

## Comments on the December 20, 2002 ITA Amendments on Split Receipting

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### Introduction

The proposed additions to the *Income Tax Act* (ITA) introduced on December 20, 2002 of subsections 248 (30) – (33), which I will refer to collectively as “Gift Amendments”, are conceptually flawed at a fundamental level. The term “gift” is not defined in the ITA. The Gift Amendments tamper with the meaning of “the eligible amount of a gift”; but do not define “gift”. Gift is “terminology” used in sections 69, 110.1, 118.1, and 248, among others, that does not have a definition in the ITA.

The Gift Amendments introduce civil law concepts of gift into the ITA without providing a statutory definition of gift. Consequently, there is now some bastardized hybrid of civil law and common law in the ITA which meets neither the civil law nor common law definition of gift. However, donors are required to refer back to provincial law in determining whether or not a gift has taken place at law. This is clearly set out in the provisions of the *Federal Law – Civil Law Harmonization Act, No. 1*<sup>1</sup> that added Section 8.2 to the *Interpretation Act* which reads:

“8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.”

It is beyond doubt that the word “gift” in the ITA is “terminology that has a different meaning in the civil law and the common law”. The *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1806, states:

“Gift is a contract by which a person, the donor, transfers ownership of property by gratuitous title to another person, the donee; a dismemberment of the right of ownership, or any other right held by the person, may also be transferred by gift.”

The common law definitions are not so precise but all deny that a gift is a contract and that the donor can receive consideration from the donee. The Federal Court of Appeal has also recognized the differences between the civil law and common law by including the qualifying words “within the meaning of the common law” in its definition:

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<sup>1</sup> S.C. 2001, c. 4, brought into effect June 1, 2001

“This Court has held that a gift, within the meaning of the common law, is 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.”<sup>2</sup>

Notwithstanding the *Federal Law – Civil Law Harmonization Act, No. 1*, the Gift Amendments are an ill conceived attempt of the Federal Parliament to legislate a homogenization of the common law and civil law of gift. The result is a bastardization which gives birth to a concept of gift which will not be recognized as being legitimate under the law of property and civil rights in either Quebec or common law provinces.

These amendments reflect a profound lack of understanding of the constitutional division of legislative authority in Canada. The issue as to whether a person in BC who has transferred property to a charity in BC has succeeded in transferring legal title by way of gift is a matter to be determined exclusively under the common law of BC. It is outside the legislative competence of the federal Parliament to interfere in this issue because section 92(13) of the Constitution gives the Provinces the exclusive right to make laws related to “Property and Civil Rights in the Province”. The law of gift with respect to transfer of title is a matter of provincial jurisdiction. The amendments contravene the stated purpose of the *Federal Law – Civil Law Harmonization Act, No. 1* when it enacted Section 8.1 of the *Interpretation Act* which reads:

“8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.”

The Gift Amendments do not consider provincial private law rules of gift in a way that respects section 92(13) of the Constitution. The Catch-22 question for the authors of the Gift Amendments is, if there has been no transfer of property pursuant to the rules, principles or concepts forming part of the law of property and civil rights in a common law province, how can there be a gift for the purposes of the ITA? The provisions of the ITA are entirely irrelevant in determining whether or not a gift has taken place in the common law provinces or Quebec. The ITA can define a gift as a white box with red ribbons for all it matters in determining whether a gift has taken place at common law. If donors in common law provinces do not comply with the common law of gift, then no property passes to the charity. Consequently, no charitable donation tax receipt should be issued.

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<sup>2</sup> *Woolner v. Canada*, 99 D.T.C. 5722, para 7, (F.C.A.).

## Jurisdictional Issues

Most constitutional jurisdiction disputes focus on the "pith and substance" of the law. The drafters of the Gift Amendments can claim that the pith and substance of the proposed amendments is tax and therefore the Gift Amendments are *intra vires* the federal Parliament. That is correct with regard to the tax impact of any transfer. However, the determination as to whether the purported "gift" has affected a transfer of property to the donee is a matter of property and civil rights and exclusively within Provincial jurisdiction. What is offensive about these amendments is that they not only do not respect provincial private law, they seek to effectively change the law within provincial jurisdiction by changing federal legislation. While the specific amendments are more in conformity with civil law than common law, I doubt that the government of Québec will be grateful for amendments to the ITA that are not respectful of the jurisdictional right of the province of Québec to have the *Civil Code of Québec*, determine the legal definition of what is a gift.

Any doubt about the federal government's intention to change the common law by amending the ITA is dispelled when one reads the opening paragraph of Income Tax Technical News No. 26 released December 24, 2002 which reads:

"The Canada Customs and Revenue Agency (CCRA) has completed its review of what constitutes a gift for purposes of the *Income Tax Act* (the Act). This review was initiated as a consequence of the decisions in various court cases that seem to call into question whether the traditional meaning of gift under common law is still the appropriate standard. Furthermore, the traditional definition of gift disqualifies as a gift a transfer of property for partial consideration, notwithstanding that there is a clear gift element and donative intent, a result with which the government and, apparently, the courts are not comfortable."

The desire to avoid reference to and consideration of provincial law is not the only intellectual source of this ill-conceived legislation. It is rooted in CCRA's long standing policy to refuse to respect and acknowledge the heritage of civil law's influence on the administrative policies of Charities Directorate. There is an uncompromising denial of the Québec fact which is obvious when one reflects on the paragraph above. Where is the Province of Québec in the mind of the author who questioned "whether the traditional meaning of gift under common law is still the appropriate standard"? CCRA has traditionally applied the common law of gift to donors in civil law Québec. The final sentence in that paragraph can only be understood in light of Charities Directorate's denial of the Québec fact because civil law does not "disqualify[y] as a gift a transfer of property for partial consideration".

Charities Directorate sacrificed the intellectual integrity of the common law of gift by importing the very useful civil law concept of a "remunerative gift" after losing the *Aspinall*<sup>3</sup> case. Revenue Canada has been unwilling to acknowledge the civil law origin of this legal concept even though the court cited the *Civil Code of Québec* definition of a "don or donation" in interpreting gift in the *Income Tax Act*. In the more than 30 years since the *Aspinall* decision, none of Revenue Canada's and CCRA's interpretation

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<sup>3</sup> *Aspinall v. MNR 70 DTC 1669*

bulletins, information circulars, pamphlets, information guides or registered charity newsletters have even mentioned Québec law with regard to gifts. Judging from its publications, the only donors that CCRA is willing to give any published guidance to are those who operate under the common law rules. The Explanatory Notes published by the Department of Finance with the amendments are the first instance of a reference to civil law with regard to gifts. However, Technical News No. 26 maintains CCRA's unblemished record on this issue by not once mentioning civil law or the Québec origins of the concept of a "remunerative gift".

Charities Directorate has succeeded in including civil law concepts in the "common law" of gift without acknowledging them for these many years by giving priority to its administrative policies instead of the rule of law. Adherence to the rule of law is not the determining issue in implementing "CCRA's interpretative approach". Technical News No. 26 evidences that the objective application of "a province's rules, principles or concepts forming part of the law of property and civil rights" is less important than CCRA's subjective determination. Reflect upon the following statement by CCRA and try make the intellectual case for the proposition that CCRA feels compelled to apply the law with regards to charitable gifts:

"Underlying the CCRA's interpretative approach to determining whether there is a gift in situations other than where there is an outright transfer of property for no consideration is that there be a clear donative intent to make a gift."

### **Consideration Distinguishes "Contract" from "Gift"**

The Gift Amendments have failed to consider the fundamental rules, principles or concepts with regard to transfer of title of property in the law of property and civil rights in common provinces.

Broadly speaking, it is only possible to transfer property on an *inter vivos* basis so as to dispose of title by some form of contract or by gift. Transfer by way of contract can be achieved in many ways, with the paramount legal principle being that a contract requires some form of consideration. Without consideration there has been no disposition of title, although there may have been a loan or some other lesser form of transfer.

The law distinguishes between transfer of title by way of contract and gift by defining a gift to be a voluntary transfer of property that precludes consideration in any form. This proposition was stated most succinctly by Jakkett, C.J. in the Federal Court of Appeal when he said:

"A contract of sale, which is, by definition, a transfer of property for a consideration, cannot be a gift, which is, by definition, a disposition of property without consideration."<sup>4</sup>

Because there is no consideration, the law of gift requires that property be delivered or transferred from the transferor/donor to the transferee/donee with the intention to make a gift. If the property is delivered

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<sup>4</sup> R. v. Little 78 D.T.C. 6179

without the intention to make a gift, under the common law there has not been a transfer by way of gift. The property is only loaned or in some other status, possibly by virtue of there being a mistake at law, that does not enable the transferee to take legal title. Subsection 248 (32) explicitly uses the language that the transfer must be “made with the intention to make a gift”:

If the transferee provides consideration to the transferor, then the transfer has not met the common law test of a gift. If the transferor intended to give consideration and the transferee intended to accept consideration, then the common law is very clear that it is a contract. It is irrelevant from a common law perspective that the consideration may have been inadequate. Millions of contracts are undertaken for consideration of \$1. It would be very problematic for the law of commercial transactions in Canada if the law of “gift” as contemplated in proposed ITA subsections 248 (30)-(33) was to become the law in Canada.

It is important to remember that the Gift Amendments are placed in section 248 which covers the entire ITA. There is nothing that limits their application to gifts in sections 110.1 and 118.1. They clearly apply to subsection 127(3) as amended. It would be disastrous if zealous auditors applied section 69(1)(b) to a contract having consideration of \$1 on the basis that the contract was a disposition “by way of gift *inter vivos*”. Unlike the situation where the parties intended the transfer to be a gift, such a contract will have resulted in a binding transfer of title at common law. Consequently, the taxpayer will have no grounds for claiming mistake because the ITA deems it to be a gift. It is within the legislative competence of the federal Parliament to deem a contract to be a gift for tax purposes. However, it is undoubtedly outside the federal Parliament’s legislative competence to deem a contract to be a gift for purposes of a province’s law of property and civil rights.

### **Difference Between Consideration and Advantage**

The Gift Amendments are mistaken in that they use the words “consideration” and “advantage” synonymously whereas the law makes an important distinction between the terms. This is apparent in the leading decision of the Federal Court of Appeal, *R. v. McBurney*, 85 DTC 5433, in which Stone J. cited the Federal Court of Australia in the *Leary* case:

“If a transfer of property is in return for valuable consideration received by the transferor from the transferee, it will not be a gift by the transferor. If the relevant property is not, for that reason, precluded from being properly regarded as a gift, the above-mentioned considerations indicate usual attributes of a gift, namely, that a gift will ordinarily be by way of benefaction, that a gift will usually be not made in pursuance of a contractual obligation and that a gift will ordinarily be without any advantage of a material character being received in return. I would add to those usual attributes of a gift, the attribute that a gift ordinarily “proceeds from a ‘detached and disinterested generosity’...”

The law cited establishes that “consideration” is fatal to a gift; whereas “advantage” is permissible. The court could hardly have stated the proposition more baldly than to say: “If a transfer of property is in return for valuable consideration received by the transferor from the transferee, it will not be a gift by the

transferor”. Having prescribed “consideration”, the court goes on immediately to prescriptively allow “advantage”, saying: “If the relevant property is not, for that reason, precluded from being properly regarded as a gift, the above-mentioned considerations indicate usual attributes of a gift...” Consequently, one only considers the attributes of the transfer to determine if there is a gift after determining that whatever advantage or benefit received was not “valuable consideration”.

One of the attributes listed is “that a gift will ordinarily be without any advantage of a material character being received in return”. Deane J. continues: “I would add to those usual attributes of a gift, the attribute that a gift ordinarily 'proceeds from a 'detached and disinterested generosity',” Consequently, a charity can provide an “advantage” to a donor acting out of detached and disinterested generosity intending to transfer property by way of gift. However, that “advantage” cannot be “consideration” or it will be a contract rather than a gift. Nor is it easy to argue that a “remunerative gift” meets the articulated test of “detached and disinterested generosity”.

### Comments on the Explanatory Notes

Having given some background on the law, I will comment on each of the Explanatory Notes beginning with those titled “Gifts and Contributions”.

#### Explanatory Note

“At common law, it is generally the view that a gift includes only a property transferred voluntarily, without any contractual obligation and with no advantage of a material character returned to the transferor.”

This statement of the common law substantially follows the language in *McBurney* that I cited previously. It should be noted that it uses the language “returned to the transferor”. This is a valid articulation of the law prior to the Gift Amendments because the only advantage which the law today is concerned with is an advantage returned to the donor by the donee as opposed to a third party. Arguably, after the enactment of subsection 248(31), an advantage will include a benefit obtained from a third party so this will no longer be an accurate statement of the law.

#### Explanatory Note

“In contrast, under section 1806 of the Civil Code of Quebec (“CCQ”), a gift in Quebec is a contract by which ownership of property is transferred by gratuitous title. However, the rights of ownership may be separated, such that it may be possible for a transferor to transfer part of the rights of ownership without any material advantage returned (i.e., by way of gift) and to transfer the other part separately for consideration. It is therefore possible, in Quebec, to sell a property to a charity at a price below fair market value, resulting in a gift of the difference.”

This statement of civil law, beginning with “in contrast”, makes it clear that this legal concept of “gift” in Québec is materially different from the common law. This is a description of a “remunerative gift.”

## Explanatory Note

“Under both the common law and the CCQ, it is generally accepted that a transfer of property is not a gift unless the donor is impoverished by the transfer to the benefit of the donee and it is the donor’s intention to enrich the donee without consideration.”

This paragraph contradicts the previous paragraph because under the CCQ the donor’s intention is not to enrich the donee “without consideration” but rather to enrich the donee as to the value in excess of the consideration.

It is my opinion that the common law is much less clear about the importance of impoverishing the donor than about enriching the donee. Again, the primary reference is the passage from *Leary* cited above where Deane J. stated that the “usual attributes of a gift” are “that a gift will ordinarily be by way of benefaction”. The key issue is that the donor gives with the intent of benefiting the charity. There is nothing in the passage about impoverishing the donor.

It is also counter to the tax policy of the ITA to argue that is an attribute of a gift to impoverish the donor. All forms of tax deductions and tax credits are used to reduce the impoverishment of donors. This became more pronounced policy in the ITA when Parliament introduced the donation tax credit for individual donors so that low income donors receive a tax credit calculated with reference to the highest marginal rate. The ITA provisions relating to gifts of cultural property can result in a donor having absolutely no impoverishment in certain fact patterns when the tax costs of a non-charitable disposition are included in the analysis. The 1997 amendments which reduced the inclusion rate of capital gains on public securities donated to public foundations also reduce the impoverishment of the donor. In all of the donation tax credit scenarios in the ITA, the policy is to introduce provisions to reduce the impoverishment of the donor so as to encourage more gifts that will increase the benefaction to the charity.

## Explanatory Note

“At common law there is generally no ability to separate the rights of ownership of a single property in the course of making a gift. As such, at common law a contract to dispose of a property to a charity at a price below fair market value would not generally be considered to include a gift.”

This is a correct statement of the law. Properly understood, this paragraph makes the point that applying the law that determines whether or not title to the property passes in a common law province, a “remunerative gift” is not a gift.

This paragraph also ignores the impact of section 69 which would deem the taxpayer knowingly disposing of the property to a charity at a price below fair market value to have received proceeds of

disposition equal to fair market value irrespective of the price paid by the charity. It is not clear how Finance intends section 69 to be applied in conjunction with the new provisions in section 248.

#### **Explanatory Note**

“Nevertheless, there have been certain decisions made under the common law where it has been found that a transfer of property to a charity was made partly in consideration for services and partly as a gift.”

No authority is provided for this paragraph. If CCRA holds this view, then it should have amended its definition of gift in its interpretation bulletins and other publications long ago. Logically construing the Explanatory Notes’ recitation of the common law of gift in the previous paragraphs would lead to the conclusion that these “certain decisions” are wrongly decided. If CCRA considers the cases to be wrongly decided, it should have appealed them.

#### **Explanatory Note**

“Subsections 248(30), (31) and (32) are added to the Act to clarify the circumstances under which taxpayers and donees may be eligible for tax benefits available under the Act in respect of the impoverishment of a taxpayer in favour of a donee. In addition to the clarification provided by these new rules, the Canada Customs and Revenue Agency will release guidelines that describe how it will apply the new rules to various situations and fundraising methods commonly used in the charitable sector.”

This paragraph implies that amending the ITA provisions will bring clarity to the situation. The reality is that the authors of the Gift Amendments have no clear understanding of the law and the jurisdictional limitations of the federal government if they think amending the ITA will change either the common law or the civil law of gift in individual provinces.

#### **Explanatory Note**

##### **Eligible Amount of Gift - ITA 248(30)**

“New subsection 248(30) of the Act, which applies in respect of gifts made after Announcement Date, defines the eligible amount of a gift as the amount by which the fair market value of the property that is the subject of the gift exceeds the amount of the advantage, if any, in respect of the gift. Subsection 248(30) is added concurrently with amendments to subsections 110.1(1) and 118.1(1) of the Act, which describe the types of gifts in respect of which an eligible amount will qualify for a deduction (for corporations) or a tax credit (for individuals). The amount of the advantage in respect of a gift is described in new subsection 248(31) of the Act.”

### **Statutory Provision Eligible Amount of Gift**

(30) The eligible amount of a gift is the amount by which the fair market value of the property that is the subject of the gift exceeds the amount of the advantage, if any, in respect of the gift.

The problem with subsection 248(30) is that it only applies if there is a gift. "Gift" is still not defined in the ITA so one has to go to the common law in common law provinces to determine its definition. The civil law concept of gift does not apply in common law provinces. If what is received from the donee is consideration, then there has been no gift.

Subsection 248(30) is the ITA's proximate articulation of Article 1810 of the *Civil Code of Québec* which reads: "A remunerative gift or a gift with a charge constitutes a gift only for the value in excess of that of the remuneration or charge."

The danger of this provision is that it will encourage charities to structure remunerative gifts as allowed under civil law and in doing so they will promote binding contracts with consideration rather than voluntary gifts with advantages returned in appreciation of the gifts.

### **Explanatory Note**

#### **Amount of Advantage - ITA 248(31)**

New subsection 248(31), which applies in respect of gifts made after Announcement Date, 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 of a property is entitled as partial consideration for, or in gratitude for, the gift or contribution. The advantage may be contingent or receivable in the future, either to the donor or to a person not dealing at arm's length with the donor. It is not necessary that the advantage be receivable from the donee. (However, a tax credit or deduction resulting from a charitable donation is not considered a benefit.)

Subsection 248(31) is added concurrently with the addition of subsection 248(30) of the Act, which defines the eligible amount of a gift, and with the amendment of subsection 127(3) of the Act in respect of contributions to a political party.

It is proposed that subsections 2000(1) and (6) and 3501(1), (1.1) and (6) of the Regulations be amended to provide that official receipts issued by a registered organization or political party in respect of a gift or contribution contain, in addition to the information already prescribed, the eligible amount of the gift and the amount of the advantage, if any, in respect of the gift or contribution."

## Statutory Provision - Amount of Advantage

(31) The amount of the advantage in respect of a gift or contribution by a taxpayer is the total of all amounts each of which is the value, at the time the gift or contribution is made, of any property, service, compensation or other benefit that the taxpayer or a person not dealing at arm's length with the taxpayer has received or obtained or is entitled, either immediately or in the future and either absolutely or contingently, to receive or to obtain as partial consideration for, or in gratitude for, the gift or contribution.

Subsection 248(31) is flawed in that it actually uses the word “consideration” as the reason for the property, service, compensation or other benefit being provided to the “donor”. If there is consideration, it is not a gift.

The Explanatory Notes state: “It is not necessary that the advantage be receivable from the donee.” Presumably this interpretation arises from adding the words “or obtained” and “or to obtain” to the traditional common law position cited in cases like *Leary* and *McBurney* and many CCRA publications that the only advantage to be concerned about is, in Deane J.'s words, “any advantage of a material character being received in return”. The words “received in return” mean that the advantage must come from the donee. Presumably, the Gift Amendments seek to change this for purposes of the ITA by adding the concept of “obtained” after the disjunctive “or” to the concept of received.

The Explanatory Notes promise future amendments to Regulation 3501 that will require the official receipt to contain as prescribed information “the amount of the advantage”. It seems an impossible obligation to impose on a recipient charity to include as prescribed information an amount of advantage that is not received from the donee and therefore not necessarily within the knowledge of the donee. This seems completely unworkable.

The Explanatory Notes are wrong when they say: “(However, a tax credit or deduction resulting from a charitable donation is not considered a benefit.)” Subsection 127(4.1)(b) defines “monetary contributions” to political parties and says the contributor cannot “receive a financial benefit of any kind (*other than a prescribed financial benefit or a deduction under subsection (3)*)...”. This statutory provision is clear evidence that in the ITA a tax deduction in the ITA for a donation is a financial benefit. If a contribution deduction under subsection 127(3) is a benefit received then it must surely follow that a charitable gift tax deduction under subsection 110.1 is a benefit as is a charitable gift tax credit under subsection 118.1.

The reason that a tax deduction or credit was not considered a benefit to a charitable donor prior to subsection 248(31) is that this benefit is received from a third party and not from the donee. This interpretation is supported not only by both the case law and CCRA publications, but also by subsection 127(4.1). If third party benefits were excluded by operation of law, there would be no need to explicitly exclude benefits from a government, municipality or other public authority beyond the tax deduction. My understanding of the reason that the legislation prohibits third party financial benefits “from a government, municipality or other public authority” is the intent to be consistent with the “in

return” principle. Political parties and candidates have the opportunity to indirectly violate the “in return” principle by enabling the donor to obtain “a grant, subsidy, forgivable loan...” from a government, municipality or other public authority. Applying rules of statutory interpretation, explicitly limiting the third party sources of financial benefit which are offensive to public sector bodies implicitly condones and authorizes receiving financial benefits from private sector third parties.

It is not clear how subsection 248(31) is supposed to interact with amended subsection 127(3) given the statutory definition of “monetary contribution” in 127(4.1). If the amendment adding the concept of “obtained” to apply to benefits received from third parties, then the legislation must be amended, at a minimum, to exclude tax deductions or credits under subsections 110.1 and 118.1 in a way which parallels subsection 127(4.1).

While it reasonably easy to amend the ITA to exclude benefits obtained pursuant to tax deductions and credits, it is far more difficult to define what benefits obtained from a third party should be considered an “advantage” for purposes of subsection 248(31). Many people teach principles of charitable giving to their children by giving children money specifically for the purpose of having the children give all or a portion of the funds received to charity. A client of mine with a private foundation gives his children a generous allowance on the basis that they put one third into savings, give one third to charity and spend only the remaining one third on themselves. Many religious parents “require” their children to “voluntarily” tithe their allowance received from the parents so as to inculcate habits of charitable giving.

Is an allowance received under these circumstances a benefit received from a parent rather than the donee which should be included in the amount of the advantage to be disclosed in the official charitable gift receipt? How is the donee charity to know of such arrangements? What due diligence procedures should it put in place prior to issuing receipts? If the recipient charity is the family’s private foundation, is there a different standard than if the recipient charity is the family’s church or a charity receiving a gift in response to a public appeal the family saw on television?

It is not clear what the public policy concern is in discounting the amount of the gift by the amount of such advantages. The ITA was amended specifically to provide a low income child with the same donation tax credit as that received by his or her high income parents. It seems the only advantage that the tax authorities should be concerned about are those coming from the recipient charity. Parliament has provided donors with a significant number of financial benefits received from the government specifically to encourage more gifts to charities. Why would Parliament discourage gifts to charities when a person other than the government is providing a financial benefit to donors as long as that person is not the donee charity?

### **Explanatory Note**

#### **Intention to Give - ITA 248(32)**

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 Announcement Date, 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.

### Example

*Mr. Short transfers land and a building with a fair market value of \$300,000 to a registered charity. The charity assumes liability for an outstanding \$100,000 mortgage on the property. The assumption of the mortgage by the charity does not necessarily disqualify the transfer from being a gift for the purposes of the Act.*

*If the value of the mortgage is equal to the outstanding amount (e.g., the interest rate and terms and conditions are representative of current market conditions), the eligible amount of the gift, in respect of which Mr. Short may be entitled to a tax credit under subsection 118.1(3), is \$200,000.*

If the amount of an advantage in respect of a transfer of property exceeds 80% of the fair market value of the transferred property, new paragraph 248(32)(b) provides that the transfer will not necessarily be disqualified from being a gift if the transferor can establish to the satisfaction of the Minister of National Revenue that the transfer was made with the intention to make a gift.

*In the above example, if the amount of the mortgage outstanding had been greater than \$240,000, Mr. Short (or the charity on Mr. Short's behalf) could apply to the Minister of National Revenue for a determination as to whether the transfer was made with the intention to make a gift.*

### Statutory Provision - Intention to Give

- (32) 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 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.

Subsection 248(32) tampers with the common law rule that the presence of consideration vitiates a gift. The subsection presumes to correct or ameliorate the common law by federal legislation introducing “the opportunity to rebut this presumption”. The presumption is described as consideration presumes an absent of “intention” to make a gift. It is hard not to consider subsection 248 (32) to be in flagrant violation of the *Federal Law – Civil Law Harmonization Act, No. 1* which enacted Section 8.1 of the *Interpretation Act* which explicitly requires “if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is

being applied". Unless the federal government is really going to try deny that "gift" is a matter of private law and argue that gift is not part of the law of property and civil rights, Section 8.1 of the *Interpretation Act* requires that "reference must be made" to the rules, principles and concepts in force in a common law province. Consequently, it contravenes the spirit of the harmonization legislation to provide for Ministerial interference to over-ride the rules and principles involved in the concept of "consideration" and "intention" in the common law of gift. If a person intended to receive any amount of consideration, then under the common law the person intended to make a contract. Corrupting that principle by introducing subsection 248(32) fails to change the common law; but does succeed in contravening the harmonization legislation.

Subsection 248(32) specifically includes the dyslexic requirement that the transfer (being in reality a contract) "was made with the intention to make a gift". This almost guarantees that the transaction will be a "mistake" at law.

It is also interesting that the adjudicator of this particular item of dyslexia is "the Minister" rather than the Court. Presumably, a court would be intellectually incapable of being satisfied that a contract could be the result when the donor set out with the explicit intention to make a gift.

It is disturbing that this legislation moves the adjudication of the law of gift from the courts to an administrative decision. While it sounds like a beneficent "saving" provision, donors would be foolish to trade the intellectual rigour and legal discipline of the court for the fluctuating and incomprehensible administrative policies of CCRA and "CCRA's interpretative approach". To my knowledge, in the entire history of Revenue Canada and CCRA, the Minister has never instructed her lawyers to go to the courts to ask the court to exercise its inherent jurisdiction to save a gift which has a flaw such as lack of intention. CCRA has an unblemished track record in going to the courts only to set aside gifts and deny those funds to the intended charity. It would be a little naive to expect CCRA to be more generous than the courts in protecting the interests of charity.

Last year I wrote a paper called "Flaunting and Flouting the Law of Gift: CCRA's Philanthrophobia". One thesis of the paper was that if CCRA likes the donor, it is a gift; and if they do not, it is not a gift. Subsection 248(32) appears to be a statutory enunciation of this thesis. For years CCRA's interpretative approach has been applied to determining what a gift is irrespective of the law. Subsection 248(32) enshrines that practice into legislation. Unfortunately, it also removes the protection of the court from a donor caught in this Orwellian mess because it explicitly sets the test as "to the satisfaction of the Minister".

The example cited is also confusing because giving real property subject to the charity assuming the mortgage is not an example of a gift with consideration or an advantage. This is not an example of a remunerative gift. Instead it is an example of the second type of gift mentioned in Article 1810 of the *Civil Code of Québec*, namely "a gift with a charge".

A gift with a charge can be made at common law because it does not separate the rights of ownership of a single property. The charge on the property is simply a feature of that particular property that goes

to determine what its fair market value is just as a “servitude, covenant or easement” on the land reduces the fair market value of the gift absent the ecological gift provisions in subsection 118.1(12). It would have been much more useful if an example had been selected which is relevant to these changes.

It is quite contradictory to the point claimed earlier that the intention of a donor in making a gift must be “to impoverish the donor” when the advantage received back from the charity does not even begin to trigger warning lights until it exceeds 80% of the fair market value of the transferred property. Theoretically, it is possible for the Minister to find an acceptable intention to gift if the value of the advantage is 99.99% of the gift. If it was any more, there would be no benefaction to the charity. However, an advantage of 80 – 99% of the value of the gift is hard to reconcile with the stated position that the donor must be impoverished.

### **Explanatory Note**

#### **Cost of Property Acquired by Donor - ITA 248(33)**

New subsection 248(33) of the Act, which applies in respect of gifts or political contributions made after Announcement Date, provides that the cost to a taxpayer of property acquired by the taxpayer in the course of the making of a gift or political contribution by the taxpayer is the fair market value of the property at the time of the making of the gift or contribution. The fair market value of such a property is relevant in computing the amount of the advantage in respect of the gift or contribution under subsection 248(31).

#### **Statutory Provision - Cost of Property Acquired by Donor**

(33) 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 contribution, is equal to the fair market value of the property at the time the gift or the contribution is made.

This provision appears intended to deal with the cost of “the amount of the advantage” set out in subsection (31). Consequently, it is interesting that subsection (33) mentions only “property” when advantage does not apply only to “property” but to “any property, service, compensation or other benefit”. Subsection (248) says “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 right of any kind whatever...” Given that CCRA asserts that a gift must consist of “property”, it will be interesting to learn how it proposes to interpret the juxtaposition of these words in defining what is property for purposes of determining what is a gift.

Presumably, subsection (33) is CCRA’s mechanism for determining that the recipient taxpayer’s cost base for tax purposes on property acquired from a charity in a remunerative gift transaction is the amount donated less the amount of the advantage acquired. If the donor is a corporation, then subsection 15(1.3) would appear to add the cost of any tax payable in respect of the property to the

benefit. It is not clear how these provisions interact because subsection 15(1.3) applies to the cost of a service as well as property.

Assuming that naming recognition is “a right of any kind whatever”, subsection (33) means that the tax cost of that “property” is its fair market value. The good news for winner of the \$3,000 door prize at the fundraising dinner in the examples in IT News No. 26, the tax cost is \$3,000 rather than the \$7 per attendee amount of advantage allocated to reduce the amount of the donation tax receipt. It is not clear how subsection (33) applies to Mr. Short’s land and mortgage in the examples set out in the Explanatory Notes for subsection 248 (32).

### Has Anything Changed?

The question that a lay person not schooled in the intricacies of the common law, civil law and the ITA will have is whether these amendments make any real change to existing practices or whether these amendments are merely a statutory re-statement of current administrative policies. While an accountant might state that this is simply a re-statement of the *status quo*, a lawyer must acknowledge that there has been a fundamental shift in legal principles. Although it deviated from the strict application of the common law in many policies and examples, the common law was still fundamentally the basis for Interpretation Bulletin *IT 110R3*. The intellectual fig leaf for allowing gifts and contracts being combined into a single transaction was the notion of “Split-Receipting”. Income Tax Technical News No.26 has the title “Proposed Guidelines on Split-Receipting”. However, the legislative amendments unequivocally cross the line from the concept of a split-gift at common law to introducing the civil law concept of a “remunerative gift”.

The issue as to whether a portion of a fundraising ticket can be considered a receiptable gift came before the courts first in the province of Québec. In *Aspinall v. MNR* 70 DTC 1669 the Tax Appeal Board considered a situation in which the National Ballet Guild of Canada issued a \$42 donation receipt for a \$150 ticket to a concert and reception in 1967. The TAB cited the *Québec Civil Code* definition of a “don or donation” in interpreting gift in the *Income Tax Act*. CCRA has never previously acknowledged the existence or application of civil law to the definition of “gift”.

Confronted with the *Aspinall* decision, Revenue Canada began to allow this form of fundraising activity without acknowledging its origins in the civil law rather than the common law. It was recognized that if a person paid \$60 for admission to a fundraising dinner and subsequently made a \$40 donation that there was no legal challenge at common law to the \$40 being a gift. Consequently, the theory evolved that the purchase of the \$60 admission to the fundraising dinner was split into a separate transaction from the gift. The problem was that these two transactions were usually funded with a single cheque. However, the common law has no legal prohibition against paying for multiple transactions with a single cheque. Consequently, the concept of split-receipting was introduced which has one non-qualifying receipt issued for the admission and an official donation receipt for purposes of claiming a tax benefit separately issued for the “gift”.

This analysis enabled one to maintain that a gift without consideration had been made at common law. *IT 110R3* supported this analysis by stating “to calculate the gift portion, the charity may consider that two payments have been received: one for the fair market value of admission and the second as a gift to the charity”. However, the legislative amendments do not describe a split receipt but describe a “remunerative gift” as authorized in civil law. Further evidence of the change in legal theory can be found in *IT 110R3*’s section on “Separation of Purchase and Gift” which reads:

“13. In certain circumstances, a donor can both purchase something from a charity and make a gift. There must be two separate transactions which are independent of each other. Where the donor can only purchase the item if a contribution is made, that contribution is not a gift and an official receipt may not be issued for it.

14. Where, however, anyone can purchase the item without making any other payment, an additional contribution made by a purchaser is a gift and an official receipt may be issued for the additional contribution but not the purchase price. Whether or not one transaction is dependent upon the other is a question of fact.”

Consequently, while the amendments concept of “eligible amount of a gift” might seem like “split-receipting” from an accounting and administrative perspective, at law it is a clear adoption of the civil law concept of gift. While the ITA can define a gift in any way it desires, it is wrong to believe that ITA amendments change the common law which governs whether title to the property purportedly gifted actually passes to the donee charity.

### **Impact on Gifts with Naming Recognition**

The most significant impact of the Gift Amendments on charities and donors will be in situations where the donor is encouraged to make a large gift in anticipation of naming recognition. Corporations pay very large amounts of money to have their name placed on public buildings such as the Air Canada Centre in Toronto. Universities and hospitals as well as many other charities provide those same corporations the opportunity to have their name prominently placed on a building owned by a charity for a comparable amount of money. Corporations and individuals are simultaneously invited to make a charitable gift of the same amount that a corporation would pay for naming rights and have the gift recognized by the naming on the building.

In recent years, naming recognition has been the type of fundraising which has been most successful for charities. It is very likely that naming gifts, whether for entire buildings, interior foyers, theatres or classrooms or even for named chairs or lecture series cross the line in common law and amount to consideration. It is undoubtedly the case that the naming recognition falls within the definition of an advantage received “as partial consideration for, or in gratitude for, the gift” pursuant to subsection 248(31). Consequently, the “eligible amount of the gift” must be reduced by the value of the advantage. Charities will receive fewer of these gifts once the practice is established that the tax benefits are reduced by the value of the naming recognition. If a corporation is willing to pay \$3 million to have its

name placed upon a university building, then presumably the amount of the “advantage” is \$3 million when an individual donor makes a gift which results in the same naming recognition.

Charities might not care about the technical aspects of the legal implications of the Gift Amendments. They should care about the extent to which the Gift Amendments will restrict their fundraising opportunities with large donors.

While CCRA may promote its “interpretative approach” rather than the law, it is very problematic for a lawyer asked to provide formal independent legal advice to a donor to similarly ignore the law. Recently I was asked to provide a legal opinion to a donor making an eight figure donation to a university to confirm that it was a “gift” at law. I declined; ostensibly on the basis that I was not licensed to practice law in the province in question. The primary reason I declined really was that in my legal opinion the naming recognition accorded to the donor amounted to consideration that disqualified it as a gift at common law. The secondary reason was concern that if I issued the legal opinion that the donor wanted, I could be liable to third party civil penalty provisions in section 163.2 of the ITA. While there may have been some doubt prior to December 20, 2002 as to whether such a legal opinion would be a “false statement” assisting a donor to claim a charitable gift tax credit, after the Gift Amendments it will undoubtedly be wrong not to reduce “the eligible amount of the gift” by the value of the naming recognition.

### **Impact on Gifts from Corporations**

The Gift Amendments have the potential to devastate gifts from corporations. The nuisance impact will be on “remunerative gifts” from any corporation to charities for things like fundraising banquets and golf tournaments. Any advantage, whether it be property, service or compensation, is described by subsection (31) as a “benefit”. Consequently, the concept of advantage not only means that a corporation has the amount of its charitable gift deduction reduced, it has conferred a “benefit” of a like amount upon an employee or shareholder. Section 15 requires that a “benefit conferred upon a shareholder” shall be added to the taxable income of the shareholder.

The far more complex problem arises with regard to the issue of benefit obtained from a third party being considered an advantage under subsection (31). One can read the Gift Amendments to say that when a donor causes his holding company, (“the taxpayer”), to make a gift to a charity of the shareholder donor’s choice, “a person not dealing at arm’s length with the taxpayer” has obtained a benefit that should be included in the computation of an advantage obtained from a third party. This is one of the reasons that benefits from a third party should not be included in the calculation of an advantage. It is completely unreasonable to expect the recipient charity to be fully informed of these arrangements and be responsible to detail the amount of such advantage in the official gift receipt.

The problem becomes much greater when an individual donor has made a formal pledge and causes his holding corporation to make a gift to honour the pledge. If the pledge is a binding commitment on the shareholder, than having the corporation make a gift that discharges the obligation is a benefit

conferred under subsection 15(1) that must be added to the shareholder's income. In this situation the recipient charity is aware of the pledge so has knowledge of the advantage obtained from a third party.

It might seem extreme to raise the problem of section 15 because CCRA's current interpretative approach is not to include such a benefit in the shareholder's income. Again, the quandary arises for lawyers asked to give independent legal advice in such situations. This past December I was involved in gift planning to continue fulfilling a pledge by an individual donor to "an agent of the Crown" made prior to February 1997. The plan was to make a gift from the donor's company. The donor requested independent legal advice from a senior tax lawyer. The lawyer raised the Catch-22 concern that if the pledge met the test of being "an agreement in writing" necessary to obtain the 100% limit for a Crown Gift, then CCRA could tax the donor for having obtained a shareholder benefit. The lawyer explored the issue with senior officials in Ottawa on a no-names basis and was advised that their legal opinion accorded with his own. Consequently, the donor did not seek to rely on his "agreement in writing" to claim a Crown Gift and had the corporation claim only a Charitable Gift.

### **Timing of Amendments**

It is particularly problematic that the government has given these amendments an effective date of December 20, 2002. Many people do not finalize their charitable giving until the very end of the year and many donors mail their cheques to charities in the last ten days of December. These amendments would have been much less disruptive to charitable giving if the effective date would have been delayed until January 1, 2003.

The Gift Amendments introducing the new regime of "the eligible amount of the gift" all apply to gifts after December 20. Consequently, any gift at the end of last year which might have resulted in an "advantage" being provided to the donor is caught even if neither the donor nor the charity had any idea that the law changed effective December 20. While it is the government's prerogative to choose any effective date, it certainly sends a hostile message to the charitable sector to spring these changes on unsuspecting donors in the dark winter nights before Christmas.

Unfortunately, the Gift Amendments also catch all gifts made at the end of the year even if there was no advantage in a particular gift. This is because subsection 118.1(2) was amended effective December 20, 2002 to require that "an eligible amount of a gift" shall not be included in the total charitable gifts claimed by an individual unless the making of the gift is evidenced by filing with the Minister of an official receipt containing prescribed information. Regulation 3501 will be amended as of December 20 to require that the receipt contain information on any "advantage". Consequently, at this time charities are not in a position to issue official donation receipts to donors for gifts given at the end of December.

Of course, one is tempted to ignore these amendments and advise charities to issue their existing receipts as if the Gift Amendments had not been introduced. As in many other instances involving CCRA and charitable gifts, one doubts whether CCRA will enforce the law as written. Instead, Charities Directorate will come up with some "interpretative approach" that will generally allow charities to ignore the law. The problem with relying on administrative policy is that only those charities which issue

receipts for gifts that CCRA likes will be free to ignore the law. If CCRA thinks that a donor has received an advantage which CCRA does not approve of for a gift made after December 20, that donor should expect to be singled out and have these amendments applied in the strictest fashion.

The problem for many donors is that charities are allowed to aggregate all of the gifts made in a calendar year and issue a single official donation receipt for all gifts made in 2002. I just received an annual receipt issued February 1, 2003 by a large national charity that says "In 2002 you gave \$1,200". There is no indication whether any or all of donations coming to that aggregate amount were made after December 20, 2002. How am I to prove that \$1100 of that amount was given prior to December 20 and that only one monthly gift of \$100 was given after that date? Is the onus on me to request that the charity issue me two different receipts containing different "prescribed information" for \$1100 and \$100 so that I can be in compliance with Subsection 118.1(2)?

The timing problem is much more acute because the Gift Amendments have still not been introduced in a Bill in Parliament. Most people expect Parliament to be prorogued in the near future once Paul Martin becomes leader of the Liberal Party. A general election may even be called in 2004 before the legislation required to introduce the Gift Amendments is introduced or passed. Consequently, the charitable sector is left with the difficult task of guessing how they implement a proposed law that the government clearly has even Parliamentary votes to pass and which the government has said is effective as of December 20, 2002 when there is no real expectation that it will be passed in 2003 and possibly not even in 2004.

## Conclusion

The Gift Amendments are a misconceived attempt to modify the common law by amending the ITA which conceivably could threaten charitable giving in Canada if donors in common law provinces apply the legal principles set out in the Gift Amendments. It is a fact that charities and donors for years have been encouraged by CCRA through publications like *IT 110R3* to give precedence to CCRA's administration practices over the rule of law. However, in the past, CCRA has adhered more closely to the law of gift than proposed in these amendments.

What is particularly puzzling about these amendments is the juxtaposition of the words "gift" and "contribution" separated by a disjunctive "or" in subsections 248 (31) and (33) and the absence of the word "contribution" in subsections 248 (30) and (32). However, the rules of statutory interpretation require there must be some intention attributed to Parliament's utilization of these two terms in the same provision.

The problems outlined in this letter could be a thing of the past if the ITA started using contribution instead of gift in sections 110.1 and 118.1 just as it does in subsection 127(3). "Contribution" includes "gift"; but the utilization of contribution in subsection 127(3) is evidence that gift is not intended to include contribution. The juxtaposition of the words in subsections 248 (31) and (33) supports this interpretation.

CCRA has never understood the complications it creates for the legal meaning of gift when it applies civil law concepts under the rubric of the common law. In the past CCRA has applied a *Civil Code of Québec* definition of gift in common law provinces by way of administrative policy. With the Gift Amendments introduced on December 20, it appears CCRA now intends to apply Québec civil law principles in common law provinces by legislative fiat.

The fundamental nature of the flawed legal analysis is reason enough to withdraw these proposed amendments at the earliest possible date. The urgency is compounded by the problems created by making the effective date of these amendments the Announcement Date, December 20, 2002.

More important than any technical wording issues is the issue of creating a regime of certainty as to which law CCRA intends to enforce when dealing with gifts to charities. It is very detrimental to the charitable sector to maintain the present policy of not being overly concerned about poorly drafted provisions in the ITA because Charities Directorate simply applies its “interpretative approach” on an ad hoc basis to address issues arising from ill-conceived and poorly drafted provisions. CCRA much prefers the doubt and ambiguity which causes the sector to march to the tune of its administrative practices rather than subjecting CCRA’s policies to the rule of law.