*"]*,* per Lamarre, T.C.C.J, at ¶50:

    > Furthermore, *de facto* control of a corporation may shift from one shareholder to another based on external factors, as is recognized in the following terms in one academic commentary referred to by counsel for the appellant (D.S. Ewens and S.J. Hugo, "The Effect of Bill C-139 on Certain Corporate Reorganizations." 88 Canadian Tax Journal 1021 at pp. 1032-33):
    >
    >> … With the new factual control test, a shareholder may find himself considered to be in control of a corporation because of changes in economic conditions, either external or internal to the corporation.

    The decision of the Federal Court of Appeal in *Silicon Graphics*, note 33, however, seems to provide a narrower test—see 2002 FCA 260, ¶67 (but compare the statement in that paragraph to the discussion at ¶66-70).

    For a useful summary of the CCRA's approach to determining whether someone has *de facto* control of a corporation, see Interpretation Bulletin IT-64R4 at ¶¶19-23, which is available on the Internet at www.ccra-adrc.gc.ca.

35. *Mimetix Pharmaceuticals*, *supra* note 34 at ¶43.

36. *Mimetix Pharmaceuticals*, *supra* note 34 at ¶46.

37. *Mimetix Pharmaceuticals*, *supra* note 34 at ¶48.

38. [2002] D.T.C. 1940 (T.C.C.).

39. *Rosario Poirier Inc., supra* note 38 at ¶11.

40. For a case involving *de facto* control where the Court found in favour of the taxpayer, see *Multiview Inc. v. R.,* [1997] D.T.C. 1489 (T.C.C.) per Brule, T.C.C.J. For several more recent cases, see *L.D.G. 2000 Inc. v. R.*, [2003] D.T.C. 827 (T.C.C.), *Transport M.L. Couture v. R.*, [2003] D.T.C. 817 (T.C.C.) (a case very similar on its facts to *Rosario Poirier Inc.*) and *Lenester SalesR.*.

41. See Interpretation Bulletin IT-64R4 at ¶23.

42. *Supra* note 34.

43. The drafting of subsection 256(5.1) would seem to suggest that Parliament intended to distinguish *de facto* control and the arm's length test. The franchise exception in that subsection is only applicable if the "corporation and the controller are dealing with each other at arm's length." But the exception would never apply if, in every case where the controller had *de facto* control, the controller and the corporation would be considered not to deal at arm's length. The Crown in *Lenester Sales,* however, seemed to believe that the two concepts are virtually identical:

   "[36] Counsel for the respondent pointed out what might be an anomaly. He noted that if a franchisor controlled a franchisee in such a way that the first part of subsection 256(5.1) applied it would follow that they would necessarily not be at arm's length and therefore the exception in the second part could never apply. He suggests that therefore the phrase "dealing at arm's length" is to be interpreted as implicitly being qualified by the word "otherwise" if it is to make any sense. I tend to agree with him but it is not necessary to reach a definitive conclusion on that point in this case."

44. Interpretation Bulletin IT-110R3 at ¶3.

45. The CCRA, in Income Tax Technical News No. 26 (December 24, 2002), seems to want to blame the courts for the change. At the same time, the CCRA's own long-standing administrative positions seemed to confirm that a transfer of property might qualify as a gift in certain circumstances even if it were made for partial consideration, and these positions were based on cases that were quite old. See, for example, *Aspinall v. M.N.R.*, [1970] D.T.C. 1669 (T.A.B.). Some have interpreted this case as turning on the definition of "gift" under Quebec civil law (see, for example, E. Blake Bromley, "Flaunting and Flouting the Law of Gift: Canada Customs and Revenue Agency's Philanthrobia" (2002) 21 Estates, Trusts & Pension J. 177 at 183), but the board member in *Aspinall,* after citing Article 755 of the *Civil Code of Quebec*, which defines a gift *inter vivos*, decided the case on the basis that a "gift must be voluntary and made with the intention that nothing will be received in return" (at p. 1670). The Department of Finance's technical notes to the Draft Legislation indicate that it thought it was addressing an anomaly that permitted gifts for (partial) value in Quebec (because of the civil law definition of gift) but not in the rest of Canada. The "split receipt" regime is old news in the U.S.: see Rev. Rul. 67-246.

46. Subsection 248(31), as set out in this article, has been edited to remove reference to the new limited-recourse debt rules as they apply to gifts to a charity. These rules are not discussed in this paper. See note 3 above.

47. The repeated reference to "monetary contribution" makes subsection 248(31) and its related subsections relevant to the determination of the amount of a contribution to a registered party. See subsection 127(3) of the *Act*, as amended by the December 5, 2003 draft legislation.

48. *Will-Kare Paving & Contracting Ltd. v. R.*, [2000] 1 S.C.R. 915, 2000 SCC 36 [hereinafter "*Will-Kare Paving*"].

49. See, for example, *Woolner v. Canada (A.G.),* [1999] D.T.C. 5722 (F.C.A.), aff'g (1997), [2000] D.T.C. 1956 (T.C.C.) at ¶7 [hereinafter "*Woolner*"].

50. See Joel A. Nitikman, "What is a Gift for Tax Purposes? The Myth of Animus Donandi" (2002) 50:3 Can. Tax J. 1130. For opposing authorities, see *Tite v. M.N.R.,* [1986] D.T.C. 1688 (T.C.C.) and *Campbell v. M.N.R.*, [1992] D.T.C. 1855 at 1856 (T.C.C.). See also Barbara L. Kirschten and Carla Neeley Freitag, "Charitable Contributions: Income Tax Aspects" *Tax Management Portfolio 521-2nd* (BNA looseleaf service) at II-E, section 1,

for a discussion of the U.S. approach, which in the past has included an inquiry into the motives of the taxpayer in making a gift. In Rev. Rul. 67-246, the IRS stated that

> Another element which is important in establishing that a gift was made in such circumstances, is evidence that the payment in excess of the value received was made with the intention of making a gift. While proof of such intention may not be an essential requirement under all circumstances and may sometimes be inferred from surrounding circumstances, the intention to make a gift is, nevertheless, highly relevant in overcoming doubt in those cases in which there is a question whether an amount was in fact paid as a purchase price or as a gift.

51. Brian J. Arnold, "In Praise of the Business Purpose Test," *Report of Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report* (Toronto: Canadian Tax Foundation, 1988) 10:1 at 10:17.

52. *R. v. Friedberg* (1991), [1992] D.T.C. 6031 at 6032 (F.C.A.), per Linden J.A. In the U.S., intention, it appears, has always played a key role in determining whether a transfer to a charity was in fact a gift. Significantly, the trend in the U.S. cases has been to move away from inquiring into evidence about the state of mind of the putative donor precisely because of the difficulties such an inquiry entails. Instead, U.S. tax courts today tend to focus on the objective circumstances surrounding a gift—its form—to determine whether it is reasonable to infer that the donor had the requisite intention. A key part of the inquiry is to try to ascertain whether the donor received a benefit as a result of transferring property to a charity. See *Hernandez*, *infra* note 90 at 87,913. See Kirschten and Freitag, "Charitable Contributions" *supra* note 50 at II-E, section 1:

> The Duberstein test concentrates on the motivation of a donor in making a transfer. In contrast, the quid pro quo test focuses on the nature and extent of any benefits received by the taxpayer as part of the transaction. The Duberstein test is considered the more subjective test, whereas the quid pro quo test is more objective. As noted by the Supreme Court in *Hernandez v. Comr.*, the "external features" of a transaction are examined to determine if a transfer was made with an expectation of a quid pro quo. This objective approach is easier to apply because it does not require the more subjective inquiry into the taxpayer's underlying motivation. The quid pro quo test has prevailed in recent years. [Endnotes omitted.]

53. See *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at p. 39 and [1983] D.T.C. 5041 at 5045, per Dickson J. (as he then was).

54. [1997] D.T.C. 5449 [hereinafter "*Fingold*"].

55. The editorial omissions relate to exceptions to the application of subsection 15(1) that are not relevant for the purposes of the present discussion.

56. *Black's Law Dictionary,* 5th ed. abridged (St Paul: West, 1983). This definition, seemingly straightforward, conceals the many difficulties inherent in valuing property other than cash. Some of the difficulties are outlined in the *Canadian Tax Reporter Commentary* (Toronto: CCH, looseleaf service) at ¶9142.

57. [1990] D.T.C. 6322 at 6325-6, per Pratte, J.A:

> In order to assess the value of a benefit, for the purposes of paragraph 15(1)(c), it is first necessary to determine what that benefit is or, in other words, what the company did for its shareholder; second, it is necessary to find what price the shareholder would have had to pay, in similar circumstances, to get the same benefit from a company of which he was not a shareholder. In the present case, the benefit or advantage conferred on the appellant was not merely the right to use or occupy a house for as long as he

wished; it was the right to use or occupy for as long as he wished a house that the company, at his request, had built specially for him in accordance with his specifications. How much would the appellant have had to pay for the same advantage if he had not been a shareholder of the company? Certainly more than what the two experts referred to as the free market rental value since, in my view, the company would have then charged a rent sufficient to produce a decent return on its investment. It is impossible to determine with accuracy the amount of that rent. However, subject to one important reservation, I cannot say that it would have been less than what the Minister assumed it to be.

58. *Steen v. R.*, [1986] 2 C.T.C. 394, [1986] D.T.C. 6498 (F.C.T.D.) per Rouleau J.

59. "Property" is defined as follows:

"property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes

(a) a right of any kind whatever, a share or a chose in action,

(b) unless a contrary intention is evident, money,

(c) a timber resource property, and

(d) the work in progress of a business that is a profession;

For a recent discussion of this definition, see *Manrell v. R.,* [2003] D.T.C. 5225, 2003 FCA 128. See also *Biderman v. R.*, [1998] D.T.C. 2188 at 2190 (T.C.C.), per McArthur T.C.J, where the Judge, citing *Kieboom v. M.N.R.*, [1992] D.T.C. 6382 (F.C.A.), remarked that the "word 'property' is indicative and descriptive of every possible interest which a person can have."

60. See, for example, *R. v. Savage*, [1983] D.T.C. 5409 (S.C.C.), which considered the meaning of "benefits" as found in paragraph 6(1)(a) of the Act, which requires employees to include employee benefits in income for tax purposes.

61. Subsection 95(3) defines "services" for the purposes of the foreign accrual property income rules to exclude activities that would otherwise be described as services (for example, the transportation of persons or goods). Subsection 147.1(1) restricts the ordinary meaning of compensation for the purposes of the provisions of the *Act* dealing with registered pension plans.

62. (Edinburgh: Chambers, 1983).

63. See also *Ogden Palladium Services (Canada) Inc. v. R.*, [2001] D.T.C. 345 at 350 (T.C.C.), per Lamarre T.C.J.

64. M Ton-That and V Sider, *Understanding Section 55 and Butterfly Reorganizations* (Toronto: CCH Canadian Ltd., 1999) at 68.

65. See paragraph 168(1)(d) of the Act and Annex 9 to the 2004 Budget Plan.

66. These provisions include subsection 17(14); subsection 18(5), definition of "specified shareholder"; subsection 18.1(1), definition of "right to receive production"; subsection 33.1(1) definition of "eligible deposit", subparagraph (a)(ii) and definition of "eligible loan", subparagraph (a)(ii); paragraph 40(3.14)(b); paragraph 53(2)(i.3); paragraph 94.1(6)(a); paragraphs 96(2.2)(d) and (e); paragraph 96(2.4)(b); subsection 143.2(1), definition of "limited-recourse amount"; subsections 143.2(2), (4) and (8); paragraph 149(1.1)(b); subsection 192(7); clause 212(1)(b)(vii)(A); subsection 233.3(1), definition of "specified foreign property"; subsection 248(12); paragraph 251(5)(b); and subsection 256(1.4).

67. Income Tax Technical News No. 26 at p. 1.

68. One obvious solution to this kind of valuation problem would be to assume that a benefit will be realized, to value that benefit as if it had been realized in the present, and then to issue a receipt with an eligible amount that has been calculated by deducting that value from the fair market value of the gift. Of course, using this method, the eligible amount might be nil or even negative!

69. For a judicial application of this rule, see *Cyprus Mines Corp. v. Federal Commissioner of Taxation* (1978), 22 A.L.R. 322 (S.C. W. Australia) cited in E. Zweibel, "Looking the Gift Horse in the Mouth: An Examination of Charitable Gifts Which Benefit the Donor" (1985-86) 31 McGill L.J. 417 at 442.

70. *Black's Law Dictionary,* supra note 56, definition of "consideration."

71. *Will-Kare Paving,* supra note 48.

72. *Will-Kare Paving,* supra note 48.

73. *Woolner, supra* note 49 at ¶7.

74. G.H.L. Fridman, *The Law of Contracts in Canada,* 4th ed. (Toronto: Carswell, 1999) at 92 [hereinafter "Fridman"].

75. Fridman at 92.

76. The Department of Finance technical notes to the Draft Legislation also contemplate this possibility.

77. [1980] D.T.C. 1838 (T.R.B.)

78. See Information Circular IC-75R3.

79. [1960] D.T.C. 130.

80. [1974] D.T.C. 6416 (F.C.T.D.)

81. [1985] D.T.C. 5433 (F.C.A.), rev'g [1984] D.T.C. 6494 (F.C.T.D.).

82. *Woolner, supra* note 49.

83. *Woolner,* supra note 49 at ¶4.

84. *Woolner,* supra note 49 at ¶11, appearing to approve the conclusion of Heald, J. in *Zandstra*.

85. *Woolner,* supra note 49 at ¶12. The Tax Court allowed the issuance of a receipt to the "donors" for the portion of their payments to the school that related to Christian education (see [2000] D.T.C. at ¶37). The Crown did not challenge the Tax Court judgment, and the Federal Court of Appeal did not disturb this result or comment on it.

86. [1984] D.T.C. 6494 [hereinafter *McBurney*].

87. *McBurney*, *supra* note 86 at 6495.

88. *McBurney*, *supra* note 86 at 6497-98.

89. In Rev. Rul. 76-232, the IRS considered whether a taxpayer could deduct a "donation" for the privilege of attending a weekend marriage seminar sponsored by a charitable organization. The sponsoring organization suggested but did not require the taxpayer to donate a specified amount that was intended to cover the costs of the seminar and a "nominal amount" for follow-up programs and future seminars. The IRS concluded that the taxpayer could claim a deduction only if the amount of the donation exceeded "the monetary value

of all benefits and privileges received and that the amount claimed as a charitable contribution is the amount of such excess".

90. (1989), 89-1 USTC ¶9347 [hereinafter *Hernandez*].

91. *Hernandez*, *supra* note 90 at 87,908 ("Syllabus").

92. *Hernandez*, *supra* note 90 at 87,913.

93. The relevant portions of the Code—§170(c)—merely define a gift or contribution for the purposes of the deduction. The section does not contain explicit language about exchanges or benefits. On the other hand, §170(f)(8)(B)(iii), dealing with the details of the information that must appear on acknowledgements of a gift before it can be deducted, reads as follows:

    > A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect. For purposes of this subparagraph, the term "intangible religious benefit" means any intangible religious benefit which is provided by an organization organized exclusively for religious purposes and which generally is not sold in a commercial transaction outside the donative context.

    The foregoing was added to the Code in 1993.

94. *Hernandez*, *supra* note 90 at 87,914.

95. *Hernandez*, *supra* note 90 at 87,914. The IRS, in Rev. Rul. 78-189, refused to accept that auditing fees could be deducted primarily on the grounds that the fees were analogous to tuition paid to religious private schools for religious education. Such tuition is "consideration" and therefore non-deductible under U.S. case law.

96. *Hernandez*, *supra* note 90 at 87,920.

97. Interestingly, in 1993, after winning in the United States Supreme Court, the IRS reversed ("obsoleted") the position it had taken in *Hernandez* as set out in Rev. Rul. 78-189. See Rev. Rul. 93-73.

    It could be asked, if intangible religious benefits are to be taken into account in determining the deduction available to a taxpayer, why should not "psychic benefits" be accounted for in a similar manner? If I donate money to a university, and it names its law school after me in return, have I not derived a significant, albeit intangible, benefit?

98. See *Woolner v. R.* (1997), [2000] D.T.C. 1956 (T.C.C.) at ¶¶33–34.