Considerations in Corporate Giving*

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This article addresses certain tax aspects of corporate giving, specifically, the tax aspects of giving that are specific to corporations as opposed to individual donors. Accordingly, it is not an exhaustive review of the tax rules governing donations by corporations[1] but rather discusses and highlights the tax aspects of charitable giving that are relevant to corporations, as well as those who provide tax planning opportunities for corporations and their shareholders.

Corporate Philanthropy

Canada's businesses claimed just over $1 billion in charitable donations in 2003. Finance and insurance companies and businesses with annual revenues over $25 million accounted for most donation dollars. However, accommodation and food services companies and those with annual revenues between $5 million and $25 million contributed the largest percentage of their pre-tax profits.

Some charitable and nonprofit organizations benefit more from corporate donations than others, and certain types of organizations are more attractive to corporate donors. Only 20 percent of Canada's 161,000 charitable and nonprofit organizations reported that they received corporate donations, grants, or sponsorships in 2003. The majority (58%) of financial support from businesses was directed to three subsectors: sports and recreation (33%); grantmaking, fundraising, and voluntarism promotion (15%); and arts and culture (10%). While social services, environment, and development and housing organizations account for 23 percent of all organizations in Canada, they received just 9 percent of all corporate donations.[2]

There are several reasons for the narrow focus of corporate giving. Certain authors argue that companies lack information about the needs and potential of charitable and nonprofit organizations and the possibilities for corporate support and partnerships. Many organizations lack the organizational capacity to negotiate and build effective partnerships with the private sector. As well, the accountability and reporting requirements of many corporations may make it difficult for smaller charities and nonprofits to manage the administrative aspects of partnering with businesses. This may make financially well-resourced organizations more attractive to corporate funders.[3]

Corporations generally contribute to charities for the following reasons: (a) to build their company's brand and reputation among consumers; (b) to build strong communities; (c) to build social capital and support among citizens and

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governments in the communities in which they operate; and (d) to attract and retain employees by fostering pride and loyalty among their employees.[4]

Tax Relief for Corporate Donations

a) General Rules

Under subsection 110.1(1) of the *Income Tax Act*,[5] a corporation is permitted to deduct, in computing its taxable income, eligible amounts of gifts made to certain donees, as well as cultural gifts and ecological gifts.

Proposed subsection 248(31) defines the eligible amount of a gift or monetary contribution as the amount by which the fair market value of the property that is the subject of the gift or contribution exceeds the amount of the advantage, if any, in respect of the gift or contribution. However, if the amount of the advantage exceeds 80 percent of the fair market value of the gift, the existence of the advantage to the donor will disqualify the donation from being a gift, unless the donor can establish to the satisfaction of the Minister that the donation was made with the intention of making a gift.[6] Proposed subsection 248(32) describes the amount of an advantage in respect of a gift or contribution as, in general, the total value of all property, services, compensation, or other benefits to which the donor is entitled.

Paragraph 110.1(1)(a) of the Act provides for a deduction in respect of charitable gifts to donees specified in paragraph 110.1(1)(a), such as registered charities, registered Canadian amateur athletic associations, municipalities in Canada, the federal or a provincial government, and others. Gifts to such donees[7] may not exceed a specified percentage of the corporation's income for the year. However, this annual income limitation is increased by a specified percentage of taxable capital gains arising on the donation of capital property and recapture arising on the donation of depreciable capital property. In addition, provision is made for a five-year carryover of contributions not deducted in the taxation year in which they are made.[8] Gifts of cultural property to certain designated institutions or public authorities under paragraph 110.1(1)(c) and ecological gifts (as described in paragraph 110.1(1)(d)) are not subject to the general annual limit as a percentage of net income.

The annual income limitation which restricts the amount of the donations that can be deducted by a corporation is such that the deduction may not exceed the lesser of the corporation's income for the year and the amount determined by the following formula: 0.75 A + 0.25 (B + C + D), the particulars of which are found under paragraph 110.1(1)(a) of the Act. In general terms, this formula translates into an annual limit of 75 percent of the corporation's net income for the year, increased by 25 percent of the total of the following amounts:

- the proportion of the corporation's total taxable capital gains for the year from dispositions that constitute the making of gifts[9] described in paragraph 110.1(1)(a) by the corporation in the year, that the eligible amount of the gift is of the corporation's proceeds of disposition in respect of the gift (i.e., taxable capital gains x eligible amount of gift/fair market value of gift);

- the total taxable capital gains of the corporation for the year in respect of deemed gifts of non-qualifying securities in a preceding taxation year, in accordance with the reserve provisions of subsection 40(1.01); and
- the total amounts, each of which is determined in respect of the corporation's depreciable property of a prescribed class and is equal to the lesser of:
  - the amount of the recapture of capital cost allowance in respect of the class that is included in computing the corporation's income for the year, and
  - for each charitable gift made by the corporation in the year of property that was included in the class, the lesser of that proportion of the capital cost of the property to the corporation that the eligible amount of the gift is of the corporation's proceeds of disposition (i.e., capital cost x eligible amount of gift/proceeds of disposition of gift) and that proportion of the proceeds of disposition of the property less outlays and expenses incurred by the corporation to make the disposition that the eligible amount of the gift is of the corporation's proceeds of disposition (i.e., (proceeds of disposition - outlays and expenses) x eligible amount of gift/proceeds of disposition).

In effect, the amount allowed as a deduction in respect of charitable gifts of property other than cash will at least be sufficient to shelter any capital gains or recapture arising from the making of the gift, provided that an advantage was not provided to the corporation in respect of the gift.

b) Donations Made for Business Purposes

Donations are sometimes made by corporations to charities not so much for philanthropic purposes as with the expectation of deriving an advantage for the benefit of the business carried on by the donor. Such was the situation in *Olympia Floor & Wall Tile Ltd v MNR*,[10] in which donations made to charities in excess of the then 10 percent maximum were claimed as ordinary business promotion expenses. The taxpayer argued that between 25 and 30 percent of its sales was attributable to gifts made to charitable organizations "that were headed up by men who, in their ordinary business lives, were in a position to cause purchases to be made of the appellant's goods and who, as a consequence of the appellant's gifts to their charitable organizations, did, in the ordinary course of events as things were done in the particular part of the Montreal community that was involved, cause substantial purchases to be made of the appellant's goods that would not otherwise have been made." Given the taxpayer's explanation, the Court held the amounts in question to be deductible and to be indistinguishable from advertising expenses. The Court also concluded that such contributions were made as part of the income-earning process and therefore could not be regarded as "gifts."[11]

The *Olympia* case was applied in *Impenco Ltd. v MNR*.[12] In this case, in computing its income for its 1984 taxation year, a corporation that manufactured boxes for the jewellery, cosmetic, and gift trade sought to deduct donations of $178,097 made to charitable organizations in attempts to attract and impress a certain clientele. The Minister allowed a deduction of only 20 percent of the corporation's net income according to the limitations that prevailed in 1984. Noting that there is nothing in the legislation requiring a taxpayer to prove an increase in sales in order that an expense be deductible, the Court held that the contributions were expenses incurred for the purpose of earning income within paragraph 18(1)(a) of the Act.

Since corporate donations are often publicly recognized by a charity, and corporations are sometimes given an opportunity to speak at special events they have sponsored to promote the corporation and the goods and/or services it offers, in many instances, corporations can justify claiming the amount contributed as either a donation[13] or as a promotional expense, both of which are deductible to a corporation. From an income tax perspective, the reasons a corporation might prefer to deduct the amount contributed to a charity as a promotional expense as opposed to a charitable donation are that the deduction of promotional expenses is not limited to a percentage of income, as is the case with charitable donations, and, provided the amount contributed is reasonable in the circumstances, as required under section 67 of the Act, it can be fully deducted.[14] If the public recognition of the corporate donor were to qualify as an advantage, the corporate donor would either be precluded from claiming the amount contributed as a charitable deduction, where, for example, the value of the advantage cannot be ascertained or exceeds 80 percent of the amount contributed, or would be limited to deducting the difference between the amount contributed and the amount of the advantage.[15]

From the charity's perspective, since amounts in respect of which a charitable donation receipt has been issued must be included in the charity's disbursement quota calculation under subsection 149.1(1) of the Act and, therefore, disbursed by the charity in pursuing its charitable activities, to the extent a charitable donation receipt is not requested by the corporation, the charity will have greater flexibility as to the use of the donated funds or property.

Donations of Inventory

a) General Rules

Where a corporation makes a donation of property that constitutes inventory, the corporation is deemed to have received proceeds equal to the fair market value of the inventory[16] and must account for any income under section 9 of the Act. Accordingly, the difference between the fair market value of the donated inventory and the cost of producing the inventory must be brought into income and tax paid on that income. The charity receiving the inventory would issue an official receipt for tax purposes in an amount equal to the fair market value of the inventory as of the date of the donation. Therefore, while the income of the corporation would be increased because it must include the difference between the value of the inventory and the cost of the inventory in income, this increase would be offset by the charitable donation deduction.

b) Medicines

In its March 19, 2007, budget, the government introduced a tax incentive for drug manufacturers to donate medicines from their inventory to the developing world.[17]

Under paragraph 110.1(1)(a.1), corporations donating medicines from their inventory can claim a tax deduction equal to the cost of the donated medicine or half the amount by which the fair market value of the donated medicine exceeds its cost, whichever is less. This is on top of the deduction corporations can claim of the fair market value of any property donated to a registered charity or government body. This additional deduction is available only when the donation is made to a registered charity that has received funding through the Canadian International Development Agency and if the gift is intended for charitable activities outside of Canada.

Paragraphs 110.1(1)(a) and 110.1(1)(a.1) allow a corporation to claim both a charitable donation deduction and a deduction equal to the lesser of the cost of the donated medicine and half the amount by which the fair market value of the donated medicine exceeds its cost, provided the following conditions are met:

- (i) the medicine was, immediately before the gift, described in an inventory in respect of a business of the corporation,
- (ii) the gift is made to a registered charity that has received a disbursement under a program of the Canadian International Development Agency, and
- (iii) the corporation directs the charity to apply the gift to charitable activities outside of Canada.[18]

To illustrate the mechanism of the new tax incentive for donations of inventory, if we assume that a corporation donates inventory having a fair market value ("FMV") of $1,200 and a cost of $400, the tax implications of donating medicines from inventory on or after March 19, 2007, will be as follows:

a. the corporation will be required under the tax rules to bring $800 into income; and
b. the corporation will be entitled to a deduction of $1,600 (i.e., $400 + $1,200).

The deduction of $1,600 will eliminate tax that would otherwise be payable in respect of the donation of the inventory and the additional deduction of $400 will preserve part (i.e., $800) of the charitable donation deduction of $1,200.

If we use the same example as mentioned above, the tax implications of donating medicines from inventory prior to March 19, 2007, would have been as follows:

a. the corporation would have been required to bring $800 into income; and
b. the corporation would have been entitled to a deduction of $1,200.

Accordingly, although the deduction of $1,200 would have eliminated the tax that would otherwise have been payable on the $800 income inclusion, only $400 of the charitable donation deduction of $1,200 would have been preserved. Under the new rules, $800 of the charitable donation deduction will be available.

Donations of Capital Property

a) General Rules

Under paragraph 69(1)(b) of the Act, when a corporation disposes of capital property by way of gift, the property is deemed to have been disposed of for proceeds of disposition equal to its fair market value. If the property has appreciated in value while in the corporation's possession, there may thus be a capital gain.

However, subsection 110.1(3) of the Act provides a special rule where a corporation makes a gift of capital property to donees described in paragraph 110.1(1)(a) (i.e., charitable organizations), 110.1(1)(b) (i.e., gifts to Her Majesty), 110.1(1)(d) (i.e., ecological gifts), or where a non-resident corporation gives real property situated in Canada to a prescribed donee (i.e., The Nature Conservancy). Under subsection 110.1(3) of the Act, a capital gain may be avoided by assigning a value to the property equal to its adjusted cost base to the corporation. Designation of an amount less than fair market value reduces the amount of any capital gain that could otherwise result.

Subsection 110.1(3) of the Act allows a corporation to assign a value to the property not greater than the property's fair market value or less than the greater of the amount of the advantage in respect of the gift and the property's adjusted cost base at the time of the gift. The amount so designated is deemed to be the corporation's proceeds of disposition of the property as well as the fair market value of the gift made by the corporation for purposes of a deduction under subsection 110.1(1) of the Act. In view of the effects of this provision on capital gains and charitable donations, the designation of a value to be imputed to the property will have to be made taking into consideration the corporation's other capital gains or losses, charitable donations, and income for the year.

b) Donations of Cultural Property

Paragraph 110.1(1)(c) of the Act provides for a special treatment with respect to gifts of cultural property: the fair market value of a corporation's cultural property gifts, other than ecological gifts, to certain institutions is fully deductible.[19]

Thus, property identified by the Canadian Cultural Property Export Review Board as coming within the purview of the *Cultural Property Export and Import Act* ("CPE&I Act")[20] may be donated to a designated Canadian institution or public authority generally without attracting capital gains tax.[21] Moreover, in the case of such a donation, its fair market value is deductible in computing the taxable income of a corporation by virtue of paragraph 110.1(1)(c) of the Act. Pursuant to subsection 118.1(10) of the Act, the fair market value of the property for this purpose is deemed to be the fair market value determined by the Canadian Cultural Property Export Review Board.

To be eligible for deduction under paragraph 110.1(1)(c) of the Act, a gift must meet the following criteria:

1. The property must have been determined by the Canadian Cultural Property Export Review Board to meet the criteria set out in paragraphs 29(3)(b) and (c) of the CPE&I Act, namely:
   - it is of outstanding significance by reason of
     (a) its close association with Canadian history or national life,
     (b) its aesthetic qualities, or
     (c) its value in the study of the arts or sciences, and
   - it is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage;
2. the property must have been donated to an institution or public authority in Canada that was, at the time of making the donation, designated under subsection 32(2) of the CPE&I Act either generally or for a specified purpose related to the property; and
3. a receipt, proving the making of the gift, must be filed with the Minister, along with the certificate issued under subsection 33(1) of the CPE&I Act (attesting to the fair market value of the property and to the meeting of the criteria set out in paragraphs 29(3)(b) and (c) of that Act).[22]

c) Donations of Publicly Traded Securities and Ecologically Sensitive Land

Paragraph 110.1(1)(d) of the Act was enacted to provide specifically for a deduction in respect of ecological gifts made by corporations. By virtue of paragraph 110.1(1)(d), where certain certification requirements are met, the total fair market value of gifts of ecologically sensitive land (including a covenant, an easement, or a servitude) made by a corporation in the year or in any of the five preceding taxation years to municipalities in Canada, the federal or a provincial government, or certain registered charities[23] is fully deductible.[24]

To be eligible for deduction under paragraph 110.1(1)(d) of the Act, a gift of ecologically sensitive land made by a corporation must meet the following criteria:

- It must be a gift of land (including a servitude for the use and benefit of a dominant land, a covenant or an easement);

- the land must be certified by the Minister of the Environment to be "ecologically sensitive land," the conservation and protection of which is important, in the opinion of the Minister, to the preservation of Canada's environmental heritage;
- the gift must be made in the year (or any of the five preceding taxation years) to the federal or a provincial government, to a municipality in Canada, or to a registered charity one of whose main purposes is the conservation and protection of Canada's environmental heritage and that is approved by the Minister of the Environment;
- the fair market value of the ecologically sensitive land must be certified by the Minister of the Environment[25]; and
- pursuant to paragraph 110.1(2)(c), both the certificate confirming the ecologically sensitive character of the donated land and the certificate stating its fair market value must be filed with the donor's tax return.

As regards donations of publicly traded securities,[26] pursuant to paragraph 38(a.1) of the Act, where the securities donated consist of a share, debt obligation, or right listed on a prescribed stock exchange,[27] a share of the capital stock of a mutual fund corporation, a unit of a mutual fund trust, an interest in a related segregated fund trust, or a prescribed debt obligation,[28] the income inclusion rate for capital gains from such gifts is nil. Paragraph 38(a.1) was introduced in the Act in 1997 in an attempt to encourage gifts of publicly traded securities to charitable organizations and public charitable foundations. The original provision was introduced at a time when the capital gains inclusion rate was 75 percent, such that the amount of the taxable capital gain for such gifts was three-eighths of the capital gain. The amount of the taxable capital gain for such gifts dropped after 1997 as the capital gains inclusion rate also dropped from 75 percent to 66 2/3 percent, to the current inclusion rate of 50 percent. Currently, where a gift of publicly traded securities or ecologically sensitive land[29] is made to a qualified donee, including a private foundation,[30] the taxable capital gain on the donation is zero, in contrast to the one-half rate that applies in respect of a disposition of capital property other than publicly traded securities and ecologically sensitive land. Accordingly, the accrued capital gains in respect of publicly traded securities and ecologically sensitive land that are donated to a qualified donee do not bear tax.

However, if the corporation received or was entitled to an advantage in respect of the gift, under proposed section 38.1,[31] only part of the corporation's capital gain will be free of tax. As a result, paragraphs 38(a.1) and 38(a.2) of the Act will apply only to the proportion of the capital gain that the eligible amount of the gift is of the taxpayer's total proceeds of disposition in respect of the gift. The capital gain in respect of the gift that exceeds the capital gain to which paragraph 38(a.1) or (a.2) applies will be taxed according to the general rules.

By way of illustration, if a corporation received an advantage worth $20 in respect of a gift of publicly traded securities to a charity and the securities had an adjusted cost base to the corporation of $40 and a fair market value of $100 at the time of the donation, the accrued capital gain of $60 which would, in the absence of the advantage, be non-taxable, will now be taxable to the extent of $6 (1/2 x ($60 x $80/$100)).

In addition, the full amount of the fair market value[32] of such securities can be deducted by a corporation when they are donated to a charity.

Where a private corporation disposes of a capital property, it may include the difference between the capital gain realized and the taxable portion of the gain to its capital dividend account, as defined in subsection 89(1) of the Act. The amount of the capital dividend account can be paid out to the corporation's shareholders under subsection 83(2) of the Act as a tax-free capital dividend, provided the corporation elects that the dividend be a capital dividend.

Since the income inclusion rate for capital gains from gifts of publicly traded securities and ecologically sensitive land is nil, where a private corporation donates such property, the amount added to its capital dividend account is the full amount of the capital gain, since no portion of the capital gain is taxable. As a result, the full amount of the capital gain in respect of the property donated can be distributed to the shareholders as a tax-free capital gain. Therefore, gifts of such property are not only beneficial to the corporation, in that the corporation does not incur any tax liability in respect of the accrued capital gain and can deduct the full fair market value of the property, but also to the shareholder who can receive a tax-free dividend from the corporation in an amount equal to the accrued capital gain on the property.[33] This may provide an opportunity for income splitting if more than one family member is a shareholder of the corporation, since the capital dividends can then be paid to one or more family members (if they hold different classes of shares and the share attributes provide for dividend sprinkling) and, more specifically, to those whose marginal tax rate is high.

To illustrate the benefits of the capital dividend account, we will compare a situation where an individual donates publicly traded securities that the individual owns personally with a situation where a shareholder causes his personal holding corporation to donate publicly traded securities it owns to a charity. For purposes of our example, we will assume that the securities have an adjusted cost base of $200 and a fair market value at the time of the donation of $1,000 and that an advantage has not been received by the donor.

The consequences of donating such shares would be as follows:

1. Individual: the accrued capital gain of $800 would not be taxable and the individual would be entitled to a charitable donation credit pursuant to subsection 118.1(3) of the Act of $1,000, which the individual could apply against his/her taxes payable.
2. Corporation: the accrued capital gain of $800 would not be taxable and the corporation would be entitled to a charitable donation deduction of $1,000, which could be applied to reduce the corporation's taxable in-

come. In addition, the corporation would be entitled to add $800 to its capital dividend account and this amount could be paid as a tax-free capital dividend to the corporation's shareholder.

The favorable tax treatment of donations of publicly traded shares may also provide estate planning opportunities where an individual holds the shares of a personal holding corporation, the assets of which consist exclusively of publicly traded securities. From an estate planning perspective, if the individual in his or her Will were to gift half of the shares of the personal holding corporation to a registered charity and the other half to his or her children, the shares transferred to the registered charity would not qualify for the preferential tax treatment and would therefore generate a taxable capital gain taxable in the individual's hands. Part or all of the taxable capital gain could be offset by the charitable donation credit to which the individual would be entitled. Alternatively, the individual could cause the corporation to donate half of its portfolio of publicly traded securities to a registered charity and then transfer the shares of the personal holding corporation to the individual's children. Not only would the corporation have a taxable capital gain of zero on the disposition of the securities to the registered charity, it would also be entitled to a charitable donation deduction equal to the fair market value of the securities. In addition, the amount of the accrued capital gain with respect to the securities would be added to the capital dividend account of the corporation and could be paid out to the shareholders, namely, the children, on a tax-free basis.

d) Donations of Stock Options and Issuance of Shares

A stock option granted by a corporation to a charity is not a transfer of property and, therefore, does not qualify as a gift.[34] In the Canada Revenue Agency's view, the grant of a stock option does not result in a reduction in the granting corporation's assets and, accordingly, this precludes the grant from being viewed as a transfer of property from the corporation to the charity.[35]

Similarly, issuing shares is not considered to constitute a transfer of property and would therefore not qualify as a gift by a corporation.[36]

Acquisition of Corporate Control Rules

As indicated above, corporations may carry forward unused charitable donations deductions for up to five taxation years. There are no provisions in the Act intended to allow corporations to sell or otherwise transfer these unused deductions to other taxpayers, except in certain circumstances where a corporation is wound up into its parent corporation[37]or amalgamates with another corporation to form a new successor corporation.[38]

However, certain transactions had over time developed under which a donation of property was made indirectly, by a person who could not otherwise use the resulting charitable donation deductions or credits, by means of a transfer of the property to a corporation, the subsequent donation of the property by the corporation to a charity, followed by a sale of the shares of the corporation to another corporation that was in a position to make use of the unused charitable donation deductions.

In response to such transactions, section 110.1(1.2) of the Act was introduced to provide that charitable donation deductions of a corporation that are unused at the time control of the corporation is acquired will be claimable only for taxation years that end before that acquisition of control. This restriction treats unused charitable donation deductions of a corporation in a manner that is similar to the treatment accorded capital losses on an acquisition of control and ensures that unused charitable donation deductions cannot be traded.

Subsection 110.1(1.2) of the Act also denies a charitable donation deduction in respect of a gift in circumstances where control of a corporation is acquired before a donation of property by the corporation but in contemplation of that gift being made. This rule does not apply where the person who acquires control is a registered charity or other qualified donee.

Conclusion

As indicated previously, Canadian corporations are significant supporters of charitable and nonprofit organizations. With 85 percent of Canadians making charitable donations to charities and 45 percent volunteering their time, it is clear that a significant proportion of business people are personally involved in their communities.[39] It is likely that their interest in their communities and in philanthropy in general accompanies them to their place of business and can influence the corporations of which they are employees, officers, or directors with respect to decisions concerning charitable giving.

Although corporations are very likely aware of the tax implications of making cash donations and of sponsoring special events, such as golf tournaments, galas, and the like, organized by charities, it is not clear that they are fully aware of some of the other opportunities available to them with respect to charitable giving. Clearly, not all corporations can avail themselves of the favorable tax treatment with respect to donations of medicines from inventory and donations of publicly traded securities and ecologically sensitive land, since they must hold these types of properties in order to take advantage of the favorable tax rules regarding donations of such properties and the benefits of the capital dividend account are only available to shareholders of private corporations. However, to the extent a corporation has portfolio investments or vacant land that is ecologically sensitive, it should consider whether donating such properties would be appropriate, given the favorable tax rules with respect of donations of such properties. In addition, in a private corporation context, shareholders of private corporations that hold significant portfolios of marketable securities should review their tax and estate planning to determine whether they should be making changes to their current plans to take advantage of the favorable regime that applies to donations of publicly traded securities.

NOTES

1. For a comprehensive review of the tax rules regarding donations by corporations, see T.L.M. Man, "Corporate Giving: A Tax Perspective," September 2006 at <http://www.carters.ca>.

2. M. Easwaramoorthy, C. Barr, G. Gumulka, and L. Hartford, "Business Support for Charities and Nonprofits," Imagine Canada Research Bulletin, Vol. 13, No. 2.

3. *Supra* note 2 at page 3.

4. M. Hall, M. Easwaramoorthy, and W. Sandler, "Business Contributions to Canadian Communities: Findings From a Qualitative Study of Current Practices," Imagine Canada, 2007, page 9.

5. RSC 1985, c.1, (5th Supp.), as amended (hereinafter referred to as the "Act").

6. Proposed subsection 248(30).

7. Crown gifts made or agreed to in writing before February 19, 1997 (budget day in 1997) are grandfathered under subparagraph 110.1(1)(b)(ii) of the Act and are therefore not subject to any annual limitation.

8. Charitable donations made in a taxation year in excess of the amount deducted for that year may be carried forward and deducted in subsequent taxation years, subject to the limitation that in no year can the deduction exceed the lesser of the corporation's income for that year and the amount determined by the formula in paragraph 110.1(1)(a) of the Act.

9. As discussed below, the inclusion rate on capital gains arising from gifts of certain capital property (including publicly traded shares) made to charities is now nil by virtue of paragraphs 38(a.1) and (a.2) of the Act.

10. [1970] C.T.C. 99 (Exch).

11. As a result of proposed subsection 248(31), the amount contributed to the charity could now be considered to be a gift if the amount of the advantage, as defined under subsection 248(32), is ascertainable and does not exceed 80% of the amount contributed or the fair market value of the property gifted to the charity.

12. [1988] 1 C.T.C. 2339 (TCC).

13. Provided the amount of the advantage, if any, in respect of the donation is ascertainable and does not exceed 80% of the monetary contribution or the fair market value of the property.

14. Anecdotally, many charities indicate that corporations rarely require a charitable donation receipt, presumably on the basis that they deduct their gift as a promotional expense.

15. In its March 2005 Registered Charities Newsletter, no. 22, the Canada Revenue Agency invited charities to share their views and experiences with respect to advantages received by a donor where there was some form of promotion, advertising, or sponsorship at issue, with a view to assisting the Charities Directorate in drafting a policy on the types and value of advantages received by a donor and, more specifically, the logic or criteria that should be used in determining whether promotion, advertising, or sponsorship constitutes an advantage and its value.

16. Subparagraph 69(1)(b)(ii) of the Act.

17. See Department of Finance, Budget documents, March 19, 2007.

18. Subsection 110.1(8) of the Act.

19. See generally Canada Revenue Agency, Registered Charities Newsletters, no. 25, Summer 2005.

20. The *Cultural Property Export and Import Act* is designed to restrict the export of art, antiques, and other objects important to Canada's cultural heritage.

21. Subparagraph 39(1)(a)(i.1) of the Act.

22. Paragraph 110.1(2)(b) of the Act.

23. Under section 207.31 of the Act, the recipient municipality or charity is subject to a penalty of 50 percent of the fair market value of the donated land where the donated land is disposed of or its use is changed without the permission of the Minister of the Environment.

24. Although donations of ecologically sensitive land are not subject to the income limitations that apply in respect of charitable gifts under paragraph 110.1(1)(a) of the Act, the limitations in subsection 110.1(1.1) of the Act are applicable.

25. Administrative procedures in respect of a request for a determination or redetermination of fair market value by the Minister of the Environment and rules concerning the certificate of fair market value are set out in subsections 118.1(10.2) to (10.5) of the Act. A donor can appeal the Minister's redetermination or confirmation of fair market value to the Tax Court of Canada.

26. For an analytical review of the rationale and cost of the tax incentive with respect to gifts of publicly traded securities, see W.I. Innes, "The Case for Tax Incentives on Gifts of Publicly Traded Securities," (2003), vol. 51, no. 2. *Canadian Tax Journal* at 905; L. Philipps, "Thinking Critically About the Taxation of Capital Gains on Donated Public Securities (or Looking Paragraph 38(a.1) in the Mouth)," (2003), vol. 51, no. 2, *Canadian Tax Journal* at 913; and David G. Duff, "Special Federal Tax Assistance for Charitable Donations of Publicly Traded Securities: A Tax Expenditure Analysis," (2003), vol. 51, no. 2, *Canadian Tax Journal* at 925.

27. See sections 3200 and 3201 of the *Income Tax Regulations* (the "Regulations").

28. A prescribed debt obligation is a bond, debenture, note, mortgage, or similar obligation of, or guaranteed by, the Government of Canada or of the government of a province or an agent of that government: see section 6210 of the Regulations.

29. Pursuant to paragraph 38(a.2) of the Act.

30. Paragraph 38(a.1) of the Act applies to gifts of publicly traded securities to qualified donees other than private foundations. However, in its March 19, 2007 Budget, the federal government extended the favorable tax treatment provided by paragraph 38(a.1) in respect of donations of publicly traded securities to private foundations. In addition, it introduced self-dealing rules for private foundations that place limits on private foundation shareholdings, taking into consideration the shareholdings of persons not dealing at arm's length with the foundation. These rules were introduced out of concern that private foundations and persons connected with private foundations might, by virtue of their combined shareholdings, be able to exercise under influence for their own benefit. Under the new rules, a private foundation will be permitted to hold no more than 2 percent of all outstanding shares of any class of shares of any one corporation. If the private founda-

tion's holdings should exceed the 2 percent limit and the foundation and non-arm's length persons together should hold more than 20 percent of the outstanding shares of a particular class of a corporation, the foundation will be required to report to the Canada Revenue Agency the number of shares held at the end of the year by the foundation, as well as by non-arm's length persons, and will also be required to divest itself of the excess within a certain time period. Penalties will apply if divestment does not occur within the time periods specified by the new rules.

31. Section 38.1 was added by Bill C-33, section 59, consequential to the addition of new subsections 248(31) to (33), for gifts made after December 20, 2002.

32. The Canada Revenue Agency takes the position that the donation date of a share is the date on which transfer of ownership takes place. In its view, a charity has taken ownership of a share when it has the right to receive dividends declared in respect of the share, the right to receive amounts on the liquidation of the corporation, and the right to exercise the votes attached to the share: see Canada Revenue Agency, Registered Charities Newsletter, No. 12, Spring 2002.

33. When the Department of Finance introduced measures in 1997 to reduce the income inclusion rate on capital gains arising from donations to charities of publicly traded securities, included in those measures (in Bill C-28) were proposed provisions to deny corporations the ability to add amounts to their capital dividend accounts in respect of gains realized on such donations. However, on December 22, 1997, the Department of Finance announced that capital dividend account treatment would be maintained for gifts of publicly traded securities to registered charities and other qualified donees, "in order not to diminish the incentive for charitable giving". See Department of Finance, Press Release 1997-124, dated December 22, 1997.

34. Canada Revenue Agency document no. 2003-0014695, November 21, 2003.

35. For criticism of this view, see A.B.C. Drache, "CCRA Nixes Stock Option Gifts", Canadian Not-for-Profit News (Carswell) 47 (June 2004).

36. *Algoa Trust*, [1993] 1 C.T.C. 2294 (TCC); aff'd without reasons 1998 CarswellNat 3211 (FCA).

37. Paragraph 87(2)(v) of the Act.

38. Paragraph 88(1)(e.6) of the Act.

39. *Supra* note 4 at page 6.