

Recent Tax Developments

MARY LOUISE DICKSON

Dunbar, Sachs and Appel, Barristers and Solicitors, Toronto

LAURENCE C. MURRAY

Peat Marwick Thorne, Chartered Accountants, Toronto

Budget Proposal Affects Prospective Donors

On February 20, 1990 the Honourable Michael Wilson, Minister of Finance, presented his 1990 budget. In the recent past, tax practitioners have grown used to countless resolutions relating to income tax and sales and excise tax legislation. This budget was an exception as there were only seven resolutions relating to the *Income Tax Act*. One of them affected the charitable and non-profit sector, or more particularly, prospective donors.

Resolution 1 of the Notice of Ways and Means Motion to Amend the Income Tax Act provides for an amendment to the *Income Tax Act* as it relates to cultural property. Briefly, prior to the proposed amendment, the gifting of an object that the Canadian Cultural Property Export Review Board has determined meets all of the criteria set out in paragraphs 23(3)(b) and (c) of the *Cultural Property Export and Import Act* is deductible for income tax purposes or available for a (non-refundable) tax credit (as determined), depending upon whether the taxpayer is an individual or a corporation, without the usual restriction of such donations being limited to 20 per cent of net income. In addition, where the cultural property is capital property, there is no capital gains tax on such an appreciated cultural property. This provision has been effective since the latter part of the 1970s and has worked reasonably well except in some tax cases dealing with the value of such property. Relatively recently, in *Albert D. Friedberg v. Her Majesty The Queen* (89 DTC 5015), the taxpayer was successful in arguing that the fair market value of the cultural property was considerably higher than its actual cost, notwithstanding that the property was donated to a designated institution shortly after it was acquired. [See "Recent Tax Developments", (1989), 8 *Philanthrop.* No. 2, pp. 39-40.] Effective for property donated after February 20, 1990, the fair market value of certified cultural property will now be determined by the Canadian Cultural Property Export Review Board, the intention presumably being to attempt to minimize as far as possible the unusual situation that arose in *Friedberg*.

Interpretation Bulletin No. IT-297R2 dated March 21, 1990 was released and replaces the previous interpretation bulletin on the subject. This bulletin deals with gifts-in-kind to charity and others and obviously covers changes to the earlier Interpretation Bulletin dated February 20, 1984 to reflect changes to the income tax legislation, including the substitution of a tax credit in respect of donations by individuals in lieu of a tax deduction. This interpretation bulletin itself clearly indicates that the general rule applicable to gifts-in-kind (that is, a disposition at fair market value) doesn't apply if there are special rules relating to such gifts. The bulletin then goes on to outline those interpretation bulletins that deal with special situations. They are as follows:

- Gifts of Life Insurance Policies as Charitable Donations (IT-244)
- Gifts of Capital Property to a Charity and Others (IT-288)
- Disposition of Canadian Cultural Property (IT-407)
- Visual Artists and Writers. (IT-504)

In addition, in this interpretation bulletin, Revenue Canada, Taxation has confirmed that the (non-refundable) tax credit for donations can be taken by either spouse, irrespective of how the attendant income tax consequences affect the husband and wife, where such property is owned jointly by the couple.

Decision Reversed

It should be noted that the decision of McKeown J. in the Leonard Foundation Trust case (1987), 61 O.R.(2d) 75 has been reversed by the Court of Appeal of Ontario. In a decision released on April 24, 1990 the Court found that the discriminatory terms of a scholarship trust established in 1923 by Reuben Wells Leonard are now contrary to public policy as declared in the Ontario Human Rights Code to the extent that the trust discriminates on the grounds of race, colour, nationality, ethnic origin, religion and sex. The trust directed that the income of the trust be used for scholarships for a "British Subject of the White Race and of the Christian Religion in its Protestant form". It contained language that excluded "all who are not Christians of the White Race, all who are not of British parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual". The amount of income to be expended on female students was limited to one fourth of the total funds available for scholarships.

The Committee responsible for administering the scholarships had received numerous complaints about the eligibility requirements for these scholarships from human rights bodies, the press, the clergy, the university community and the general community and finally the Ontario Human Rights Commission filed a formal complaint against the Leonard Foundation alleging that the trust contravened the Human Rights Code. The Court agreed. It found, however, that the general intent of the trust was charitable and therefore the scholarships should continue to be granted but on a non-discriminatory basis. This was contrary to Col. Leonard's wishes as expressed in the Trust.

The Court of Appeal of Ontario has clearly found that a charitable trust that is acceptable at the time it is established can later, if public mores change, become unacceptable.

There is no question that this decision has the potential to have a profound effect on charitable giving in Ontario. Critics of the decision argue that the decision will discourage charitable giving because a donor cannot be certain his or her wishes will be carried out.

It does seem that the decision will have far-reaching effects. For example, it is quite conceivable that trusts designed to assist disabled people, aboriginal people or other people of a particular culture or even women will at some time in the future be found discriminatory if those groups are no longer regarded as "oppressed". On the other hand, in our multicultural society it would have been surprising if the Court had reached a different result and upheld the validity of the Trust.