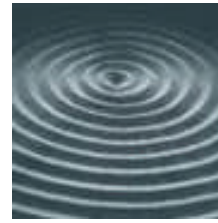
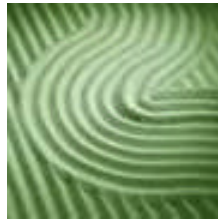


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An introduction to the Canadian tax treatment of the third sector Robert B. Hayhoe 2004

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8 Miller Thomson LLP 1998-2004

An Introduction to the Canadian Tax Treatment of the Third Sector

Robert B. Hayhoe*

INTRODUCTION

This is an introductory outline of the Canadian income taxation of the voluntary (or third) sector. Because the audience for this outline is not made up of Canadian lawyers or academics, I will assume no knowledge about the Canadian tax rules for the third sector or even the general Canadian legal system. Given the length constraints under which this outline is prepared, it will deal with the subject on a conceptual level and will provide neither the degree of practical detail necessary to practise in the area as a Canadian lawyer nor the fully formed policy position which would be necessary to perform a proper academic analysis of the Canadian tax treatment of the voluntary sector. I will, though, point the reader toward other published literature which should enable readers to obtain the practical and policy background to the outline which I will give.

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¹ I do not propose to address the application of Canada's value-added tax, the GST, to the sector. For more information, see the GST legislation, the *Excise Tax Act*, R.S.C. 1985, c. E-15 or one of the articles on the subject: Peter H. Wood, "The GST: Charities and Other Non-Profit Organizations," *in Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: Canadian Tax Foundation, 1992), 30:1-53 or Ronald C. Knechtel, "Compliance Issues in Operating Charities," *Report of Proceedings of Forty-Ninth Tax Conference*, 1997 Tax Conference (Toronto: Canadian Tax Foundation, 1998), 28:1-24.

To understand at a general level the income tax treatment of the voluntary sector in any given jurisdiction, there are really only two conceptual questions. The first is whether tax applies to the organization and the second is whether donations to the organization by other taxpayers give rise to any tax benefit to the donors. As well, in the context of a federal state, it is necessary to consider which level of government has the ability to tax and to regulate participants in the sector. This paper will address all three of these questions in the Canadian context.

As a legal matter, the constitutional authority to regulate charities is a provincial matter in Canada. Notwithstanding that constitutional imperative, the Canadian regulation of charities is largely, as a practical matter, federal and carried out through the *Income Tax Act*. This paper will provide an outline of this division of power. The paper will also show that most third sector organizations are exempt from income tax in Canada, although it is generally only donations to organizations which meet the common law legal definition of “charity” which give rise to a tax benefit.

CONSTITUTIONAL ANALYSIS

Canada is a federal state with a federal parliament and ten provinces , each with their own legislature. The written Canadian Constitution² divides legislative authority and

² R.S.C. 1985 C.1 (5th Supp.), as amended (herein referred to as the “Act”). Unless otherwise stated, statutory references in this chapter are to the Act.

³ Ignoring for the moment the three Arctic territories, being the Yukon Territory, the Northwest Territory and Nunavut.

competence between the provinces and the federal government by listing their respective areas of competency⁴.

Under the Constitution, the provinces have exclusive jurisdiction over “Hospitals, Asylums, Charities, and Eleemosynary Institutions” (all of which can be classified as charities at common law). While the power to regulate charities is provincial, it is only in the province of Ontario that the Attorney General makes any consistent effort to exercise his general power to supervise charities (through the office of the Public Guardian and Trustee). Because of this practical abdication of provincial responsibility for charities, the *de facto* regulator of the voluntary sector in Canada is the federal Canada Customs and Revenue Agency, which regulates charities through the income tax system.

⁴ The territories also have legislative councils, but these are not constitutionally protected, being creatures of federal statute having only delegated authority: *Northwest Territories Act*, R.S.C. 1985, c. N-27 or *Yukon Act*, R.S.C. 1985, c.Y-2 or *Nunavut Act*, S.C. 1993, c.28.

⁵ *Constitution Acts, 1867 to 1982*.

⁶ Section 91 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.) lists the federal legislative powers, while section 92 lists the provincial powers.

⁷ See notes 47-56 and accompanying text.

⁸ Section 92 of the *Constitution Act, 1867* provides as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

Since the federal government (on the majority view – see Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, looseleaf) at 17.1) has residuary power under its power to make laws for the peace, order and good government of Canada, it has the power to regulate charities in the territories.

⁹ In addition, some other provinces have specific pieces of legislation that regulate fundraising.

¹⁰ For example, see Rachel Blumenfeld, “Case Comment: *Ontario (Public Guardian and Trustee) v. AIDS Society for Children (Ontario)* (2001), 39 E.T.R. (2d) 96” (forthcoming 2002) 4:2 *IJNL* (<http://www.icnl.org/journal/journal.html>).

¹¹ Assume for the purposes of this paper that the federal government has a plenary power to tax throughout Canada. For a more full discussion of the division of taxing authority see Joseph E. Magnet, “The Constitutional Distribution of Taxation Powers in Canada,” (1978) 10 *Ottawa Law Review* 473 and

Given the constitutional division of powers, it is necessary to consider whether the *de facto* regulation of the voluntary sector through the tax system is constitutionally proper. Although no Court has ever considered the specific issue, it is likely that the federal tax system's treatment of the voluntary sector would be found to be *intra vires* provided that the purpose of the tax system is taxation and not regulation. This would require a Court to accept that the regulation of charities pursuant to the Act has the purpose of administering the tax exemption for charities and the tax recognition of donations, rather than of regulating behaviour *per se*. Having provided this brief constitutional discussion, I will now turn to the specific tax questions raised in the introduction.

TAX EXEMPTION OF THIRD SECTOR ORGANIZATIONS

The Act provides an exemption from Part I income tax for a number of different kinds of participants in the voluntary sector. These tax exempt entities include governments and quasi-governmental organizations like municipal authorities and corporations owned by a federal, provincial or municipal government, as well as various specific

G.V. La Forest, *The Allocation of Taxing Power under the Canadian Constitution* 2nd ed. (Toronto: Canadian Tax Foundation, 1981).

¹² See Hogg, *supra* note 8 at 30.13(c).

¹³ Part I is the portion of the Act that imposes a general income tax on income of a person from a source. Although there are various other parts to the Act that impose various other taxes, organizations that are exempt from Part I tax are generally exempt from taxes pursuant to these other parts. For example, the Part I.3 Large Corporation Tax is not applicable by virtue of paragraph 181.1(3)(c). Similarly, subsection 212(14) provides an exemption from the withholding tax which would otherwise be imposed on a foreign non-profit organization earning income from Canada (provided that the organization is tax exempt in its home jurisdiction) as does subsection 219(2) from Part XIV tax on non-resident corporations. Finally, subsection 227(14) provides exemption pursuant to Parts IV, IV.1, VI and VI.1.

¹⁴ Paragraph 149(1)(c).

¹⁵ Paragraphs 149(1)(d) – (d.6).

types of voluntary sector organizations such as agricultural organizations, boards of trade or chamber of commerce , homes for the aged , non-profit scientific research corporations , labour organizations and mutual insurance corporations . The Act provides that for all of the above listed types of organizations “no tax is payable under this Part on the taxable income of a person for a period when that person was” one of the above listed organizations.

In addition to the relatively specialized third sector organizations listed above, there are essentially two different categories of third sector organizations that deserve a more detailed treatment. The first one is a “non-profit organization” which is exempted from income tax by paragraph 149(1)(l):

“149. (1) No tax is payable under this Part on the taxable income of a person for a period when that person was...

Non-profit organizations

(l) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada;”

¹⁶ Paragraph 149(1)(e).

¹⁷ Paragraph 149(1)(l).

¹⁸ Paragraph 149(1)(j)

¹⁹ Paragraph 149(1)(k)

²⁰ Paragraph 149(1)(m)

²¹ Subsection 149(1)

The above definition constitutes virtually the entire tax legislative system for non-profit organizations. As can be imagined, basing the entire tax regulation of non-profit organizations on the above short definition results in a number of issues being left for judicial determination. There have been a number of articles that describe the Canadian tax treatment of non-profit organizations. However, I will here only identify some of the conceptual issues that might be of interest to an audience not made up of Canadian lawyers or academics.

Pursuant to 149(1)(l) set out above, a non-profit organization is only tax exempt if it is a club, society or association. Courts have held that these terms are not to be given a technical meaning and that an organization with virtually any legal form can be a non-profit organization. More importantly, a non-profit organization is explicitly defined to exclude an organization that is a charity (defined otherwise in the *Income Tax Act* as an organization which has exclusively charitable purposes or activities). Essentially, the definition of charity, which will be discussed below, is a common law test.

²² See Ronald C. Knochtel, "Tax Treatment of Non Profit Organizations" in *Report of Proceedings of the Forty-first Tax Conference*, 1990 Conference Report (Toronto: Canadian Tax Foundation, 1991), 35:1 at 35:16; Arthur Drache, "Charities, Non-Profits and Business Activities," *Report of Proceedings of the 49th Tax Conference*, 1997 Tax Conference (Toronto: Canadian Tax Foundation, 1998), 30; and Arthur Drache, *Canadian Taxation of Charities and Donations* (Toronto: Carswell, looseleaf) (hereinafter "Drache Looseleaf") at 15-1. I have recently prepared an updated detailed outline of this area (submitted to *The Philanthropist* for publication as "An (Updated) Introduction to the Taxation of Non-Profit Organizations"). My article is based on a presentation made in May, 2001 as part of a seminar sponsored by the Charities and Not-For-Profit Section of the Canadian Bar Association – Ontario entitled "The ABCs of NPO's: Getting Oriented in the World of Not-For-Profit".

²³ A corporations with share capital (*St. Catharines Flying School Ltd. v. M.N.R.*, 53 D.T.C. 1232 (Ex. Ct.)); a partnership (*M.N.R. v. Begin*, 62 D.T.C. 1099 (Ex. Ct.)); a trust (*L.I.U.N.A. Local 27 v. M.N.R.*, 92 D.T.C. 2365 (T.C.C.)).

²⁴ Subsection 149.1(1)"charity", "charitable organization" and "charitable foundation"

²⁵ See notes 47-56 and accompanying text.

While the definition of “non-profit organization” goes on to list various approved non-profit purposes, they can all be subsumed to the basket clause of “any other purpose except profit”. Furthermore, in order to meet the definition of a non-profit organization in the *Income Tax Act*, it is necessary that the organization not make any of its income available to its members. The above non-profit and non-distribution requirements, based as they are on very general statutory language, have resulted in relatively extensive litigation as the Canada Customs and Revenue Agency has challenged the tax exemption of non-profit organizations, who have been obliged to appeal to Court to establish their tax exemption . These challenges arise most frequently for organizations that earn a profit but argue that the profit was not the purpose for carrying on the profitable activity.

²⁶ See the articles and book cited at note 22 for a full discussion of this complicated and confusing area of jurisprudence.

Tax Exemption of Registered Charities

The Act also provides a specific tax exemption for a “registered charity”.²⁷ Subsection 248(1) defines registered charity as: “a charitable organization, private foundation or public foundation ... that has applied to the Minister in prescribed form for registration and that is at that time registered.” Thus, only a charity that is registered with the Canada Customs and Revenue Agency as such is exempt from Part I income tax. We have previously seen that the other third sector income tax exemption of general application, being the exemption for “non-profit organizations”²⁸ only applies to organizations that do not have exclusively charitable purposes or activities.²⁹

Thus, an organization which is charitable at law but which is not a registered charity is not provided with any specific exemption from Part I income tax pursuant to the Act. As a result, it is at least arguable that unregistered charities are taxable under the Act.³⁰ How their income should be calculated is a matter that I will not discuss in detail at this time but it is possible that the income of an unregistered charity could include annual surplus from operations or even all revenue.³¹ While there might be an argument that

²⁷ Paragraph 149(1)(f).

²⁸ Paragraph 149(1)(l).

²⁹ See notes 47-56 and accompanying text.

³⁰ Revenue Canada Technical Interpretations have come to this conclusion on many occasions: Revenue Canada document no. 9333965 (26 April, 1994), document no. 9305505 (15 June, 1993). Similarly, see by J.J. Coombs, *Charities and Charitable Donations* (Don Mills: CCH Canadian Limited, 1978) at paragraph 624 or Knechtel, *supra* note 20 at 35.3.

³¹ Would an unregistered charity be able to deduct its expenses, since they would arguably not have been incurred to earn income?

income from charitable operations is not income from a source that is taxable pursuant to Part I of the Act,³² this paper will not provide a detailed analysis of this argument.

Registration of Unregistered Charities

In one sense, the obvious solution to the difficulty of an unregistered charity being taxable would be to apply to have an unregistered charity registered as a charity. While this would certainly involve additional record-keeping requirements and Canada Customs and Revenue Agency filings³³, these issues should be manageable in most cases. However, subsection 149(10) provides that on a corporation becoming exempt pursuant to section 149 (which includes the paragraph dealing with the tax-exempt status of a registered charity), the organization which is becoming exempt is deemed to have disposed of all of its property for fair market value, thereby triggering any accrued capital gain and the possibility of a resulting tax liability. Note that there is no parallel provision for organizations that are not organized as corporations so there does not appear to be any deemed disposition upon a charitable trust or an unincorporated charitable association becoming exempt by being registered.³⁴

³² See *Schwartz v. Canada* [1996] 1 S.C.R. 254.

³³ The record keeping requirements imposed on registered charities by section 230 of the Act and Income Tax Regulation 5800 are more extensive than those that apply to, for example, a non-profit organization. Furthermore, the T3010 Information Return which is required to be filed annually by all registered charities (see <http://www.ccr-aadrc.gc.ca/E/pbg/tf/t3010-01eq/README.html>) is very much more detailed than the T1044 form which is required to be completed by a non-profit organization (<http://www.ccr-aadrc.gc.ca/E/pbg/tf/t1044eq/README.html>).

³⁴ Knechtel, *supra* note 22 at 35:16.

While I understand that a charity that grants donation receipts³⁵ is required to be registered in order to prevent tax evasion by donors, the policy reasons for treating an unregistered charity as a taxable entity because it has not registered are not clear. This is particularly so since a non-profit organization (which by definition has objects which are less beneficial to the public at large than the unregistered charity) needs not register, has similarly lax tax reporting requirements,³⁶ but is not taxable. An unregistered charity that disposes of its property should not be required to apply for a remission order³⁷ in order to avoid tax on the resulting capital gain.

Maintenance of Registration

The registration of a charity is not permanent, but is subject to continued compliance with the requirements of the Act. These include such definitional issues as the requirement that the registered charity continue to use its activities for its charitable purposes. However, they also include various technical requirements such as the requirement that certain types of registered charities not incur debt³⁸ or requirements that registered charities expend certain portions of their income on current charitable

³⁵ See the discussion at notes 61-62 and accompanying text.

³⁶ See note 33.

³⁷ A mechanism whereby the federal government may, pursuant to section 23 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, forgive tax which is legally required to be paid. See H. Arnold Sherman and Jeffrey D. Sherman, "Income Tax Remission Orders: The Tax Planners' Last Resort or the Ultimate Weapon?" (1986) 34 *C.T.J.* 801.

³⁸ Pursuant to subsections 149.1(3) and 149.1(4) registered charities that are classified as public and private foundations respectively (as opposed to charitable organizations), may not incur debts other than for certain listed purposes.

activities.³⁹ These various requirements are relatively complicated and are therefore beyond the scope of this paper.⁴⁰

A registered charity which no longer meets the qualifications in the Act for registration as such (either as a result of a decision by the registered charity to change the scope of its activities or as the result of an administrative error by the registered charity) is subject to having its registration revoked by the Canada Customs and Revenue Agency.⁴¹ Pursuant to the Act⁴², revocation of registration results in the automatic application of a tax equal to the value of the assets of the registered charity. While this seems draconian, as a matter of fact, the Canada Customs and Revenue Agency is loath to impose revocation of registration even when the Act would permit it to do so. Essentially, revocation of registration is only imposed when the defaulting charity has been engaged in outrageous behaviour (for example, fraud) or the offence at issue is a very serious second offence where the charity has previously been warned about the same issue. Furthermore, the Act provides that the revocation tax may be avoided to the extent that the charity whose registration is being revoked makes grants to other registered charities within the year following revocation.⁴³ As a result, even in the rare occasions when a charity's registration is revoked, revocation tax virtually never applies.

³⁹ Subsection 149.1(1) "disbursement quota".

⁴⁰ See Drache Looseleaf supra note 22.

⁴¹ Pursuant to subsections 149.1(3) – 149.1(5).

⁴² Section 188.

⁴³ Section 188.

Unlike some other jurisdictions that have intermediate sections⁴⁴, revocation of registration is the only penalty for most non-compliance by a registered charity.⁴⁵ This lack of intermediate sanctions is a serious problem both for charities and for the Canada Customs and Revenue Agency. I understand how Canada Customs and Revenue Agency staff can feel as if they have little power to ensure compliance since, as described above, they are reluctant to impose what is essentially capital punishment by revoking the registration of a registered charity and taxing away all of its assets. On the other hand, Canadian registered charities have to operate with the knowledge that the smallest breach of the technical rules in the Act could result in revocation of their registration. As a result, there are proposals outstanding which call for the development of an intermediate sanctions system of taxes or penalties applicable to registered charities that breach the Act.⁴⁶

Definition of Charity

Leaving behind the technical discussion above, an organization is only eligible to be registered as a charity if it has charitable purposes. The definition of charity in Canada is a common law one, based on the 19th century English decision in *Lord Pemsel's* case⁴⁷ which itself relied upon a 1601 English statute known colloquially as the Statute

⁴⁴ For example the United States

⁴⁵ The one exception is the tax imposed by section 189 on private foundations that lend money to controlling donors at less than market interest rates.

⁴⁶ For example, the voluntary sector initiative (a joint research, policy and advocacy initiative of the voluntary sector and the federal government) is proposing that a system intermediate sanctions be developed. See: www.vsi-isbc.ca/eng/pdf/updateoct.pdf.

⁴⁷ *Pemsel v. Special Commissioners of Income Tax*, 3 T.C.53, [1891] A.C. 531, [1981-94] All E.R. Rep. 28 (HL).

of Elizabeth.⁴⁸ Lord Pemsel's case held that charitable objects could be classified into four "heads" or categories, being the relief of poverty, the advancement of religion, the advancement of education and other purposes of a charitable nature beneficial to the community as a whole.⁴⁹ Many textbooks⁵⁰, articles⁵¹ and significant amount of jurisprudence⁵² have developed on the subject of whether certain purposes or activities are charitable at law. Nonetheless, there remains substantial uncertainty with respect to the charitable status of a number of relatively common third sector purposes and activities.

Presently, the most significant issue arising out of this definition of charity in Canada is the political purposes doctrine. Both as a matter of the common law of charity⁵³ and as a matter of the Income Tax Act⁵⁴, an organization with exclusively charitable purposes which is a registered charity may not engage in political activity. While this distinction is obvious in some cases (for example, it is clear that a registered charity is not permitted to engage in partisan election politics), it is less clear in other cases. The dividing line between the permitted charitable purpose of advancing education and the forbidden

⁴⁸ *An Acte to Redress the Misemployment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses*, 43 Elizabeth I, c. 4.

⁴⁹ The meaning of the first three heads is generally rather obvious. However, the scope of the fourth head, being purposes of a charitable nature beneficial to the community as a whole, is not obvious. Rather than being a general provision for beneficial purposes, this fourth head refers only to an odd assortment of purposes that pass common law decisions have viewed as charitable. One good example is environmental protection.

⁵⁰ For example, see the English texts: Hubert Picarda, *The Law and Practice Relating to Charities* 3rd ed. (London: Butterworths, 1999) and O. Tudor, *Law of Charities*, 8th ed.(1995) or the Canadian text of Donald Bourgeois, *The Law of Charitable and Non-profit Organizations*, 2nd ed. (Toronto, Butterworths, 1995).

⁵¹ There is no seminal Canadian article. However, see past issues of *The Philanthropist* for various articles on the subject.

⁵² The most recent decision of the Supreme Court of Canada is *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, 99 D.T.C. 5034.

political purpose of advocacy can be very difficult to draw. There is currently significant agitation in the Canadian voluntary sector in favour of permitting advocacy organizations to become registered as charities.⁵⁵

It should be noted that organizations that are currently not charitable because of their advocacy purpose are still tax exempt in Canada by virtue of being non-profit organizations. Activists who would like advocacy organizations to also be eligible for registered charity status are driven by a desire to have donations to their organizations recognized for the donor's tax purposes.⁵⁶

DONATIONS

Turning now to the issue of what voluntary sector organizations are able to provide tax recognition for gifts to them, the Act provides for different tax treatment for corporate taxpayers and for individual taxpayers. The Act provides corporate taxpayers with a deduction⁵⁷ from income for donations up to 75% of income made to organizations that are described in the Act as qualified donees.⁵⁸ Similarly, the Act provides for a tax credit⁵⁹ for individuals for donations to qualified donees.⁶⁰ This tax credit provides tax

⁵³ See Picarda, supra note 50 at chapter 14.

⁵⁴ Subsection 149.1(6.1)

⁵⁵ For example, the website of the Institute for Media, Policy and Civil Society (www.impacs.org) presents forcefully the partisan view that advocacy by charities should be encouraged. The limitations on advocacy by registered charities are also being criticized by the Voluntary Sector Initiative (www.vsi-isbc.ca)

⁵⁶ See notes 61-62 and accompanying text.

⁵⁷ Subsection 110.1(1).

⁵⁸ Subsection 248(1) "qualified donee".

⁵⁹ See Robin Boadway and Harry Kitchen, *Canadian Tax Policy*, 3rd ed. (Toronto: Canadian Tax Foundation, 1999) at 126 for a description of the tax credit mechanism.

recognition equivalent to the middle marginal rate for gifts up to \$200 per taxpayer per year and equal to the top marginal rate for gifts above \$200 per year up to 75% of the individual's income for the year. Thus, for individual taxpayers who do not earn income at the top marginal rate, the tax credit provided to them provides an incentive beyond a mere deduction from income.

Definition of Qualified Donee

The list of entities that are recognized as qualified donees is the same for both individuals and corporations. I will therefore outline and comment on the list without differentiating between corporate and individual donors.

Registered Charities

The first and most important type of qualified donee is a registered charity. It is important to note that in order to be registered, a charity must be both a Canadian resident and have been created or established in Canada⁶¹. This essentially means that foreign charities cannot become registered as registered charities and thus qualified donees. Instead, they are able to be instrumental in the formation of new Canadian charities which are qualified donees and which can then work with the related foreign charity to achieve charitable purposes.⁶²

⁶⁰ Subsection 118.1(1).

⁶¹ Subsection 248(1) "registered charity"

⁶² See Robert Hayhoe, "A Critical Description of the Canadian Tax Treatment of Cross-Border Charitable Giving and Activities", (2001) 49 *Canadian Tax Journal* 320 (hereinafter "Hayhoe Critical") for a detailed

Registered Canadian Amateur Athletic Associations

Registered Canadian amateur athletic associations are a type of non-profit organization that is required by the Act to be devoted to the promotion of sports throughout Canada.⁶³ These are generally used to support high level “amateur” sports in Canada although they may also be used to support more traditional recreational amateur sport in Canada.⁶⁴

Governmental Bodies

The Canadian federal government, Canadian provincial governments and Canadian municipalities⁶⁵ are qualified donees. In addition to the actual government entities themselves, agencies of these government entities are also qualified donees. The United Nations and its agencies are also listed as a qualified donee. In the context of the United Nations, the question of whether a particular entity is a United Nations agency or not is an interesting one given that United Nations entities may not meet the ordinary common law test for agency.⁶⁶

policy analysis or David Amy, “Foreign Activities by Canadian Charities” (2000) 15:3, *The Philanthropist* 41 for an practical outline of such structures.

⁶³ Subsection 248(1) “registered Canadian amateur athletic association.”

⁶⁴ *Maccabi Canada v. M.N.R.* 98 D.T.C. 6526 (F.C.A.).

⁶⁵ Which may include native Indian bands which exercise some of the powers of a municipality in their local area: *Otineka Development Corporation Limited and 72902 Manitoba Limited v. The Queen*, 94 D.T.C. 1234 (T.C.C.).

Foreign Universities

The Act also provides that a university outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada, is a qualified donee. The Canada Customs and Revenue Agency maintains a list by regulation in which it lists the universities that it accepts as being customarily attended by Canadians.⁶⁷ Although the Regulation currently only lists universities in the United States, the United Kingdom, Austria, Belgium, Switzerland, Israel, Lebanon, the Republic of Ireland, Germany, Poland, Spain, The People's Republic of China, Jamaica, the Czech and Slovak Federal Republic, Australia, Croatia, South Africa, the Netherlands, Hong Kong, New Zealand, the Canada Customs and Revenue Agency does maintain an informal application process by which it is willing to expand this list.

Foreign Charities with Canadian Government Patronage

The last qualified donee is a foreign charity that has received a gift from the Canadian federal government within the past year. The Canada Customs and Revenue Agency takes a very narrow view⁶⁸ of what constitutes a gift from the Canadian federal

⁶⁶ I have previously argued that common law tests for agency are inappropriate in the circumstances: Hayhoe Critical, supra note 62 at 325.

⁶⁷ Income Tax Regulation Schedule VIII.

⁶⁸ For example, the Canada Customs and Revenue Agency takes the position that foreign development grants made by the Canadian International Development Agency, which is an integral part of the federal government, do not generally constitute gifts from the federal government because reporting conditions are imposed upon the grants. This is an exceedingly narrow approach and one which I have previously argued is a wrong at law: Hayhoe Critical, supra note 62 at 327.

government and maintains a list which varies from year to year but which usually only contains a handful of names.⁶⁹

CONCLUSION

As described above, the Canadian tax system applicable to the third sector generally provides that other than charities that have not applied to become registered charities, most voluntary sector organizations in Canada are exempt from tax pursuant to the *Income Tax Act*. However, only organizations that are qualified donees (primarily registered charities) are able to issue the receipts that are necessary in order for their donors to obtain tax recognition for donations. This represents a desire by Canada to retain control over the tax benefits that it provides for donations.

⁶⁹<http://www.cra-adrc.gc.ca/E/pub/tp/ic84-3r5attacheq/ic84-3r5-attach-e.html>