

June 19, 2006

Elizabeth Tromp
Director General
Charities Directorate
Canada Revenue Agency
320 Queen Street
Ottawa ON K1A 0L5

Dear Ms. Tromp:

Re: Review of the Registered Charity Information Return (T3010)

Introduction

I am writing on behalf of the Charities and Not-For-Profit Law Section of the Canadian Bar Association (CBA Section). The Canadian Bar Association is a national association representing approximately 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The primary objectives of the CBA include improving the law and the administration of justice. The CBA Section deals with law and practice relating to the regulation and administration of charities and not-for-profit organizations in Canada.

On February 17, 2006, Terrance Carter, as the CBA Section representative, and other members of the CBA Section attended a meeting of the Charities Directorate Technical Issues Committee in Ottawa to discuss issues related to the current review of the T3010 return. At the outset, we wish to confirm that the CBA Section is very supportive of this review process and of the work the Committee has done thus far. This letter sets out our formal comments concerning some of the issues that are relevant to that review.

Legislative Basis for the T3010 Return

Subsection 149.1(14) of the *Income Tax Act* (the ITA) provides for both an “information return” and a “public information return” and this distinction has been repeated recently in subsection 189(6.1), concerning the returns a charity must file after its registration is

revoked. Each return must contain prescribed information in prescribed form.¹ We understand that for simplicity, the two distinct concepts of the information return and the public information return were combined into a single return, the T3010.² Therefore, the T3010 return seems to have a dual purpose, namely to provide information to the public and to ensure compliance.³ We are concerned that as a result of the use of the single T3010 return, the distinction between the two functions has been blurred and there is ambiguity in how information in the T3010 return is to be treated. It is the CBA Section's position that if CRA intends to continue to use the T3010 return to fulfill both purposes, it should communicate clearly to charities what portions of it are considered part of the "public information return" and what portions relate to the "information return," and provide explanations as to the basis upon which they are requesting the information.

A review of how the two types of return are distinguished in the ITA is instructive. The first difference relates to public disclosure of information. Under ITA subsection 149.1(15), notwithstanding section 241, information in a public information return shall be communicated or otherwise made available to the public by the Minister in such manner as the Minister deems appropriate. It seems that the intention is for information collected on this return to be disclosed to the general public. Referring to the information in the return rather than listing it in the ITA itself provides some flexibility. This avoids any requirement to amend the ITA if the information in question changes.

In addition to the information in the public information return, under ITA subsection 241(3.2), CRA can provide to members of the public, among other things:

- a copy of the charity's governing documents,
- any information provided in the prescribed application for registration,
- the names of the directors and when they held their respective positions,
- a copy of the notice of registration (including any conditions and warnings),
- a copy of all or part of any letter sent to a charity whose registration has been revoked or annulled, dealing with the grounds for revocation or annulment,
- a copy of all or part of any letter or notice sent to a charity or relating to suspension under section 188.2 or any assessment of tax or penalty, and

¹ Under subsection 248(1), "prescribed" means in the case of a form, the information to be given on a form or the manner of filing a form, authorized by the Minister. In some cases, although the ITA contemplates that a form will be prescribed, no form is in fact prescribed.

² We assume for the purposes of discussion that form T3010 has been authorized pursuant to regulation as both the information return and the public information return for purposes of subsection 149.1(14). In its guide T4033, CRA states that "an information return" includes form T3010A, form TF725, form T1235, form T1236 and a copy of the financial statements. It appears that this all refers to the information return and not the public information return, but this is not clear.

³ We are aware of the research that has been done with respect to the initial legislative initiatives, the approaches in the United States and the United Kingdom, and the Joint Regulatory Table recommendations, but have assumed for the purposes of this discussion that our guidance must come first and foremost from the *Income Tax Act*.

- an application by the charity or information filed in support of it, with respect to a designation, determination or decision by the Minister under subsections 149.1(6.3), (7), (8) or (13).⁴

Further, ITA paragraph 241(3.2)(f) allows CRA to provide any financial statements required to be filed with an information return under subsection 149.1(14).

However, the definition of specified gift in ITA section 149.1 requires the amount in question to be designated as a specified gift in the “information return” for the year. This is presumably the information return, and not the public information return, contemplated in subsection 149.1(14). The new definition of capital gains pool provides that the amount in question must be declared by the charity in “an information return under subsection (14)”. In this case, it is not clear if this provision refers to the information return, the public information return or both.

The second difference relates to enforcement. ITA paragraph 168(1)(c) states that a registered charity may face revocation if it “fails to file an information return as and when required under this Act or a regulation.” Some may argue that the reference to an information return includes a public information return. We do not think this is the case, given the distinctions mentioned above and the wording in the new provisions imposing interim sanctions.

One of these new provisions, ITA subsection 188.1(6), imposes a penalty if the charity fails to file an “information return” as required by subsection 149.1(14). While the ITA is not clear, it seems reasonable to conclude (based on relevant provisions of the ITA and CRA’s audit and administrative practices) that this is intended to compel disclosure of the information CRA requires to perform its regulatory role. This information would not necessarily be disclosed to the public and the consequences of failing to file that return would be serious. Since the main purpose of a public information return is to inform the general public, it seems reasonable that the consequences of not filing that return should be less severe. However, CRA takes the position that failure to file either return can apparently result in a penalty.⁵ According to the explicit words of the ITA, an “information return” is not the same as a “public information return”⁶ and failure to file the latter should not be grounds for revocation.

However, given the combination of the information return and the public information return in the T3010 form, it is unclear what would constitute a failure to file. If there is only one return (with a dual purpose), it seems that failure to file the physical return, whether it is the information return or the public information return or both, would constitute failure to file an “information return” or a “return.”⁷ Failure to complete one part of the return while completing the other part creates uncertainty about whether a return

⁴ This would also include subsection 149.1(5) under the July 18, 2005 draft legislative proposal by Finance Canada.

⁵ See CRA guide T4033.

⁶ Otherwise, the word “public” is superfluous.

⁷ In T4033, CRA states that every registered charity has to file “an information return” each year, without distinguishing between the information return and the public information return mentioned in subsection 149.1(14). It also states that a charity that does not file “its return” can lose its registered status.

has been filed at all. At a minimum, if the T3010 form continues to serve a dual purpose and is considered to be both the information return and the public information return contemplated in subsection 149.1(14), it should be made clear whether failure to complete the public information portion of the return would be grounds for revocation or a penalty. This is discussed further below.

Some members of the CBA section with long memories recall that the original purpose of the information returns was to provide public information, and not to assist CRA in performing its regulatory role. It seems that CRA has over the years begun to use them at least in part as a means of obtaining information solely to monitor compliance under the ITA, and not for the purpose of providing information to the public. However, the return does not clearly set out the purpose for which the requested information is required, and does not segregate the types of information. Charities are therefore uncertain about the consequences that flow from providing information in the T3010 return.

CBA Section's Recommendations for the T3010 Return

Again, we understand that the information return and the public information return were combined into a single return for the sake of simplicity.⁸ If its dual nature is to be maintained, we recommend that the T3010 return clearly identify and communicate to the sector those sections required for compliance and those required for public information. Further, if the focus of a particular section is compliance, the return and the relevant section of the guide should clearly identify the regulatory purpose for which the information is being sought (e.g. disbursement quota calculation, political activities, related business activities, undue benefit, etc.). In short, we believe there should be more information in the guide about both the purpose and the substance of these compliance issues and the reason for each question. Possibly, links could be provided to related explanations on the CRA website on the more complicated compliance issues.

Further, the CBA Section recommends that a reasonable time limit be imposed on CRA to use information in the T3010 return for assessing or other compliance purposes, through amendments to the ITA or otherwise. This would be consistent with other provisions in the ITA which limit the ability of CRA to issue reassessments (in the absence of misrepresentation or fraud or similar circumstances) after a reasonable amount of time has elapsed and to deal with returns with due dispatch in the first instance. Under ITA subsection 189(8), certain provisions in Part I apply to registered charities under Part V. These include the rules dealing with assessments, particularly section 152. Subsection 152(1) provides that the Minister shall, with all due dispatch, examine a return of income for a year and assess the tax, interest and penalties, if any, payable and make certain other determinations. However, these rules apply only for purposes of an amount assessed under Part V or a notice of suspension. There is no obligation on the Minister to do anything with the information return or public information return required under subsection

⁸ There appears to be some precedent for a dual-purpose return. For instance, the T3 income tax return that must be filed by a trust under paragraph 150(1)(c) of the ITA also serves as an information return for purposes of regulation 204. However, there is no element of public disclosure and the sole objective is to assist CRA in monitoring compliance.

149.1(14). Thus, there is a requirement to file the T3010 return under Part I, but this does not result in any assessment under Part I.

Similarly, where an assessment is issued under Part V for a penalty under ITA subsection 188.1(6) for failure to file a return, the rules in Part I dealing with the timing of subsequent reassessments apply. However, this does not address the basic issue of timely review of information contained within the T3010 return.

Charities should not be faced with the spectre of an unlimited time frame for review of information they provide for compliance purposes, and potentially unlimited exposure to revocation, penalties, or other intermediate sanctions based on the information. If the information in the return is only for disclosure to the public, and the status of the charity under the ITA is not directly affected, the issue of when the information is reviewed is not of the same significance. However, we think this further illustrates the need to differentiate clearly between the “public” information and the “compliance” information in the return. This could perhaps be accomplished by dividing the return into two separate components, each clearly identified, with the purpose of the information and any limitations with respect to the timeframe within which it can be reviewed by CRA clearly identified.

While we recognize the utility of streamlining the return (or returns) to the extent possible, and lessening the compliance burden on charities, there is a danger that charities will not understand the purpose for which information is being sought, the nature of the sanctions that might be imposed on them (including revocation) and the complexity of the disbursement quota and other highly technical requirements. We have previously pointed out to both CRA and the Department of Finance our continuing concerns about the complexity of the disbursement quota rules and the inability of charities and their advisors to comprehend them and comply, particularly in the context of the disclosure required in the current T3010.⁹

We believe it would be useful if CRA provided, either on its website or in the material sent to the charity with the return, the information it has on file with respect to the charity’s objects and approved activities. In this way, charities, CRA and the general public will all have the same information with respect to the intended (and approved) purposes of the organization. This is particularly important given the high turnover among volunteers and staff of some organizations, as well as their accountants who assist in the preparation of the returns. In addition, CRA would have more confidence that the charity’s responses to the questions in sections A and C of the current return are based on a correct understanding of the facts. In this regard, however, we think the purpose of many of the questions in section C of the return is compliance, and CRA may lack legal jurisdiction to require disclosure of information that is not related to the administration of the ITA. The CBA Section is concerned about CRA’s view that charities must advise the Minister of any new activities or programs not expressly approved on initial registration. In some circumstances it may be prudent for an organization to seek CRA’s views with respect to a proposed program because it may not be viewed by CRA as charitable. However, we do not believe the ITA

⁹ The fact that the Return currently consists of four pages and the guide consists of over 28 pages shows how complicated the reporting process has become.

imposes such an obligation on registered charities. At the very least, if such questions remain, the return should include a warning about the potential prejudicial impact of answers to such questions.

To summarize, the CBA Section recommends that:

- If CRA intends to continue to use the T3010 return to both provide information to the public and to ensure compliance, it should communicate clearly to registered charities what portions of the return are considered the “public information return,” and what portions relate to the “information return”;
- Consequences of the failure to file the “public information return” should be less severe than failure to file the “information return.” Given that both returns are contained in the T3010 form, what constitutes a failure to file a return should be clarified, as should the consequences for failure to complete the public information portion of the form;
- If the focus of a particular section of the T3010 return is compliance, the return and the relevant section of the guide should clearly state the regulatory purpose for which the information is being sought;
- A reasonable time limit should be imposed on CRA to use the information in the T3010 return for assessing or other compliance purposes;
- CRA should provide, either on its website or in the material sent to the charity with the return, the information it has on file with respect to the charity’s objects and approved activities;
- CRA should revisit its position that the ITA imposes an obligation on registered charities to advise the Minister of any new activities or programs not expressly approved on initial registration. Alternatively, and at the very least, the return should include a warning about the potential prejudicial impact of answers to such questions.

If you wish to discuss this submission with the CBA Section or any member of the executive, please do not hesitate to contact me or Terrance Carter, our representative on the Committee. In addition, if it would be of assistance in revising the T3010 return, members of the Section Executive would be more than willing to further assist in this process.

Thank you for your consideration in this matter.

Yours truly,

(Original signed by Kerri Froc on behalf of James Parks)

James M. Parks
Chair, National Charities and Not-For-Profit Law Section

c.c. Terry DeMarch, Charities Directorate, Canada Revenue Agency