

Cross-Border Giving Strategies and the New Disclosure Rules

Presented by: Lorne Saltman
May 23, 2019



Topics to Discuss

1. Introduction:
2. Cross-Border Donations
3. Information Sharing, including CRS
4. Trust Tax Return Filings
5. Canada Business Corporations Act

Cross-Border Donations

- Generally, Canadian resident can only get tax credit for individual or income deduction for corporation on donation to Canadian registered charity
- Exceptions:
 - Certain foreign universities qualify if registered with the CRA under the ITA
 - Article XXI-7 Canada-U.S. Tax Treaty permits recognition of Canadian resident donation to U.S. charity, provided donor has U.S.-source income
- Alternative: Canadian charity registered as “Canadian Friends of Charity X”

Cross-Border Donations ...cont'd

- Where a Canadian charity is registered as “Canadian Friends of Charity X”, it may want to transfer funds from Canada to the non-resident Charity X
- The CRA prohibits the Canadian charity from being a mere conduit for such funds to be transferred to Charity X
- Instead, there must be a contractual arrangement made between the two organizations: typically a Joint Venture or an Agency Agreement, under which the Canadian charity must maintain sufficient direction and control to satisfy the CRA that it is not a conduit

Cross-Border Donations ...cont'd

- Cross-border giving is a complex area requiring careful navigation of the tax laws to ensure that tax deductions are maximized, permitting more to go to the charitable destination
- In a family business with international operations, it would be worthwhile to channel charitable donations to come from member companies in jurisdictions with the highest tax rates

Cross-Border Donations ...cont'd

- Compare private charitable foundation to donor-advised endowment fund with public charitable foundation
 - Confidentiality can be preserved only through a public foundation
 - Control can only be maintained through a private charitable foundation
 - For cross-border donation arrangements, public foundations may impose strict limits (country risk, for example), while a private family foundation may have more tolerance for such risks

Common Reporting Standard

- The OECD has promulgated a process to combat tax secrecy and tax evasion, and to promote transparency through the automatic exchange of information known as the Common Reporting Standard (“CRS”)
- Part XIX, Sections 270-281 have been added to the *Income Tax Act* to implement CRS in Canada
- Over 90 countries are committed to implementing CRS starting this year (except for the U.S.A.) by signing the OECD’S *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*

Common Reporting Standard...cont'd

- The OECD prescription for combatting Base Erosion and Profit Shifting is “Transparency and Automatic Exchange of Information”
- Reflects shift from mere legal ownership to beneficial ownership.
- Heavily influenced by FATCA (U.S. “Foreign Account Tax Compliance Act”) and Canada/US Intergovernmental Agreement
- But unlike FATCA which has heavy sanctions through the imposition of 30% withholding tax, CRS has no sanctions
- Expect peer review to establish and maintain Standard

Common Reporting Standard...cont'd

- The OECD proclaims that the following are the main benefits of automatic exchange of information (“AEOI”):
 - AEOI can provide timely information on non-compliance where tax has been evaded
 - It can help detect cases of non-compliance even where a tax administration has had no previous indication of non-compliance
 - It has deterrent effects, increasing voluntary compliance and encouraging taxpayers to report all relevant information
 - It can help educate taxpayers in their reporting obligations, increase tax revenues and, thus, lead to fairness – ensuring that all taxpayers pay their fair share of tax in the right place at the right time

Common Reporting Standard...cont'd

- The Standard requires universal rules for Keeping Information, Collecting Information and Exchanging Information
- Governments in CRS jurisdictions have downloaded significant due diligence requirements on Financial Institutions in order to open and maintain Financial Accounts
- Controversy in some countries where there is pressure to make certain private records of beneficial ownership of companies and trusts publicly available

Common Reporting Standard ...cont'd

- Canadian financial institutions must collect information about financial accounts owned by residents of other countries (*Reportable Persons*), and must report this information to the CRA
- In turn, the CRA will transmit this information to the taxation authority of the country of residence of the account holder
- The other countries that implement the CRS will likewise require their financial institutions to collect information about Canadians that will be transferred to the CRA

Common Reporting Standard ...cont'd

- Only financial accounts are reportable under CRS, whereas under a Tax Information Exchange Agreement, information can be requested that encompasses all tax-related assets (e.g. real estate)
- A “Financial Account” is not a legal document, such as a Deed of Trust or an Agreement; thus, there is no authority under CRS to require disclosure of same
- Accordingly, it is apparent that CRS is primarily an instrument of deterrence (in response to public outrage over disclosures in the Panama Papers, the Paradise Papers, etc.), whereas the TIEA is the central instrument for tax authorities to conduct international tax investigations with tax havens

Common Reporting Standard ...cont'd

- Concern over infringement on privacy rights with no requirement for due process, e.g. no requirement to inform the account holder that this information is being transmitted to the country of residence, and no right to make representations against such a transmission
- If an account holder comes from a corrupt country, such information may be used to blackmail, kidnap or otherwise harm the family or their business

Common Reporting Standard ...cont'd

- *Reporting Financial Institution* covers depository institutions, investment entities and specified insurance companies
- *Reportable Accounts* include financial accounts held by individuals and entities, including a non-financial entity (“Passive NFE”) that requires a high level of due diligence to determine if a Reportable Person is in control
 - In the case of a corporation, 25% share ownership is enough to constitute control
 - In the case of a trust, this could be the settlor, the trustee, a beneficiary, a protector, or any other person exercising effective control over the trust
- How a beneficiary can be a controlling person of a trust is not only mystifying but is contrary to law

Common Reporting Standard ...cont'd

- The following commentary by the OECD in its 2014 seminal publication, “Standard for Automatic Exchange of Financial Account Information in Tax Matters”, at page 12, shows the extreme, almost paranoid, breadth of disclosure required:
 - “A comprehensive reporting regime requires reporting not only with respect to individuals, but should also limit the opportunities for taxpayers to circumvent reporting by using interposed legal entities of arrangements. This means requiring financial institutions to look through shell companies, trusts or similar arrangements, including taxable entities to cover situations where a taxpayer seek to hide the principal but is willing to pay tax on the income.”

Tax Reporting for Trusts

- Again, following the OECD lead to enhance transparency and the automatic exchange of information, the Income Tax Act (Canada) is being amended to require trusts to disclose information ostensibly to combat tax evasion and aggressive tax avoidance
- Starting in 2021, most express, residence trusts and non-resident trusts that are required to file a tax return, with assets worth at least \$50,000, must report certain personal information in the T3 Annual Tax Return; exceptions include a graduated rate estate

Tax Reporting for Trusts ...cont'd

- The following personal information must be reported:
 - Settlor
 - Trustees
 - Beneficiaries
 - Protectors
 - Any other person who has the ability to exert influence over the Trustee's decisions regarding the distribution of income or capital of the trust

Tax Reporting for Trusts ...cont'd

- The following gross negligence penalties apply for knowingly contravening the filing requirements:
 - The greater of
 - \$2,500, and
 - 5% of the highest amount at any time in the year that is the total fair market value of all the property held by the trust

Canada Business Corporations Act

- Canada is following the lead of the OECD and enacting corporate laws to require transparency and the automatic exchange of information
- Stated purpose is to prevent corporations from being misused for tax evasion, money laundering, corruption and financing of terrorist activities
- Starting July 1, 2019 each private corporation incorporated under the CBCA will be required to maintain a register of “individuals with significant control of the corporation”

Canada Business Corporations Act ...cont'd

- Who are “individuals with significant control of the corporation”?
 - An individual who is the registered or beneficial owner of, or who has direct or indirect control or direction of, either 25% or more of the voting rights of all the corporation’s shares, or 25% or more of the corporation’s shares measured by fair market value, or
 - An individual who has direct or indirect influence that, if exercised, would result in control in fact of the corporation

Canada Business Corporations Act ...cont'd

- What is in the Register and who has access to it ?
 - Corporation must maintain information on controlling person, including: name, date of birth, last known address, day on which individual became or ceased to be a controlling person, description of the controlling person's interests in the corporation and rights in respect of the corporation's shares, and jurisdiction of residence for tax purposes
 - Access can be requested by the Director under the CBCA, certain authorized investigative bodies (such as a police force), any shareholder or creditor, so long as they are to use the information in connection with any matter relating to the affairs of the corporation

Canada Business Corporations Act ...cont'd

- What enforcement powers are there ?
 - A corporation that without reasonable cause contravenes the new requirement is guilty of an offence and is liable for a fine not exceeding \$5,000
 - Knowingly contravening the new rules could result in fines not exceeding \$200,000 or six months imprisonment or both, imposed on the corporation, its directors, officers or shareholders

Canada Business Corporations Act ...cont'd

- What protections for privacy are there ?
 - No right for a controlling person to be notified that a person has been granted access to the Register
 - No right to challenge the release of information, e.g. Minister of National Revenue could be creditor seeking personal information that could then be automatically sent to the taxation authority of the controlling person's jurisdiction of residence
 - However, the corporation must prepare and maintain the register by safeguarding personal information in accordance with the *Personal Information Protection and Electronic Documents Act* (Canada) ("PIPEDA")

Canada Business Corporations Act ...cont'd

- How does this disclosure of detailed personal information square with a CBCA corporation's obligations under PIPEDA ?
- Under PIPEDA, the corporation must adopt and implement adequate security safeguards to protect information from loss or unauthorized disclosure or access
- In addition, the corporation must obtain the informed consent of the affected beneficial owner to include his/her personal information in the Register

Conclusions on Disclosure Today

- Governments in Canada (and around the world) are aggressively gathering personal information about individuals and automatically transmitting it to other governmental authorities, with virtually no protection for privacy rights
- In contrast, the Courts are developing new protections for individuals who are harmed through the broadcast of personal information through social media

Conclusions on Disclosure Today ...cont'd

- In the case of *Jane Doe 72511 v. N.M. et al.*, a spurned lover posted nude pictures of his former girlfriend on a pornographic site; she sued him and won on the basis of the new tort of *public disclosure of private facts*
- The plaintiff successfully proved the following elements of the tort:
 - The defendant publicized an aspect of the plaintiff's private life,
 - The plaintiff did not consent to the publication,
 - The matter publicized would be highly offensive to a reasonable person, and
 - The publication was not of legitimate concern to the public.

Conclusions on Disclosure Today ...cont'd

- While it is not appropriate, or possible, to apply this new tort to the actions of governments pursuant to Parliamentary legislation, the public needs to be aware of the full implications when successful companies and individuals are singled out for alleged misconduct, and these policies of transparency and automatic exchange of information put the privacy rights of all of us at risk
- There needs to be a public debate about the consequences of these policies, especially when dealing with corrupt regimes outside Canada



Questions?

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Changes to the Rules on:

- Gifts and Exports of Cultural Property
- Registered Charities and Political Advocacy

Presented by: Clifford S. Goldfarb
May 23, 2019



WELCOME

Non-Profit and Charities

CULTURAL PROPERTY

Cultural Property

BACKGROUND - *Cultural Property Export and Import Act*
– 1977 (“CP Act”)

PURPOSE – Establishes rules for the export of culturally important objects from Canada

- Control list of objects or classes of objects regardless of their places of origin, the export of which is deemed necessary to control in order to preserve the national heritage in Canada

Cultural Property

- Classes of items designated for the Control List:
- historical documents, photographs, films, sound recordings, mineral specimens, fossils, archaeological artifacts, ethnographic items, military objects, applied artistic and decorative items, fine art, scientific or technological objects, textual and graphic records of all kinds, maps, iconographic items, musical instruments.

Cultural Property

- At least 50 years old and creator not alive – 35 years in Canada
- Gives Canadian Institutions two-six months raise funds to buy the item before an export permit is issued
- Government provides some funds
- Application for export permit is made to Canada Border Services Agency. Expert examiner decides if object is subject to control. Appeal to Canadian Cultural Property Export Review Board

TEST FOR DENIAL OF EXPORT PERMIT

- S.29(3)(b) and (c) of the CP Act
- In reviewing an application for an export permit, the Review Board shall determine whether the object in respect of which the application was made:
 - (b) is of outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and
 - (c) is of such a degree of national importance that its loss to Canada would significantly diminish the national heritage.

ITA – 1997 Addition of Super Tax Credit for Gifts of Cultural Property

- EFFECT OF CREDIT – ITA s.39(1)(a)(i.1)
- A taxpayer's capital gain excludes an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(b) and (c) of the CP Act if
 - (A) the disposition is to a designated institution or a public authority in Canada, or
 - (B) the disposition is made by the taxpayer's estate to such an institution
- Section 110.1(1)(c) contains a similar provision for corporations

ITA – 1997 Addition of Super Tax Credit for Gift of Cultural Property

- In addition to no capital gains inclusion, gifts of cultural property also are entitled to a super credit:
- 100% of the receipted amount may be deducted against income for the year and the preceding five tax years – vs. 75% for a standard receipted amount ITA
- s.118.1(2.1) & definition of “total cultural gifts” in s.118.1(1)

ITA – 1997 Addition of Super Tax Credit for Gift of Cultural Property

- WHO CAN ISSUE RECEIPT – CP Act, s.32, Minister may designate any institution or public authority indefinitely or for a period of time, and generally or for a specified purpose.
- Category A organizations (in operation $\geq$ 2 years) have an unlimited designation from one or more cultural property classes
- Includes art galleries, museums, special collections libraries, each of which is designated for one or more classes of objects
- List at: <https://www.canada.ca/en/canadian-heritage/services/funding/movable-cultural-property/designated-organizations.html>
- Category B organizations are in operation between 1 and 2 years.
- Guide on how to apply to be designated is at: http://publications.gc.ca/collections/collection_2013/pc-ch/CH41-33-2013-eng.pdf

ITA – 1997 Addition of Super Tax Credit for Gift of Cultural Property

- The amount of the receipt that can be issued by the designated institution or public authority is the fair market value of the property, as determined by the Cultural Property Export and Import Board
- 10-YEAR RULE – ITA, s.207.3 – an institution which disposes of such a gift must pay a tax of 30% of FMV at time, unless to another designated Canadian institution or public authority

Heffel Decision FCTrial (Summer 2018)



Iris bleus, jardin du Petit Gennevilliers

Oil on canvas, 21¾" x 18¼", 1892, Gustave Caillebotte French impressionist painter



Heffel Decision FCTrial (Summer 2018)

- ... must be a connection with Canadian heritage that is more direct than the fact that Canada is multicultural and Canadians may wish to study the traditions of any one of the many countries from which their ancestors may have come.
- Parliament has chosen words that require a direct connection with the cultural heritage that is particular to Canada, ... and to separate the analysis of aesthetic qualities and value for study from the analysis of national importance.

Heffel Decision FCTrial (Summer 2018)

- Decision on export permit let to dismay in the philanthropic community and a freeze of gifting due to concern about meeting much higher national importance standard

Heffel Decision FCTrial (Summer 2018)

- BUDGET MARCH 19, 2019 – PROPOSED TO REMOVE NATIONAL IMPORTANCE AS REQUIREMENT FOR GIFTS
- BILL C-97, WAYS AND MEANS MOTION TO IMPLEMENT BUDGET –
- [s.4 (1)] subparagraph 39(1)(a)(i.1) of the ITA will be amended to require the object to be certified only to be of outstanding significance, and will no longer required to be of national importance. The amendment is deemed to have come into force on March 19, 2019

Heffel Decision FCTrial (Summer 2018)

- HEFFEL FCA April 16 – REVERSING FCT – result a work by an international artist can be of “national importance”
- C-97 STATUS IN PARLIAMENT [Second reading at this time – not sure if it will be proceeded with in the circumstances]

CHARITIES AND ADVOCACY

Charities and Advocacy

BACKGROUND – Under the ITA, charities are currently required to devote all of their resources to their charitable purposes

Charities and Advocacy

- In 1985 *Scarborough Legal Services* case led to a concern that any sort of advocacy, whether partisan or non-partisan, was not a charitable activity and could lead to de-registration
- S.149.1(6.1) for foundations and (6.2) for organizations were passed (1987), allowing charities to devote up to 10% of their resources to non-partisan advocacy “ancillary and incidental” to their charitable purposes
- This was considered to be a relieving provision, but quickly became regarded as a limitation

Charities and Advocacy

- Over the years CRA published several interpretation bulletins, setting out how it interpreted these provisions, the most recent of which, prior to the developments of last summer, was CPS-022, Political Activities, first published in 2003 and updated several times.
- A number of years ago the 10% limit was increased to 20% for charities with revenues under \$50,000
- The limiting provisions of the ITA and the perceived shortcomings of CRA's published policies led to most organizations shying away from any kind of activities that might run afoul of the ITA and CRA's policies

CRA Political Audits

- In 2012 CRA undertook a series of audits of approximately 60 charities to review their degree of engagement in political advocacy.

CRA Political Audits

- When Liberal government came into power in 2015 it suspended all of the ongoing audits while it engaged in a consultation on the situation.
- March 31, 2017 report (Report) of the Consultation Panel on the Political Activities of Charities (Panel), four recommendations

CRA Political Audits

1. Revise the CRA's administrative position and policy (including its policy guidance, CPS -022 Political Activities) to enable charities to fully engage in public policy dialogue and development.
2. Implement changes to the CRA's administration of the ITA in the following areas: compliance and appeals, audits, and communication and collaboration to enhance clarity and consistency.

CRA Political Audits

3. Amend the ITA by deleting any reference to non-partisan "political activities", to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.
4. Modernize the legislative framework governing the charitable sector (ITA) to ensure a focus on charitable *purposes* rather than *activities*, and adopt an inclusive list of acceptable charitable purposes to reflect current social and environmental issues and approaches.

CWP Charter Challenge

Canada without Poverty v. Attorney General of Canada

- CWP is a registered charity whose charitable purpose is the relief of poverty. It generally does not fulfill its purpose through the provision of housing, food, or other tangible benefits, but mostly engages in public advocacy for policy and attitudinal change.
- In the course of its audit CRA determined that virtually all of its activities consisted of public advocacy and indicated its intention to de-register the charity.

CWP Charter Challenge

Canada without Poverty v. Attorney General of Canada

- Justice Morgan declared that the limitation of 10% of a charity's resources for political activities in ITA s.149.1(6.2) violates the charity's s.2(b) Charter right to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, and was not saved by being within such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

CWP Charter Challenge

Canada without Poverty v. Attorney General of Canada

- Since “charitable activities” must be read to include political activities, without quantum limitation, in furtherance of the organization’s charitable purposes, he declared that the two relevant sections of the ITA, ss.149.1(6.2)(a) and (b) were of no force and effect, effective immediately;
- Finally, he held that the exclusion of partisan political activities from the definition of “charitable activities” in s.149.1(6.2)(c) was to remain in force.

CWP Charter Challenge

Canada without Poverty v. Attorney General of Canada

- Initially the Government announced its intention to appeal this decision – which in my personal opinion is somewhat suspect on a number of grounds, but in the light of amendments to the charitable advocacy provisions of the ITA in December 2018, they abandoned the appeal.

Amendments to ITA

- On December 13, 2018, amendments to ss.149.1(1), (6.1) and (6.2) came into effect
- A new definition of “charitable activities” in s.149.1(1)”includes public policy dialogue and development activities carried on in furtherance of a charitable purpose;” (“PPDDAs”, also, but less often, called “P2D2A”)
- The amended sections now permit charities to devote all of their resources to “public policy dialogue and development activities” in furtherance of their stated charitable purposes.

Amendments to ITA

- New ss. 149.1(10.1) provides that non-partisan “public policy dialogue and development activities carried on by an organization, corporation or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose”

Guidance CG-027

- DRAFT GUIDANCE – STATUS Guidance - CG-027 (Public policy dialogue and development activities by charities) - January 21, 2019, replaces CPS-022
- CRA also provided a Q&A elaborating on this Guidance
- Public feedback accepted until April 23rd. [Waiting for CRA to publish final version]

Guidance CG-027

- The new legislation does not define PPDDA's. The explanatory notes that accompanied the bill and CRA's draft Guidance define them as activities that "generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country"
- In other words, under the *Income Tax Act*, a charity is now free to advocate for any change to a law, policy, or decision of government that would further its stated charitable purpose.

Guidance CG-027

- A charity's PPDDAs further a stated charitable purpose if they satisfy both of the following criteria:
 - the PPDDAs relate to the charity's stated charitable purpose
 - the PPDDAs, when considered together with the charity's stated charitable purpose, would provide a benefit to the public (see Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test)

Guidance CG-027

The Draft Guidance includes the following list of PPDDAs from the Consultation Report:

- Providing information – charities may provide information to their supporters or the general public related to their charitable purposes (including the conduct of public awareness campaigns) in order to inform or persuade the public in regards to public policy. Such information must be truthful, accurate, and not misleading.

Guidance CG-027

- Research – charities may conduct research into public policy, distribute the research, and discuss the research and findings with the media and with others as they see fit. Note that to advance education as a charitable purpose, a charity's research must meet the criteria in Policy statement CPS-029, Research as a charitable activity.
- Disseminating opinions – charities may express opinions on matters related to their charitable purposes to participate in developing public policy, as long as they draw on research and evidence and are not contrary to hate speech laws or other legitimate restrictions on freedom of expression.

Guidance CG-027

- Advocacy – charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country.
- Mobilizing others – charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country.

Guidance CG-027

- Representations – charities may make representations in writing or verbally to elected officials, public officials, political parties, and candidates, and appear at parliamentary committees, to bring their views to the public policy development process, and may release such materials publicly. Note that a charity engaging in this type of activity may be required to register as a lobbyist organization.

Guidance CG-027

- Providing forums and convening discussions – charities may invite competing candidates and political representatives to speak at the same event, or may request written submissions for publication, to discuss public policy issues that relate to the charity's purposes.
- Communicating on social media – charities may express their views, and offer an opportunity for others to express their views, in regards to public policy, on social media or elsewhere.

Guidance CG-027

- Incorporation for Purpose of Advocacy?
- The explanatory notes to the new s.149.1(10.1) state that PPDDAs will not be considered to reflect a separate political purpose.

Guidance CG-027

- NO PARTISAN ADVOCACY – s.149.1(6.1) and (6.2) continue to provide that a charity “that devotes any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office shall not be considered to be constituted and operated exclusively for charitable purposes.”

Guidance CG-027

- ADVOCACY IN SUPPORT OF PURPOSE = COUNTS AS A CHARITABLE ACTIVITY – FORM T3010 Registered Charity Information Return. A charity must keep records that demonstrate its primary consideration in carrying on PPDDAs is to further its stated charitable purpose and provide a public benefit.

Guidance CG-027

- Since charities now must report on PPDDAs rather than political activities, revised versions of Form T3010 and Form T2050, Application to Register a Charity under the Income Tax Act, will be released in November 2019. In the meantime, CRA has provided guidance on its website on how to use the existing forms

<https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/t3010.html> for T3010 and

<https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/t2050.html> for T2050

Federal Election – Permitted Activities

- Beyond scope of this talk, but need to be aware of different rules which apply during election campaigns
- Draft Guidance has sections dealing with the extent to which charities can properly participate in election campaigns without crossing the line into supporting or opposing a candidate or party

Consultation Panel Status

- March 7, 2019, the Minister of National Revenue (Minister) published its response (Response) to the 2017 report (Report) of the Consultation Panel on the Political Activities of Charities (Panel).
- Funding to CRA to enhance outreach and education of the charitable sector, including enhanced CRA employee training.
- Established Permanent Advisory Committee on the Charitable Sector, to provide recommendations on “important and emerging issues facing charities and other qualified donees.”



Questions?

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Public policy dialogue and development activities by charities

i The Canada Revenue Agency is accepting [feedback](#) on this draft administrative guidance until April 23, 2019.

For a general overview of the changes to the rules governing the political activities of charities, see the [Questions and answers](#).

Guidance

Reference number

CG-027

Issued

January 21, 2019

This guidance replaces Policy statement CPS-022, Political activities.

On this page

- [Furthering a stated charitable purpose](#)
 - [Meaning of stated charitable purpose](#)
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 - [The requirement for PPDDAs to further a charitable purpose](#)
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- [Prohibited: Supporting or opposing a political party or candidate](#)
 - [Meaning of direct and indirect support or opposition](#)

- Allowed: Communicating about policy issues
- Allowed: Informing the public about the policy positions of political parties and candidates
- Representatives of a charity involved in politics on their own personal time
- A charity's activities other than PPDDAs
- Other legal requirements
- Annex A – Categories of charity.
- Footnotes

To be eligible for registration, the Income Tax Act requires a charity to be constituted and operated exclusively for charitable purposes, and all the charity's resources must be devoted to charitable activities carried on by the charity itself. ¹ Charitable activities include public policy dialogue and development activities (PPDDAs) that further a charitable purpose. PPDDAs (Public policy dialogue and development activities) generally involve seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country.

As long as a charity's PPDDAs (Public policy dialogue and development activities) are carried on in furtherance of its stated charitable purpose(s), the Income Tax Act places no limits on the amount of PPDDAs (Public policy dialogue and development activities) a charity can engage in. ² In this context, a charity may devote up to 100% of its total resources to PPDDAs (Public policy dialogue and development activities) that further its stated charitable purpose.

Furthering a stated charitable purpose

The Income Tax Act permits a charity to fully engage without limitation in PPDDAs (Public policy dialogue and development activities) that further its stated charitable purpose, provided they never directly or indirectly support or oppose a political party or candidate for public office (see Prohibited: Supporting or opposing a political party or candidate). In other words, under the Income Tax Act, a charity is free to advocate for any change to a law, policy, or decision of government that would further its stated charitable purpose.

Meaning of stated charitable purpose

A stated charitable purpose is a purpose that meets the following three criteria:

- the purpose appears in the charity's governing documents
- the purpose falls within one of the four categories of charity (see Annex A)
- the purpose provides a benefit to the public (see Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test)
 - this includes a requirement that any private benefit conferred is necessary, reasonable, and proportionate (see also Guidance CG-013, Fundraising by registered charities)

The requirement to have a stated charitable purpose

The Income Tax Act requires a charity's stated purposes to be charitable.³ Accordingly, the purposes stated in a charity's governing document may not refer to influencing the laws, policies, or decisions of a government. This is the case even if most or all of a charity's activities are PPDDAs (Public policy dialogue and development activities).

Instead, a charity's purposes should be drafted so that they focus on the charitable purposes the PPDDAs (Public policy dialogue and development activities) are meant to achieve, rather than the PPDDAs (Public policy dialogue and development activities) themselves. A stated charitable purpose could include, for example:

- to relieve poverty by providing social services for the working poor
- to advance education by building more schools for students
- to advance religion by offering religious instruction to elementary school students
- to relieve conditions associated with disability by providing support to caregivers who are family members

The requirement for PPDDAs (Public policy dialogue and development activities) to further a charitable purpose

A charity's PPDDAs (Public policy dialogue and development activities) further a stated charitable purpose if they satisfy both of the following criteria:

- the PPDDAs (Public policy dialogue and development activities) relate to the charity's stated charitable purpose
- the PPDDAs (Public policy dialogue and development activities), when considered together with the charity's stated charitable purpose, would provide a benefit to the public (see Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test)

In this context, a charity could, for example, carry out PPDDAs (Public policy dialogue and development activities) to:

- relieve poverty by contributing to government policies in matters relating to poverty relief

- advance education by contributing to government policies in matters relating to the regulation of education
- advance religion by either of the following methods:
 - contributing to government policies in matters relating to religion
 - constituting a targeted attempt to manifest, promote, sustain, or increase belief in the religion furthered by the purpose in a manner that is clearly and materially connected to the teachings, doctrines, or observances of the religion identified in the stated purpose

Examples of PPDDAs (Public policy dialogue and development activities) that further a stated charitable purpose

A charity provides information to the public about the benefits of enhancing social assistance programs for the impoverished, to further its purpose of relieving poverty.

A charity makes representations to elected representatives to lobby for increased provincial funding for post-secondary education, to further its purpose of advancing education.

A charity calls on its supporters to contact elected representatives of all parties and urge them to support provincial funding for religious schools of a certain faith through the public education system, to further its purpose of advancing religion.

A charity expresses views on social media platforms against a municipal government's zoning decision to permit smoking on restaurant patios, to further its purpose of promoting health.

A charity must keep records that demonstrate its primary consideration in carrying on PPDDAs (Public policy dialogue and development activities) is to further its stated charitable purpose and provide a public benefit. ⁴

Public policy dialogue and development activities

PPDDAs (Public policy dialogue and development activities) can be described as activities a charity carries on to participate in the public policy development process, or facilitate the public's participation in that process. A charity can also transfer resources to another qualified donee to support the recipient's PPDDAs (Public policy dialogue and development activities). As long as a charity's PPDDAs (Public policy dialogue and development activities) further its stated charitable purpose, the Income Tax Act places no limit on the amount of PPDDAs (Public policy dialogue and development activities) a charity can engage in.

For the purposes of this document, **public policy** means the laws, policies, or decisions of a government, in Canada or a foreign country. The Canada Revenue Agency (CRA) considers PPDDAs (Public policy dialogue and development activities) to include: ⁵

Providing information – charities may provide information to their supporters or the general public related to their charitable purposes (including the conduct of public awareness campaigns) in order to inform or persuade the public in regards to public policy. Such information must be truthful, accurate, and not misleading.

Research – charities may conduct research into public policy, distribute the research, and discuss the research and findings with the media and with others as they see fit. Note that to advance education as a charitable

purpose, a charity's research must meet the criteria in Policy statement CPS-029, Research as a charitable activity.

Disseminating opinions – charities may express opinions on matters related to their charitable purposes to participate in developing public policy, as long as they draw on research and evidence and are not contrary to hate speech laws or other legitimate restrictions on freedom of expression.

Advocacy – charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country.

Mobilizing others – charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country.

Representations – charities may make representations in writing or verbally to elected officials, public officials, political parties, and candidates, and appear at parliamentary committees, to bring their views to the public policy development process, and may release such materials publicly. Note that a charity engaging in this type of activity may be required to register as a lobbyist organization. See Other legal requirements.

Providing forums and convening discussions – charities may invite competing candidates and political representatives to speak at the same event, or may request written submissions for publication, to discuss public policy issues that relate to the charity's purposes.

Communicating on social media – charities may express their views, and offer an opportunity for others to express their views, in regards to public policy, on social media or elsewhere.

Prohibited: Supporting or opposing a political party or candidate

The Income Tax Act prohibits a charity from devoting any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office.⁶ Any activity that supports or opposes a political party or candidate is not a PPDDA (Public policy dialogue and development activities), and a charity cannot carry on such an activity to any degree.

This requirement is particularly important to remember during an election period, when charities may want to express their views on the policy issues that matter to their supporters. Beyond the requirements of the Income Tax Act, charities are also subject to other legislation governing election and activities surrounding representation to parliamentarians, such as the Canada Elections Act and the Lobbying Act (see Other legal requirements).

Under the Income Tax Act, a charity may publicly agree or disagree with a decision or position of a government, but in doing so must not support or oppose any political party or candidate for public office. As a general guideline, a charity's communications should focus on the policy issue under discussion, and not refer to any candidate or political party.

The CRA (Canada Revenue Agency) considers a **candidate** to be a person who meets that specific definition in the applicable election legislation. For example, a candidate in a federal election would be a person that meets the definition in The Canada Elections Act.⁷

In the context of subsections 149.1(6.1) and (6.2) of the Income Tax Act, the CRA (Canada Revenue Agency) does not consider the term candidate to include **potential** candidates. A potential candidate would include, for

example, individuals who publicly announce their intention to run for public office without having filed nomination papers or otherwise met the criteria in the relevant election legislation.

The CRA (Canada Revenue Agency) considers a **political party** to be an organization with a fundamental purpose to participate in public affairs by endorsing one or more of its members as candidates and supporting their election.⁸

The CRA (Canada Revenue Agency) considers a candidate for **public office** to include a candidate seeking election to any of the following:

- the House of Commons
- a provincial or territorial legislative assembly, national assembly or parliament, band council, regional or municipal government, or similar entity

Meaning of direct and indirect support or opposition

Direct support or opposition means either of the following:

- the charity's external materials (for example, social media messages, website, print publications) communicate a message that supports or opposes a political party or candidate to the public
- the charity transfers any of its resources (for example, financial, human, or physical resources) to a political party or candidate, or allows a political party or candidate to use its resources without compensation

Examples of direct support or opposition could include:

- endorsing a candidate over social media
- telling people on a charity's website not to vote for a political party

- making a donation to a political party or a candidate's election campaign
- buying tickets to a political party's fundraiser
- sending volunteers, paid staff, or board members to accompany a candidate in a door-to-door election campaign, as representatives of the charity (also see Representatives of a charity involved in politics on their own personal time)
- inviting only one candidate in an election to speak to the charity's supporters, without giving all candidates an equal opportunity to present their views and answer questions
- allowing or assigning paid staff or volunteers to work for a candidate's election campaign, rather than carrying on work for the charity
- allowing a political party to use a charity's premises without compensation

Indirect support or opposition means either of the following:

- the charity's records explicitly reveal it carried on an activity to support or oppose a political party or candidate
- the charity transfers any of its resources to a third party, to be used to support or oppose a political party or candidate

Examples of indirect support or opposition could include:

- The internal minutes of a meeting of the directors of a charity record their explicit decision to oppose a candidate in a provincial election whose views on a policy issue differ from those of the charity, by carrying out PPDDAs (Public policy dialogue and development activities) that specifically target his riding but do not refer to the candidate.
- A charity temporarily assigns some of its staff members to work for a non-profit organization that it regularly collaborates with, on the

understanding the staff members' salaried time will be used to support the election campaign of a candidate who is seeking to address the same social issue as the charity.

- A charity's internal planning documents explicitly confirm that it will oppose a political party that takes a different view on a certain policy issue, by holding a public demonstration in front of the building where the party is gathering for its annual convention.
- A charity develops an internal strategic report that explicitly states the charity will support a political party through its PPDDAs (Public policy dialogue and development activities), by publishing research materials that will offer evidence and arguments in favour of the party's position on an issue, without ever referring to the political party in its public materials.

A charity that provides a platform for the public to comment on and discuss issues (for example, a website or blog) must monitor these platforms, and remove messages that support or oppose a political party or candidate for public office. In such a case, a charity might choose to add a notice to its platform that messages that support or oppose a political party or candidate will be removed.

The CRA (Canada Revenue Agency) does not consider a charity to support or oppose a political party or candidate if it merely receives a gift from a party or candidate, or is promoted by a party or candidate. For example, if a political party, candidate, or elected representative donates to a charity, or compliments the charity on social media, the CRA (Canada Revenue Agency) would not as a result consider the charity to support or oppose that political party or candidate.

Allowed: Communicating about policy issues

A charity may carry out PPDDAs (Public policy dialogue and development activities) that support or oppose a law, policy, or decision of government that a political party or candidate also supports or opposes. A charity can do this at any time, inside or outside of an election period, as long as in doing so the charity does not refer to or otherwise identify the political party or candidate.

The actions a political party or candidate may independently take do not transform the activities of a charity into direct or indirect support of or opposition to that party or candidate. What the CRA (Canada Revenue Agency) considers is the activities of the charity itself. For example, a charity's PPDDAs (Public policy dialogue and development activities) are not, nor do they become, support of or opposition to a political party or candidate, if a political party or candidate:

- is commonly known or understood to have a specific view on the same issue
- publicly communicates a view on the same issue
- adopts a policy approach suggested by the charity, puts part of the charity's policy research or commentary on their website or other communications platform, or uses part of the charity's research in an activity
- comments positively or negatively on the charity or the charity's PPDDAs (Public policy dialogue and development activities)

Examples

Allowed PPDDAs (Public policy dialogue and development activities), and not prohibited direct or indirect opposition to a political party

A charity that is registered to support newly arrived refugees in Canada posts on its blog its experiences working with these individuals, and its opinions on the refugee system, an issue on which a provincial political party has expressed differing views.

Prohibited direct support for a candidate

The charity tells people to vote for the candidate with a particular view on Canada's refugee system.

Not an activity of the charity, and not typically a concern for the CRA

(Canada Revenue Agency) A candidate in a municipal election calls for new local government programs to help refugees, and cites a charity's publications on the issue as support.

Allowed: Informing the public about the policy positions of political parties and candidates

Under the Income Tax Act, inside or outside of an election period, a charity may:

- Publish on its website or social media platforms, or otherwise distribute to the public, the policy positions of all political parties or all candidates, or their responses to policy questions.²
 - This is the case even if it is obvious to an audience that one or more of the parties or candidates share or oppose the views of the charity.
 - The charity must present the information in a neutral fashion, so that no political party or candidate's policy position or response is singled out, favourably or unfavourably. For example, a charity cannot:

- put red “X”s next to the policy positions of a political party that differ from those of the charity, and green checkmarks next to the policy positions of a political party that align with those of the charity
 - tell people to vote for the party whose response most closely matches the views of the charity on an issue
- Hold candidates’ debates, provided all candidates are given an equal opportunity to present their views and answer questions.
 - Generally, the CRA (Canada Revenue Agency) expects a charity to invite all candidates to any debate or forum it organizes. If a charity limits the number of candidates it invites, the charity must be able to show it has a rationale that it applies consistently, to show it is not supporting or opposing any particular candidate or political party.
 - If one or more candidates decline an invitation to a candidates’ debate, the CRA (Canada Revenue Agency) does not consider the debate to oppose or support a candidate or political party solely as a result of this circumstance.
 - Provide information to its supporters or the public on how **all** the Members of Parliament or the legislature of a province, territory or municipal council voted on an issue connected with the charity's purpose.
 - However, a charity must not single out the voting pattern of any particular political party or candidate on any issue.

Representatives of a charity involved in politics on their own personal time

The Income Tax Act prohibits a charity from directly or indirectly supporting or opposing a political party or candidate, but this requirement does not apply to representatives of a charity, in their own personal, private capacity as individuals. That is, a representative of a charity, such as a director, is not prohibited by the Income Tax Act from being involved with an election, political campaign, or any other political process in their own personal, private capacity as individuals, whether during an election period or not.

However, a charity must not use its resources, such as office space, supplies, phone, photocopier, computer, or publications, and human resources such as employees or volunteers, to support that individual's personal political involvement.

Under the Income Tax Act, representatives of a charity can publicly voice their personal views on political issues, but must not use events or functions organized by a charity, the charity's publications, or other resources as a platform to voice their views on these issues.

In situations outside charity functions and publications, representatives of a charity, particularly leaders, who want to speak or write in their individual capacity are encouraged to indicate that their comments are personal rather than the views of the charity. This is particularly important in the case of social media, where it may be difficult to tell whether a representative's messages reflect his or her personal views, or those of a charity.

A charity's activities other than PPDDAs (Public policy dialogue and development activities)

The rules in the Income Tax Act regarding PPDDAs (Public policy dialogue and development activities), and the flexibility they provide, do not typically apply to other types of charities' activities, such as fundraising.

Other legal requirements

A charity that intends to carry out PPDDAs (Public policy dialogue and development activities) should be aware of other federal, provincial, or municipal requirements that might apply to these types of activities, such as:

- the Canada Elections Act
- the Lobbying Act
- the First Nations Elections Act
- provincial lobbying and election legislation

Charities should be aware that some provinces may have rules regarding the use of charitable assets that differ from the requirements of the Income Tax Act as they relate to PPDDAs (Public policy dialogue and development activities).¹⁰ A charity that meets the requirements of the Income Tax Act as they relate to PPDDAs (Public policy dialogue and development activities) is not exempted from meeting any provincial requirements on the use of its resources, such as any restrictions on the use of charitable assets for a political purpose.

Annex A – Categories of charity

These purposes have already been found to be charitable by the courts, or are analogous to those that have been found to be charitable by the courts:

- relief of poverty
- advancement of education

- advancement of religion
- certain other purposes beneficial to the community in a way the law regards as charitable, including purposes that:
 - protect the environment
 - uphold human rights
 - promote health
 - promote the welfare of animals
 - advance the public's appreciation of the arts
 - provide relief to the victims of natural disasters or other emergencies
 - address or prevent specific problems faced by children, youth, or families
 - provide certain public works, amenities, services, or facilities (cemeteries, libraries, parks, etc.)
 - preserve property of outstanding significance or national importance (cultural property, heritage sites, etc.)
 - promote volunteerism in the community at large
 - address the needs of the Aboriginal people of Canada
 - protect human life and property
 - promote industry, trade and commerce
 - promote the efficiency and effectiveness of other registered charities
 - relieve conditions attributable to being aged
 - relieve conditions associated with disability
 - promote the efficiency and effectiveness of the Canadian military
 - uphold the sound administration of the law
 - promote racial equality.
 - provide for the rehabilitation of those involved in the criminal justice system

- are otherwise recognized by the courts under this category

Footnotes

- 1 This includes both charitable organizations and charitable foundations as defined in subsection 149.1(1).
- 2 In summary, the Income Tax Act deems PPDDAs (Public policy dialogue and development activities) carried on in support of a charitable purpose to be carried on in furtherance of those purposes and not for any other non-charitable purpose, such as a political purpose.
- 3 To be considered charitable, a stated purpose must meet certain requirements laid out by the courts. See Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue, [1999] 1 SCR 10 at para 159. One of these requirements is that the stated purpose cannot be what the courts have considered to be a political purpose. Subject to the principles expressed in Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue, at paragraphs 190 to 192, the CRA (Canada Revenue Agency) considers a political purpose to be any purpose that seeks either of the following:
 - further the interests of a particular political party; or support a political party or candidate for public office
 - retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country

4

See *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, [2007] 3 SCR 217, at paragraph 42: But the government is entitled and indeed obliged to look at the substance of the purposes and activities of an applicant for registered charity status. Rewriting the objects in the Letters Patent or filing a carefully worded application will not be sufficient. The organization, in substance, must have as its main objective a purpose and activities that the common law will recognize as charitable.

5

Generally, PPDDAs (Public policy dialogue and development activities) include, but are not limited to, the types of activities the Canadian courts have considered to be political activities. See, for example, *Positive Action Against Pornography v The Minister of National Revenue* [1988] 49 DLR (4th). Also, some activities that might fall under the description of PPDDAs (Public policy dialogue and development activities) may already be charitable, if they meet the relevant criteria. See Policy statement CPS-029, Research as a Charitable Activity, and Guidance CG-001, Upholding human rights and charitable registration.

- 6 See subsections 149.1(6.1) and (6.2), which state that an entity devoting any part of its resources to the direct or indirect support of, or opposition to, any political party or candidate for public office shall not be considered to be constituted and operated exclusively for charitable purposes and therefore not eligible for registration as a charity. The term “partisan” is sometimes used to describe this requirement, which in its everyday use tends to mean a demonstrated bias towards one political party or candidate. However, the requirements of subsections 149.1(6.1) and (6.2) of the Income Tax Act are not limited to demonstrations of bias, but also include broad support or opposition across more than one political parties or candidates. That is, supporting or opposing all political parties or candidates would violate the requirements of subsections 149.1(6.1) or (6.2) in the same way as supporting or opposing only one political party or candidate would.
- 7 S.C. 2000, c.9, s.2.
- 8 Ibid.
- 9 It may not be possible for a charity’s publications to present the views of all candidates or parties, such as in cases where there are an extremely large number of candidates in an election, or a political party has not yet made its platform public. A charity should be able to show it treated all candidates and parties in the same manner, such as by ensuring they are all asked the same question, and given the same amount of time to respond.
- 10 See, for example, Ontario's Office of the Public Guardian and Trustee, whose role includes reviewing applications by organizations who wish to be given charitable status to check that the activities of the organization are, in fact, those which the law defines as charitable.

Date modified:

2019-01-24

Corporate Governance Principles for Non-Profit Entities

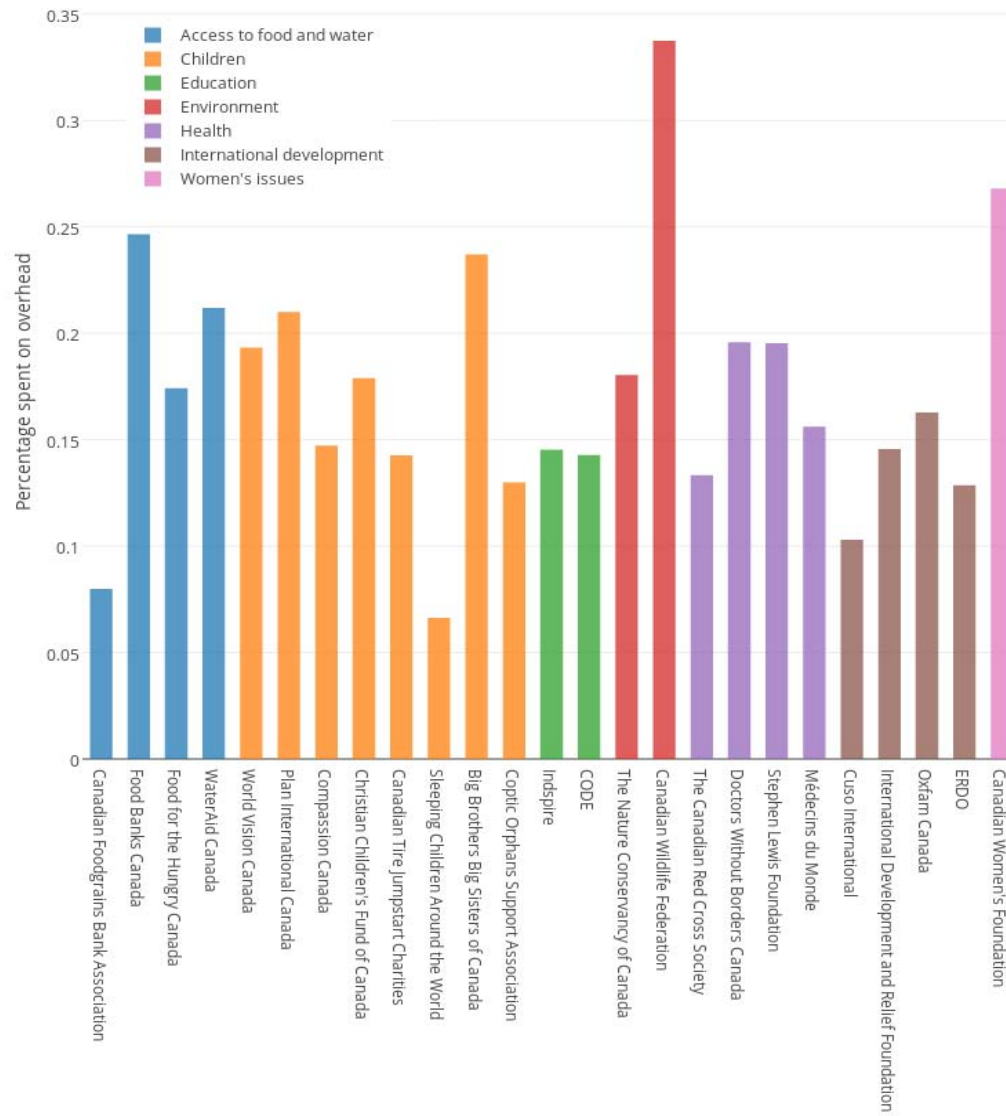
Presented by: Kenneth Jull
May 23, 2019



Non-Profit Sectors

- Canada has one of the largest and most vibrant nonprofit and voluntary sectors in the world.
- It accounts for 6.8 percent of the nation's gross domestic product (GDP) and employs 12 percent of Canada's economically active population.
- With the significant role nonprofit organizations play in Canadian life and the increasing demand for accountability in nonprofit organizations, more attention is being drawn to governance issues.

The Financial Post's 25 Charities of the Year: Percentage spent on overhead



Thesis: Four Points for Non-Profit Governance



1. Good faith and best interests of the corporation parallel but are not identical to the tests articulated for profit corporations;
2. Non-profits are subject to corporate criminal liability which may be an ethical blind spot;
3. There are risks of being a victim of fraud but also risks of non-compliance on a corporate level;
4. Matrix risk management is essential

Thesis: Four Points for Non-Profit Governance



1. Good faith and best interests of the corporation parallel but are not identical to the tests articulated for profit corporations;

Canada Not-for-profit Corporations Act (S.C. 2009, c. 23)



148 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and **in good faith** with a view to the **best interests of the corporation**; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with

- (a) this Act and the regulations; and
- (b) the articles, the by-laws and any unanimous member agreement.

Guide to the Not-for-Profit Corporations Act, 2010



- When ONCA comes into effect(target of early 2020), it will:
- make the incorporation process for new not-for-profit corporations more efficient
- make a new distinction between public benefit corporations and other not-for-profit corporations
- clarify that not-for-profit corporations can engage in commercial activities if the activities support the corporation's not-for-profit purposes
- a not-for-profit corporation may be subject to restrictions on its activities imposed by other legislation such as the Income Tax Act

Guide to the Not-for-Profit Corporations Act, 2010



- provide clearer rules for governing the corporation and increasing accountability
- ONCA will provide a statutory duty of care for directors, which will require them to act honestly and in good faith with a view to the best interests of the corporation, and to exercise reasonable care, diligence and skill
- set out a due diligence and good faith reliance defence for directors
- a director will not be legally liable in certain circumstances if they acted with the care, diligence and skill a reasonably careful person would have acted in similar circumstances
- list specific requirements for directors and officers to report a conflict of interest in certain circumstances

Good Faith



Beattie v. Women's College Hospital 2018 CarswellOnt 18570, 2018 ONCA 872,

The appellants are both doctors who practiced for many years in the respondent hospital's urgent care centre. The respondent closed the urgent care centre and, as a consequence, terminated their privileges.

The trial judge dismissed the appellants' action for damages for wrongful dismissal on the ground that it was barred by s. 44(5) of the Public Hospitals Act, R.S.O. c. P.40. That provision provides that if the board of a hospital decides to cease to provide a service:

No action or other proceeding for damages or otherwise shall be instituted against [the hospital] for any act done in **good faith** in the execution or intended execution by a board of its authority [to cease to provide the service] or for any alleged neglect or default in the execution in good faith by a board of such authority.

Objective Criteria versus local agendas



Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals 2017 CarswellOnt 14316, 2017 ONSC 5409,

- A few affiliates then loaded the board with their own executive directors and she states that it became difficult to govern because the directors or executive directors of the affiliates were more interested in advancing their local agendas rather than success of the OSPCA
- She adds that under the **new governance model**, the board will vote for their own replacements pursuant to a broader set of criteria based on **skills, competencies experience and diversity** rather than merely being affiliate member. The stated goal is to seek more diverse and qualified individuals, including, for example, an indigenous representative.

Non-Profits and the Business Judgement Rule



Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals 2017 CarswellOnt 14316, 2017 ONSC 5409,

- In *Hadjor v. Homes First Society*, 2010 ONSC 1589, 70 B.L.R. (4th) 101 (Ont. S.C.J.), Justice Belobaba reviewed the law with respect to the **Business Judgment Rule** this way:

48 First, the Business Judgment Rule. In *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, this Court explained the Business Judgment Rule as follows:

The Business Judgment Rule protects boards and directors from those that might second-guess their decisions.

The Court looks to see that the directors made **a reasonable decision, not a perfect decision**. This approach recognizes the autonomy and integrity of a corporation and the expertise of its directors.

Non-Profits and the Business Judgement Rule



Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals 2017 CarswellOnt 14316, 2017 ONSC 5409,

- Having reviewed the material filed by both sides, I have no difficulty coming to the conclusion that the decision of the board, acting in the best interests of the OSPCA, was to put in place a modern "best-practices" governance structure and is entitled to deference under the Business Judgment Rule.

Public Sector Boards



DUAL LOYALTIES ON NON-PROFIT BOARDS: SERVING TWO MASTERS

Clifford S. Goldfarb

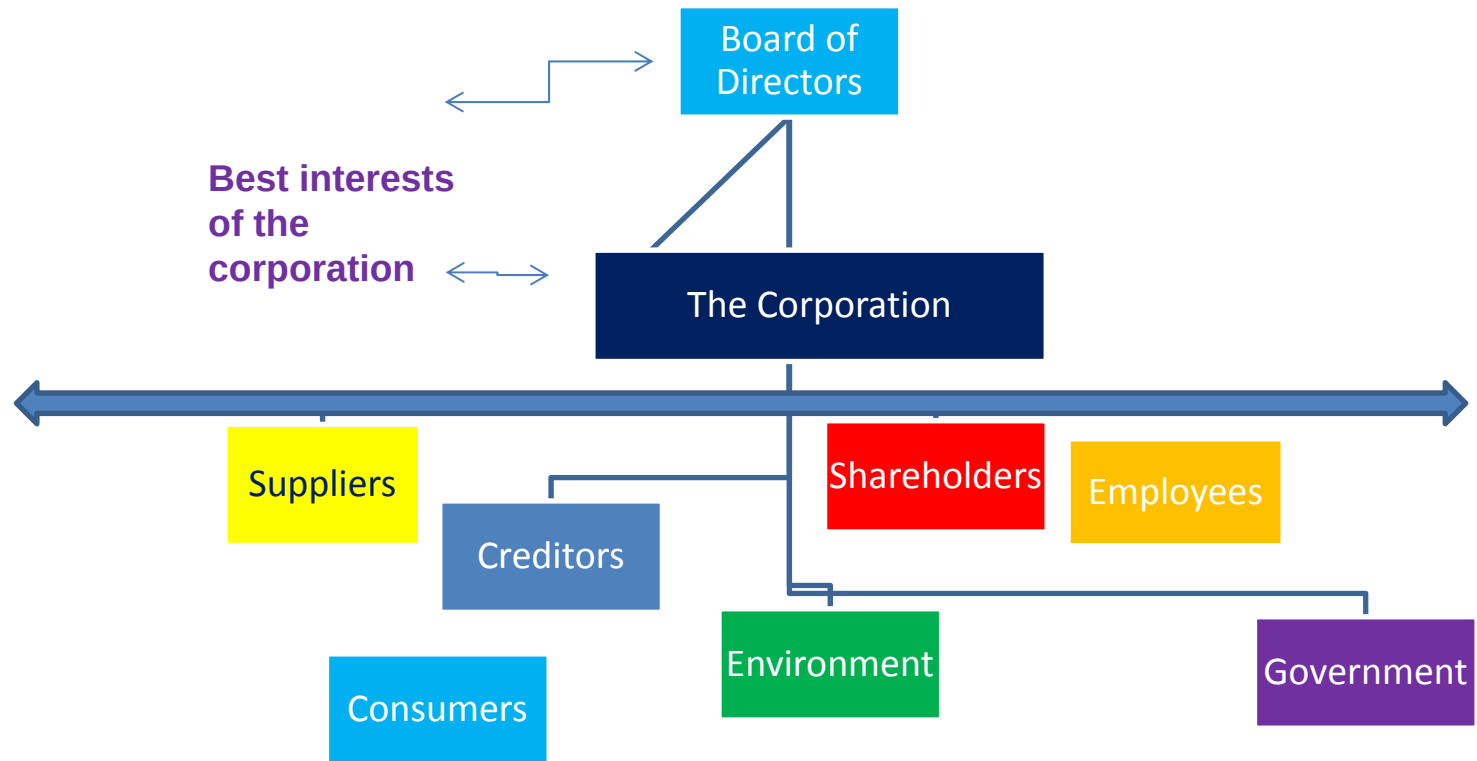
CBA-OBA National Symposium on Charity Law

- It is extremely common for the boards of non-profit organizations to consist in whole or in part of representatives of the constituent bodies, stakeholders or members. For example, invariably a hospital support foundation will have on its board the president of the hospital and the chair of the board of the hospital. Hospital boards have representatives of the medical and nursing staff.



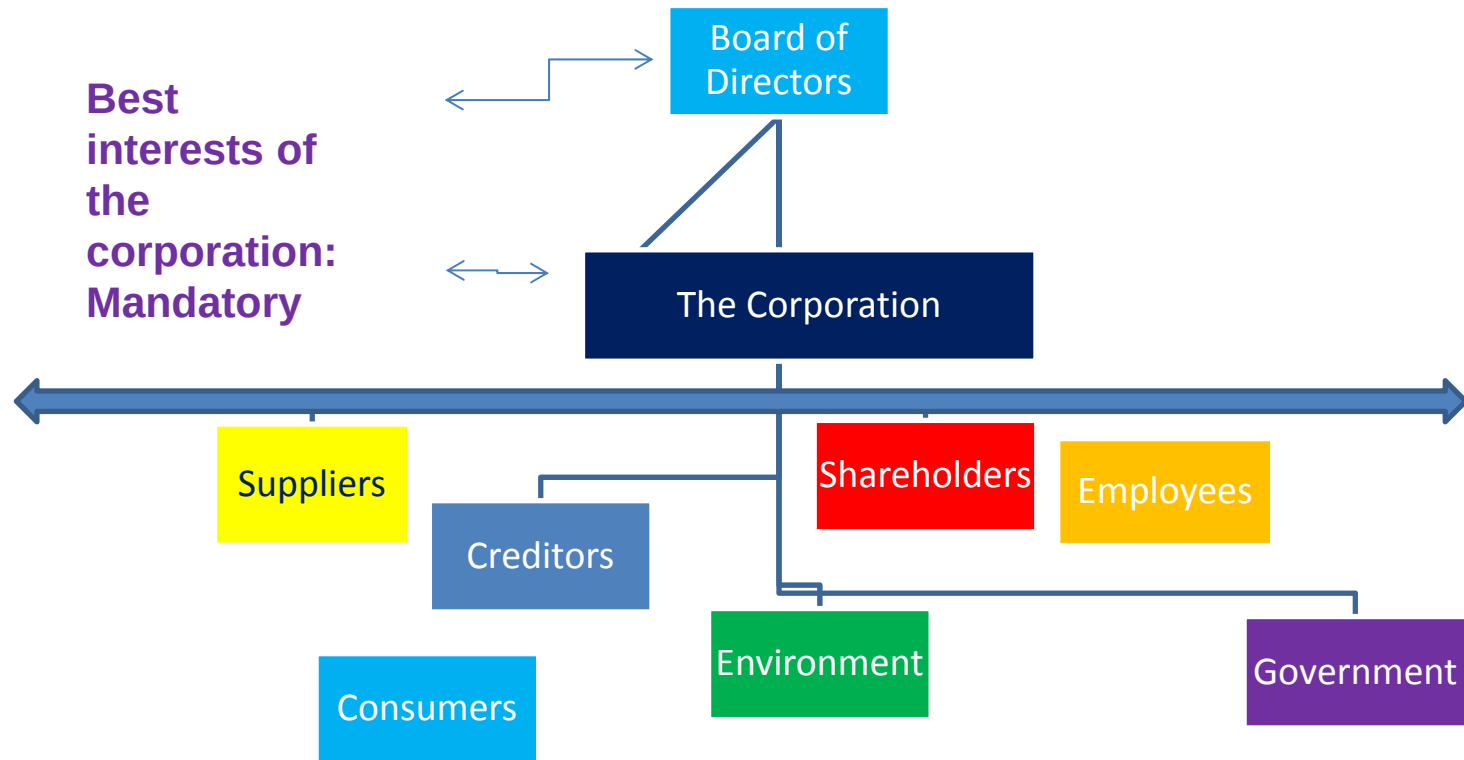
Peoples v. Wise: Moving in the Direction of Overlapping Models

- We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of **shareholders**, **employees**, **suppliers**, **creditors**, **consumers**, **governments** and the **environment**.



BCE Inc. v. 1976 Debentureholders, 2008
CarswellQue 12595, 2008 SCC 69 at paragraph 39

- In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may *also be appropriate*, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:
- "We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."



- **Discretionary consideration of other stakeholders**

Thesis: Four Points for Non-Profit Governance



2. Non-profits are subject to corporate criminal liability which may be an ethical blind spot;

Each of us tends to believe that we see the world objectively; to see ourselves as more fair, unbiased, competent, and deserving than average; and to be overconfident about our abilities and prospects. This tendency to view the self in positive terms is heightened when the characteristic at issue is socially desirable—as is the case with ethical behavior. Indeed, attorneys tend to believe that their own ethics and their firm’s ethical standards are more stringent than those of other attorneys and other firms.(Robbennolt and Sternlight, “Behavioral Legal Ethics” (2013) 45 Ariz. St. L.J 1107. at 1116.)

Westray and Criminal Negligence



Senior Officer

“Senior officer” is now defined in s.2 of the *Criminal Code* as follows:

“Senior officer” means a representative who plays an important role in the establishment of the organization’s policies *or*

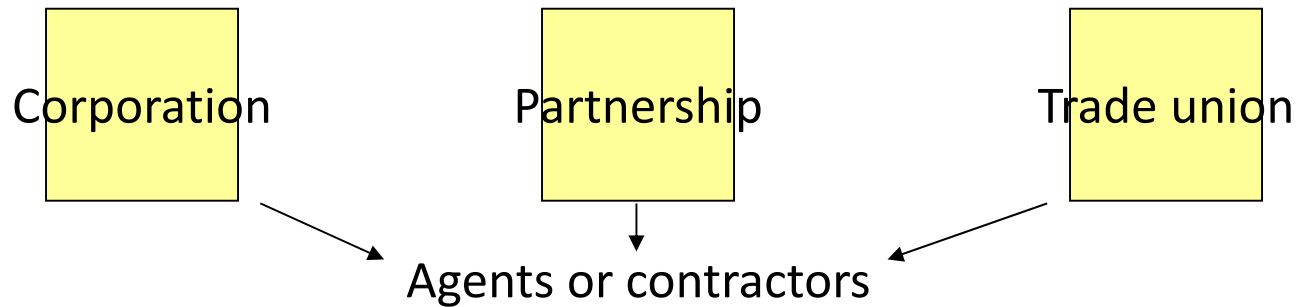
>> policy

>> operational

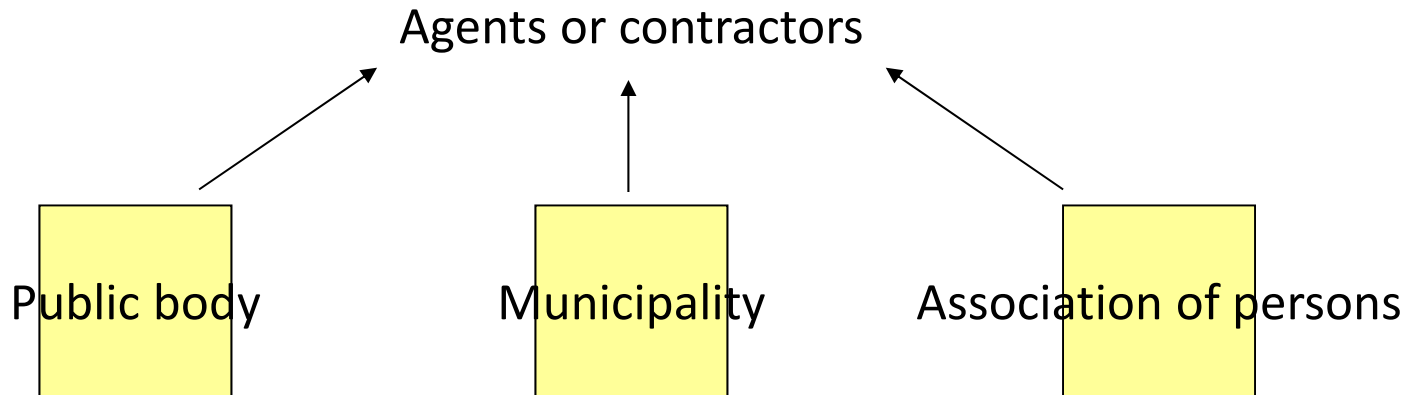
is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.

C-45: Wider Organizations

Private

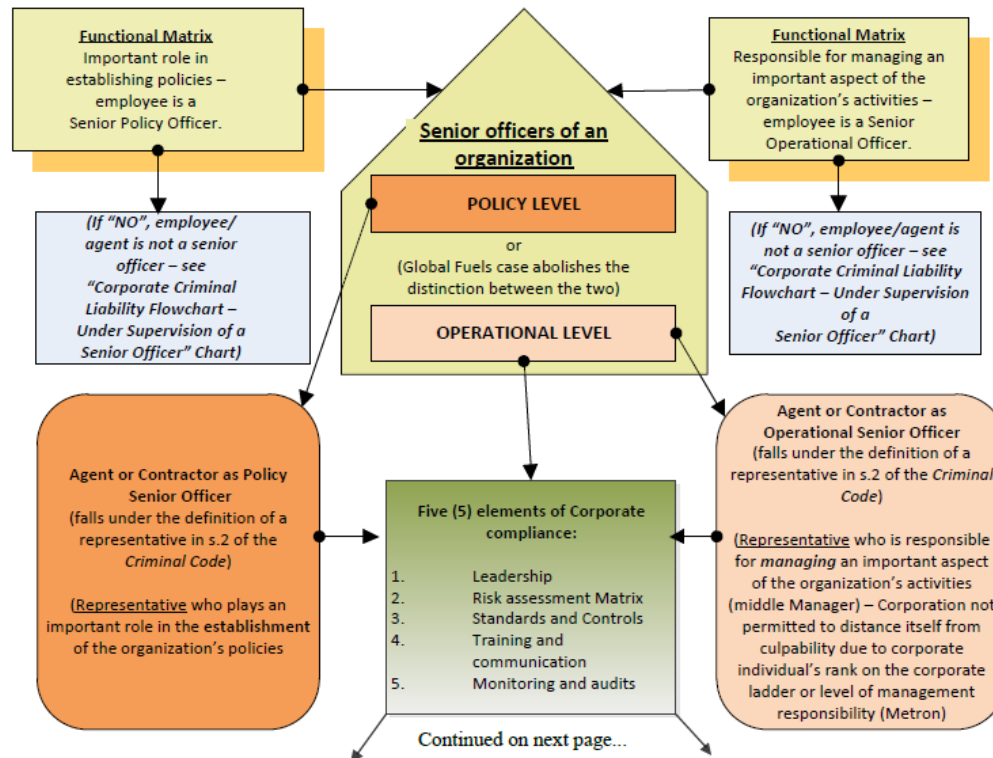


Public



Corporate Criminal Liability Flowchart

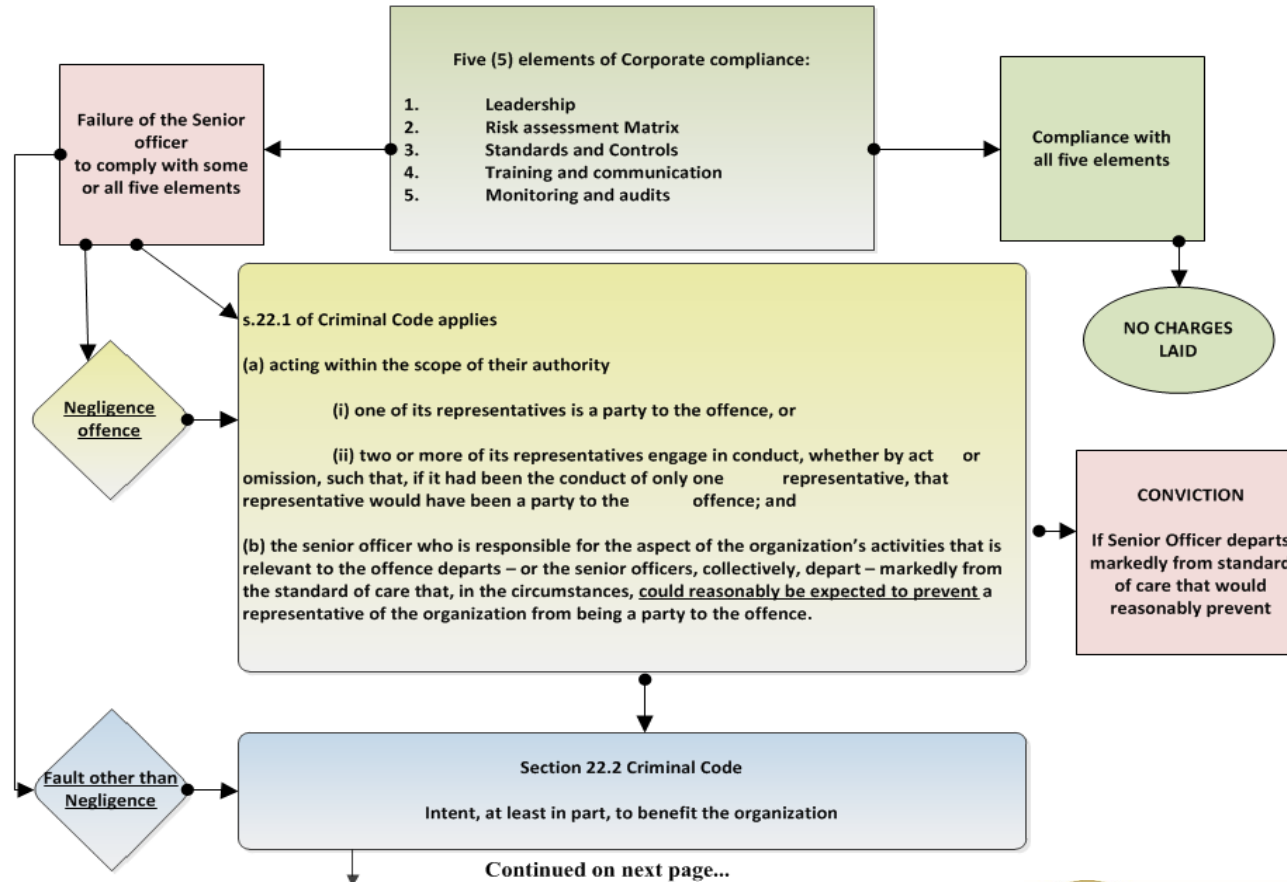
Senior Officer Level



Corporate Criminal Liability Flowchart

Senior Officer Level

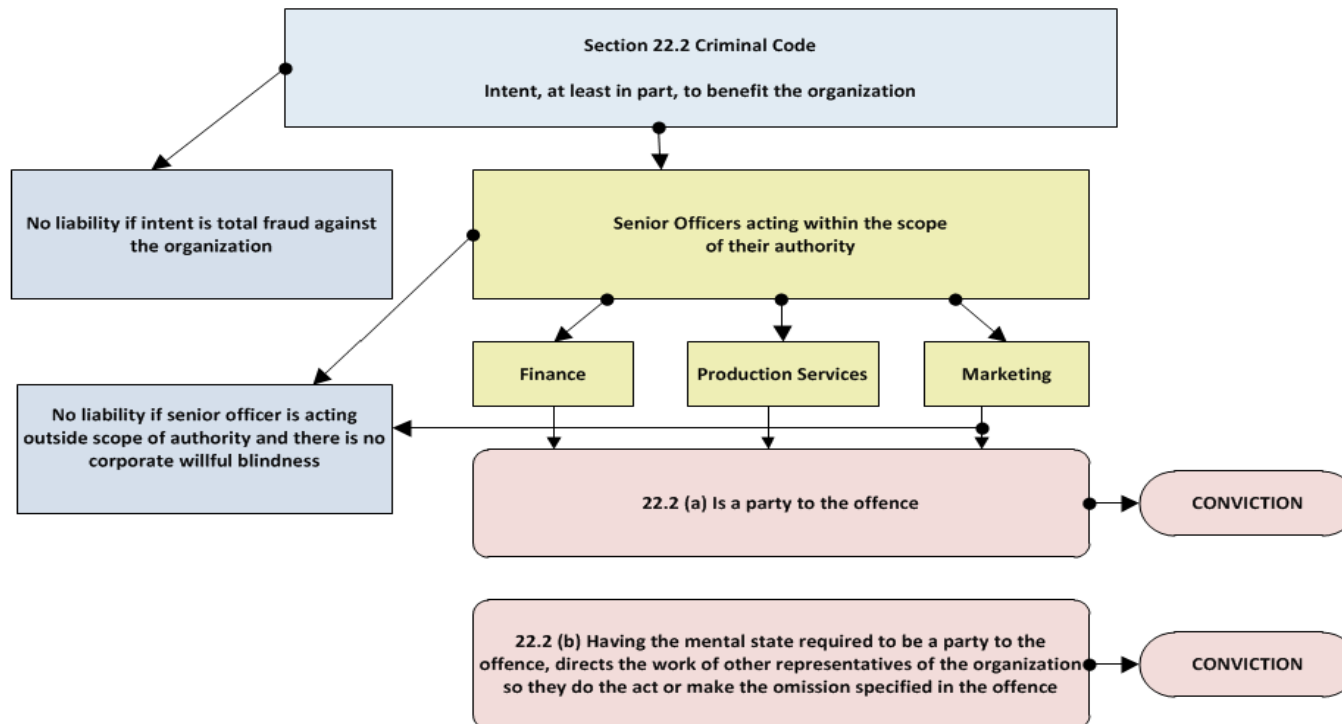
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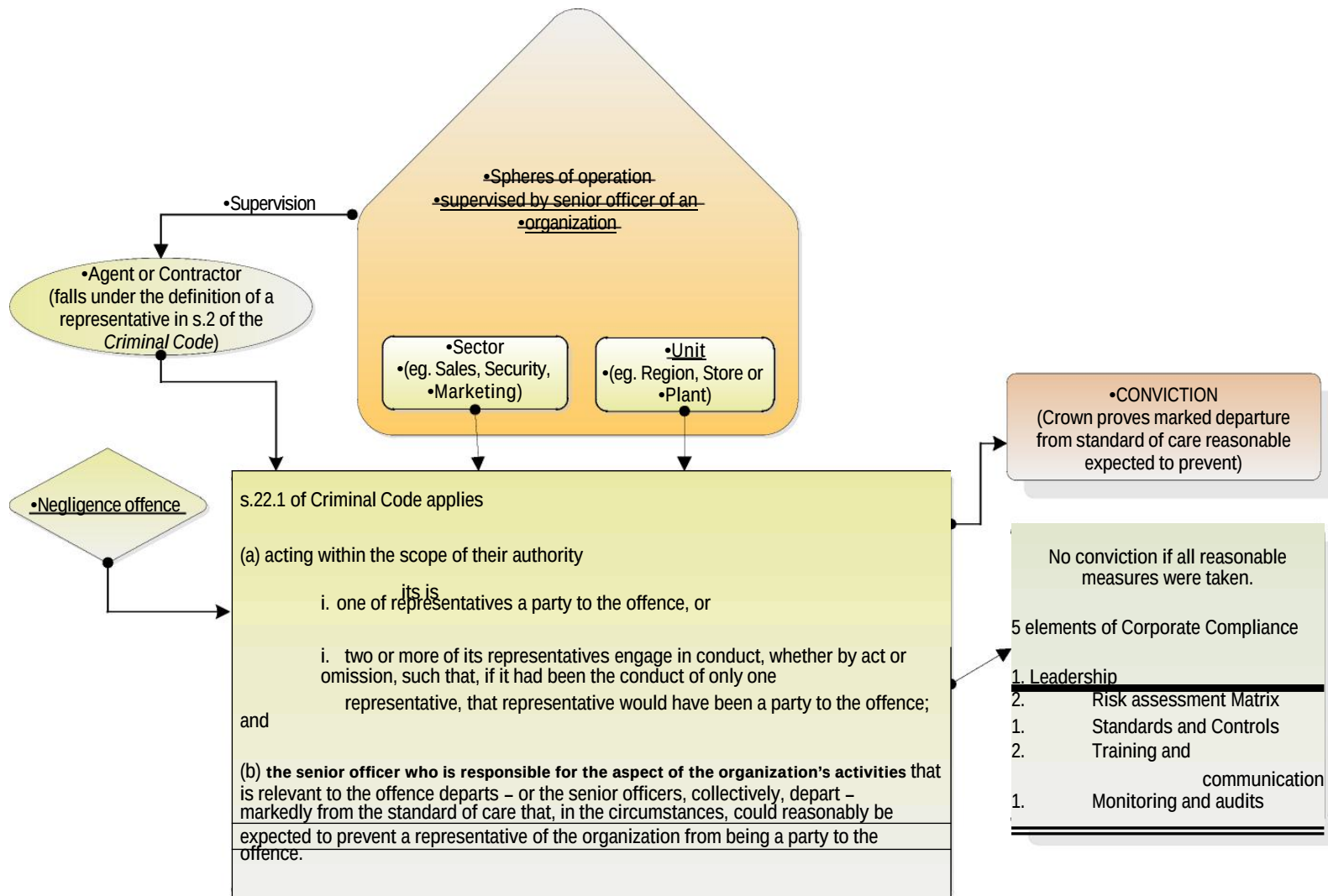
Corporate Criminal Liability Flowchart

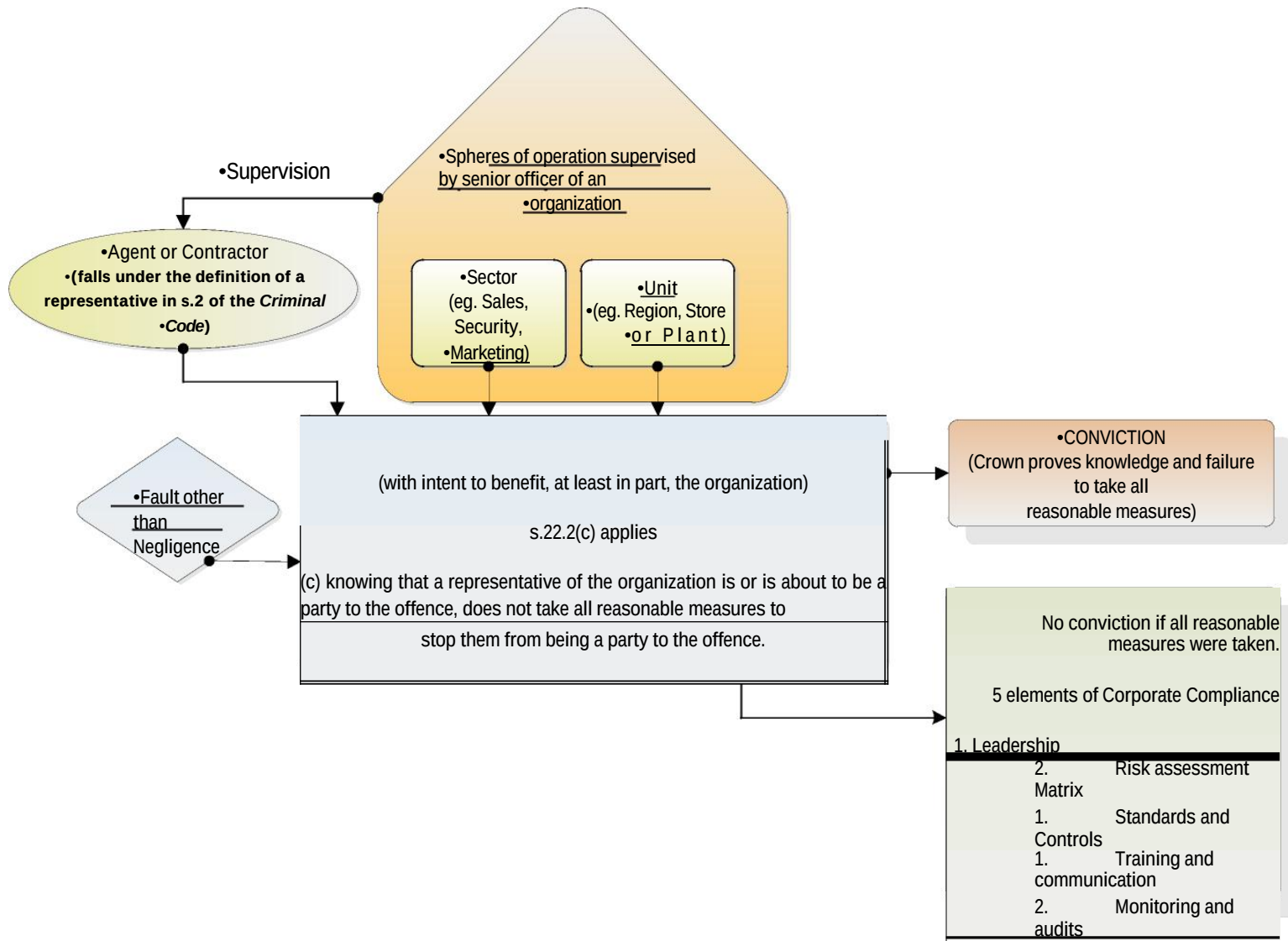
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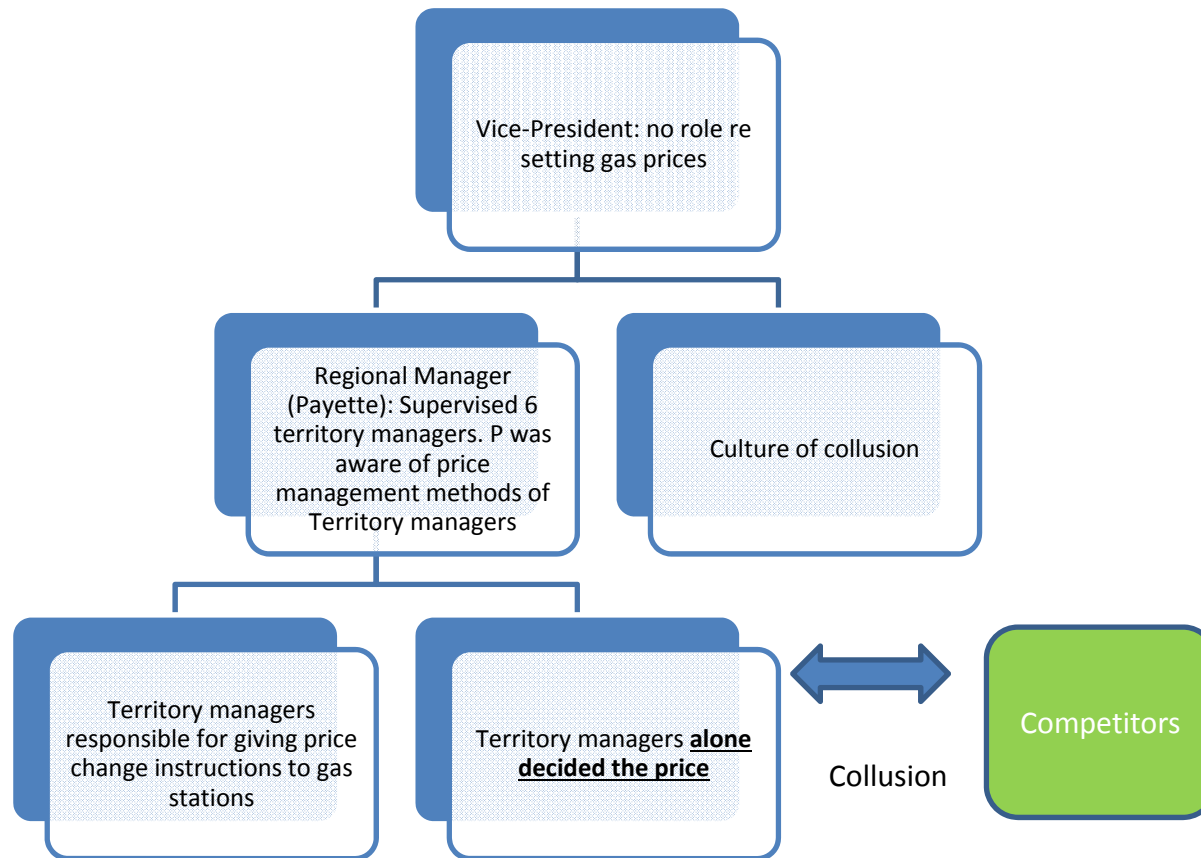


•Corporate Criminal Liability Flowchart – Under Supervision of a Senior Officer

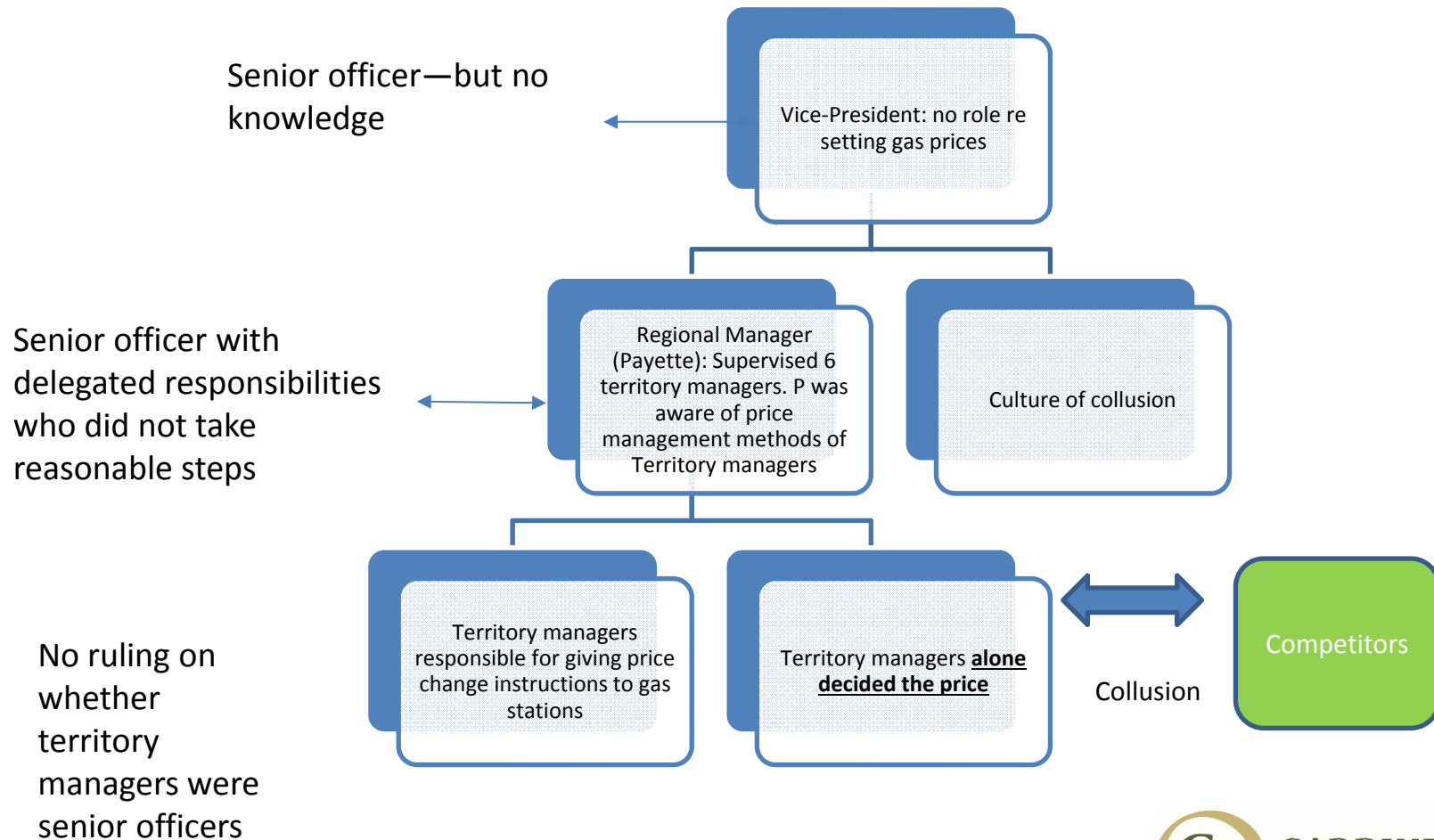


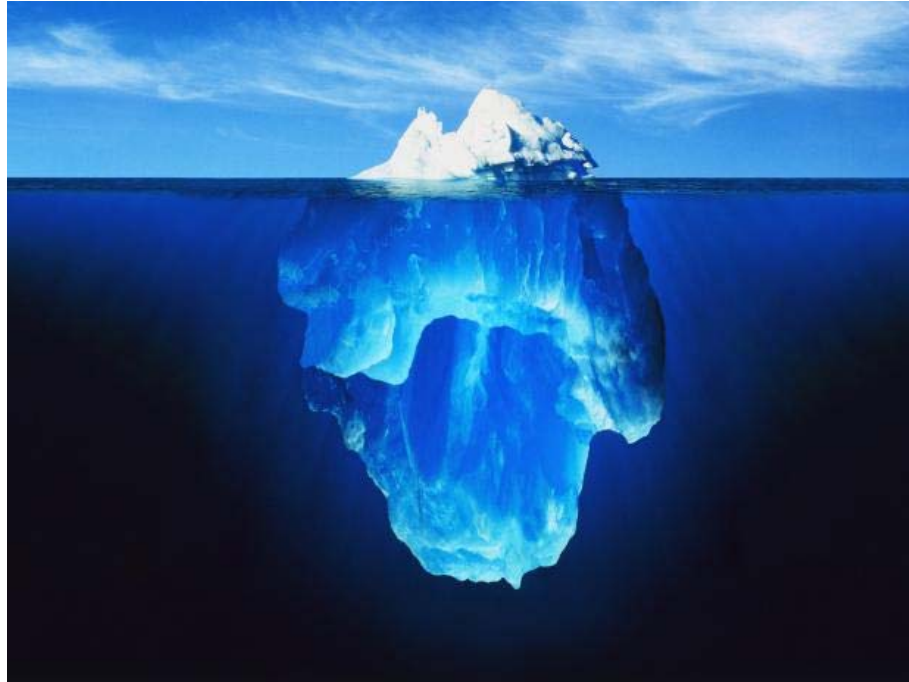


The New Law of Expanded Organizational Criminal Liability



The New Law of Expanded Organizational Criminal Liability





(3) There are risks of being a victim of fraud but also risks of non-compliance on a corporate level

Risk from Fraud

Fraud in Canadian nonprofit organizations as seen through the eyes of Canadian newspapers, 1998–2008 Qiu Chen, Steven Salterio, & Pamela Murphy Queen's University, Kingston, Ontario

- We found that the median loss from fraud within Canadian nonprofit organizations was \$27,244, significantly smaller than the median loss of US\$100,000 for nonprofits in the United States in 2004 (Greenlee, Fischer, Gordon, & Keating, 2007).
- However, the median fraud loss in Canada represents about 5% of annual revenues, quite close to the Association of Certified Fraud Examiners (ACFE) estimate of 7% of annual revenues for all U.S. organizations (ACFE, 2008).
- Smaller nonprofit organizations—those employing fewer than 50 people and/or having annual revenues of less than \$100,000—experienced the most number of fraud cases and the highest losses relative to their annual revenue.

Risk

Fraud in Canadian nonprofit organizations as seen through the eyes of Canadian newspapers, 1998–2008 Qiu Chen, Steven Salterio, & Pamela Murphy Queen's University, Kingston, Ontario

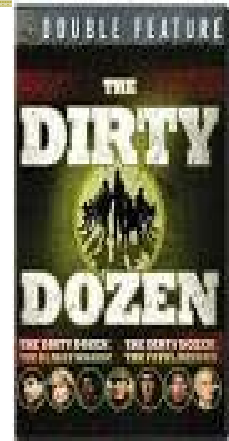
- We found that fraudsters within Canadian nonprofit organizations had a slightly different face than those in the rest of the world along one dimension: gender.
- The typical Canadian perpetrator is almost as likely to be a woman as a man (46% were women and 54% were men), whereas perpetrators worldwide are overwhelmingly male (85%) (PricewaterhouseCoopers, 2007).
- The gender breakdown in the U.S. is closer to that of Canada (60% of U.S. perpetrators were male; ACFE, 2008), but the Canadian literature still points to more female perpetrators than most other fraud literature. We posit this difference might reflect the greater percentage of women employed by nonprofit organizations in general.



IRS's Dirty Dozen scams — 2019 edition

<https://www.journalofaccountancy.com/news/2019/mar/2019-irs-dirty-dozen-tax-scams-201920830.html>

- **Abusive tax shelters, trusts, and conservation easements (IR-2019-47):** The IRS warned taxpayers to stay away from abusive schemes that tax cheats often promote. They include abusive trusts, abusive micro-captive insurance shelters, and abusive syndicated conservation easements. This is the first year that the IRS has included abusive trusts and conservation easements on the list. In earlier years, only abusive tax shelters were included.



Guindon v. Canada 2015 SCC 41 ("*Guindon*")

Agreed Facts before the Tax Court:

- The Settlor was going to acquire timeshare units called Biennial Vacation Ownership Weeks ("VOWs") from TDL, which held the property of [Hawkes Nest Plantation Resort/Arawak Inn in Turks and Caicos Island](#) [sic];
- After acquiring the VOWs the Settlor would gift the VOWs to the Trustee, who in turn would exchange the VOWs to the beneficiaries of the Trust, in return for the payment of a vendor take-back charge;
- The amount of the vendor take-back charge that was to be paid by beneficiaries of the Trust was [\\$3,248](#) per VOW;
- It was anticipated that the beneficiaries would donate the VOWs to a registered Canadian charitable organization for a receipt for the fair market value of the donated VOWs; and
- The VOWs were valued at [\\$10,825](#) per VOW.

Turks and Caicos: Providenciales



Guindon v. Canada 2015 SCC 41 ("*Guindon*")

- Ms. Guindon agreed, for a fee of \$1,000, to provide an opinion letter on the tax consequences of this program on the basis of a precedent provided by the promoters. She recommended that the promoters have a tax lawyer and an accountant review her opinion to ensure its accuracy, as the opinion did not fall within her field of expertise, but nonetheless provided the letter knowing that it was intended to be part of the promotional package for the scheme. She wrote that the transactions would be implemented based on supporting documents that she had been provided with and had reviewed. She had not reviewed the supporting documents.

Guindon v. Canada 2015 SCC 41 ("*Guindon*")

- Ms. Guindon was also the president and administrator of a registered charity, Les Guides Franco-Canadiennes District d'Ottawa. In November 2001, this charity agreed to become the recipient of the donated timeshares. The promoters would then sell the timeshares on behalf of the charity which would receive a minimum of \$500 per unit sold.

Guindon v. Canada 2015 SCC 41 ("*Guindon*")

- The scheme was a sham: no timeshare units were created and no transfers from the donors to the charity occurred. The promoters prepared 135 tax receipts, which were issued by the charity and signed by Ms. Guindon and the treasurer of the charity. The total receipted amount was \$3,972,775. The Minister of National Revenue disallowed the charitable donation tax credits claimed by the donors. On August 1, 2008, the Minister assessed Ms. Guindon for penalties under s. 163.2 of the ITA for each of the tax receipts issued on the basis that she knew, or would have known but for wilful disregard of the ITA, that the tax receipts constituted false statements.

Hawkes Nest Plantation Development Parcel



Hawkes Nest Plantation Development Parcel



Grand Turk Cruise Centre



Guindon v. Canada 2015 SCC 41 ("*Guindon*")

- The Appellant, Julie Guindon, was assessed penalties totaling **\$546,747** under subsection 163.2(4) of the Income Tax Act (the “ITA”). Ms. Guindon is a lawyer practicing mainly in the areas of family law and wills and estates. She was retained to provide a legal opinion on a charitable-donation plan called “The Global Trust Charitable Donation Program” (the “Program”).
- Ms. Guindon provided a legal opinion vouching for the plan. She provided a signed copy of her legal opinion without having reviewed all of the documents referred to in the opinion.
- Ms. Guindon accepted a retainer of one thousand dollars (\$1,000) to prepare an opinion letter and advised that the area of tax law did not fall within her field of expertise.

Thesis: Four Points for Non-Profit Governance



4. Matrix risk management is essential

Matrix Analysis and Levels of Audit

Impact trumps likelihood where equal

MATRIX WHERE GRAVITY OF HARM TRUMPS PROBABILITY

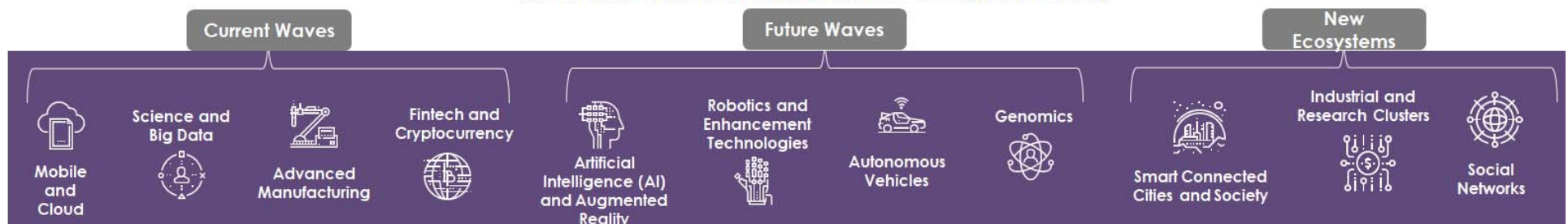
Impact			
Significant 	Significant Management effort required	Internal investigations with external counsel and retained experts and significant remediation	Act now: immediate and comprehensive remediation and self-report to the Regulator
Moderate	Management effort worthwhile	Extensive management essential	Internal investigations and remediation commenced
Minor	Accept risks	Accept risks with monitoring	Management effort required
	Low	Medium	High
			Likelihood

The Essential Elements of Corporate Compliance

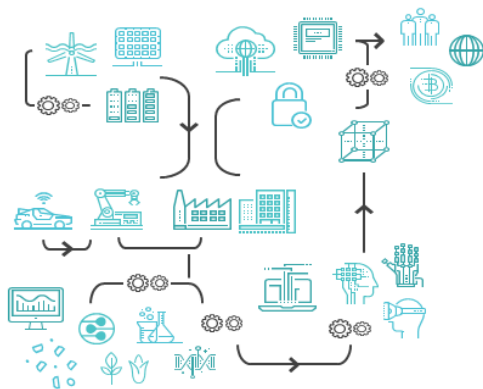
USSG's 7 Elements of an Effective Compliance Program	13 Good Practices by the OECD on Internal Controls, Ethics, and Compliance	UK's 6 Principles for "Adequate Procedures"
1. Standards and procedures to prevent and detect criminal conduct	1. Risk assessment as basis for effective internal controls and compliance program	1. Proportionate procedures
2. Leaders understand / oversee the compliance program to verify effectiveness and adequacy of support; specific individuals vested with implementation authority / responsibility	2. Policy that clearly and visibly states bribery is prohibited	2. Top level commitment
3. Deny leadership positions to people who have engaged in misconduct	3. Training – periodic, documented	3. Risk assessment
4. Communicate standards and procedures of compliance program, and conduct effective training	4. Responsibility – individuals at all levels should be responsible for monitoring	4. Due diligence
5. Monitor and audit; maintain reporting mechanism	5. Support from senior management – strong, explicit and visible	5. Communication
6. Provide incentives; discipline misconduct	6. Oversight by senior corporate officers with sufficient resources, authority, and access to Board	6. Monitoring and review
7. Respond quickly to allegations and modify program	7. Specific risk areas – promulgation and implementation programs to address key issues	
	8. Business partners due diligence	
	9. Accounting – effective internal controls for accurate books and records	
	10. Guidance – provision of advice to ensure compliance	
	11. Reporting violations confidentially with no retaliation	
	12. Discipline for violations of policy	
	13. Re-assessment – regular review and necessary revisions	
NOTE: A general provision requires periodic assessment of risk of criminal conduct and appropriate steps to design, implement, or modify each element to reduce risk		

Minister Bains announces Canada's Digital Charter

MAKING CANADA A COMPETITIVE, DATA-DRIVEN, DIGITAL ECONOMY NATIONAL DIGITAL AND DATA CONSULTATIONS



Technologies are reshaping the way people live and connect, the nature of work and industrial production



- Big Data: 90% of the world's data created in the last 2 years
- 80B connected devices by 2025
- Industrial robots to reach 3M by 2020
- AI – Global GDP 14% higher in 2030
- Nearly 10% of jobs automated
- 2B active Facebook users
- 4B Google search per day – 1.2T annually
- Cybercrime to cost \$6T annually by 2021



Digital Charter

- Requiring organizations to provide individuals with the information they need to make informed decisions, including requiring specific, standardized, plain-language information on the intended use of the information, the third parties with which information will be shared, and prohibiting the bundling of consent into a contract.



Questions?

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