I. IT IS TIME TO MODERNIZE NOT-FOR-PROFIT LEGISLATION

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A. INTRODUCTION

Charities and not-for-profit organizations in Canada may be incorporated under either provincial or federal legislation.

The federal legislation is the Canada Corporations Act ("CCA"). All provinces have at least one statute, often the Corporations Act, under which charities and not-for-profit organizations are incorporated.

Legislation applicable to corporations which have shareholders (i.e. for-profit corporations) is updated from time to time. However most legislation applicable to not-for-profit organizations and charities is not changed very often.

The CCA had its last major amendment about ninety (90) years ago. The Ontario Corporations Act is over a century old and its most "recent" changes were in 1953.
B. FEDERAL LEGISLATION

There have been unsuccessful attempts in recent years to amend the CCA. Until the CCA is updated, companies and their advisors will have to live with an old, out-of-date statute, a very few legal cases interpreting it and Industry Canada policies which may have no legal basis.

A few years ago legislation was drafted which would have replaced the CCA with a modern statute. Many groups had an opportunity to have input in the legislation and the civil servants in Ottawa produced a bill.

Unfortunately the bill was not passed during the Liberal majority government. Both the Liberal minority government of Paul Martin and the Conservative minority government of Stephen Harper have not pushed the matter forward.

Many had hoped that this legislation would not have been caught in the "political quagmire" of the minority governments and all parties might have passed it as being a good step forward which would benefit all Canadians. There are close to 100,000 not-for-profit organizations incorporated under the CCA and they deserve some attention. The new legislation would have required all of these corporations to take steps to be continued under the new act and pass new bylaws.

Hopefully the next federal government will place new legislation for not-for-profit corporations higher on the legislative agenda.
C. ONTARIO LEGISLATION

In May 2007 the Ministry of Government Services of the Ontario government released a consultation paper which deals with the modernization of the legal framework governing the 50,000 not-for-profit corporations in the province. This is part of a three phase initiative of the Ontario government dealing with laws governing Ontario corporations.

There is general agreement that the current act is outdated and no longer reflects the current status and needs of not-for-profit organizations incorporated in Ontario. The legislation would have allowed not-for-profit organizations and charities to incorporate more effectively and efficiently. It would have allowed them to incorporate "as of right" and not require approval of the government. The current definition of a not-for-profit corporation requires that it pursue purposes other than the pecuniary gain of its members and that it not be a commercial or business entity which distributes its property to members, except on dissolution. Many interpret the current legislation to permit not-for-profits to engage in profitable activities so long as their activities are incidental to the principal objects of the corporation and the "profits" are used to advance the objects. There has been some discussion as to whether not-for-profits should be prohibited from carrying on for-profit activities as it is unfair if they compete with taxable entities. Some commentators suggest that new legislation should prevent these not-for-profit corporations from carrying on commercial activities or at least place some restriction on the size of their activities.

The current act provides for one class of not-for-profit corporation. The government is considering expanding this. One possible model is the Saskatchewan Not-for-Profit Corporations Act which provides for a separate type of corporation known as a charitable corporation. Some people have recommended that there be classes which include religious, charitable, political, mutual benefit and general not-for-profit corporations. The California Corporations Code has different classifications depending on whether the organization provides a "mutual benefit", "religious", or "public benefit" purpose.
The Ontario government is considering amending the legislation so that there would be no objects clause. As a result *ultra vires* issues would no longer be relevant. Therefore no act of the corporation would be invalid only because it is contrary to its letters patent.

The Ontario Bar Association among others is commenting on the proposed plans. Hopefully draft legislation will be produced soon.

**D. CONCLUSIONS**

The federal proposals were in detailed form but have not been passed, presumably because of the minority government in Ottawa.

The Ontario proposals are not yet in draft form. Hopefully they can be produced in draft legislative form and do not find themselves before the Ontario Legislature at a time when there is a minority government in office.

Everyone agrees that it is time to modernize the corporate law as it applies to not-for-profit organizations and charities. Hopefully the efforts being made to update the legislation under the two statutes most used in Canada for this purpose, the *Canada Corporations Act* and the *Ontario Corporations Act*, will show results soon.
Audit requirements can be a very important consideration for a not-for-profit organization or charity. Audits generally cost between three and five thousand dollars for even the smallest organization. It is important for the directing minds of any organization to understand the audit requirements for each particular incorporating statute prior to making a decision with respect to incorporation. This is, of course, only one of many factors to consider.

In Canada, charities and not-for-profit organizations can be incorporated either federally or provincially.

A. FEDERAL AUDIT REQUIREMENTS

1. Canada Corporations Act

The Canada Corporations Act requires that an auditor make a yearly report to the members of the not-for-profit organization or charity with respect to the financial statements. This report must state whether, in the auditor’s opinion, the financial statements fairly represent the financial position of the corporation and the results of its operations in accordance with generally accepted accounting principles ("GAAP"). Because the auditor’s report must be in accordance with GAAP, impliedly it must be performed by an accredited auditor or accountant.

Industry Canada’s Policy Summary on Not-for-Profit Corporations states that a corporation’s by-laws must indicate that the members will appoint auditors at each annual meeting. If this is in a corporate by-laws, it must comply with it.

The financial burden of having an audit may be prohibitive for certain smaller not-for-profits. However, some relief is available.

The Canada Corporations Act provides that, if all members agree, the auditor may be a director, an officer or an employee of the corporation or any of its affiliates. It is possible that an auditor holding one of these...
positions may charge less for an audit than an external auditor. However, if one of these positions is not held by an accountant, or the individual cannot reduce this cost, the corporation incorporated under the Canada Corporations Act will receive no relief.

2. Income Tax Act (Canada)

Registered charities and registered Canadian amateur athletic associations must attach financial statements to their annual information returns which are filed with Canada Revenue Agency. Not-for-profits must attach financial statements to the tax returns they file with Canada Revenue Agency. These financial statements consist of a statement of assets and liabilities and a statement of revenue and expenditures for the fiscal period. There is no requirement that these financial statements be audited.

B. SELECTED PROVINCIAL AUDIT REQUIREMENTS

1. Alberta

In Alberta, a not-for-profit organization or charity may be incorporated provincially under one of two Acts:

- the Societies Act; and
- the Companies Act (Alberta).

Organizations that are incorporated under the Societies Act are required to include in their by-laws provisions respecting the audit of accounts. The provisions of the Societies Act require that financial statements containing certain pieces of prescribed information must be presented to the members at each annual general meeting. This implied audit requirement is quite vague. Indeed, the Societies Act itself provides no real indication of how structured or detailed the audit must be.

However, the Societies Regulation provides that the audited financial statements that accompany a society’s annual return need not be audited by a professional accountant unless the by-laws of the society require, or a fee is being charged to perform the audit. Therefore, it would appear that:
• if a particular society’s by-laws do not require a professional accountant to audit the society’s financial records; and

• the person performing the audit does not charge a fee,

the society may not be required to complete a formal audit. Ostensibly some form of review is required, but it appears that this review may be completed by anyone who does not charge a fee, including a member of the particular society. Smaller and/or more cost-conscious not-for-profits should bear these factors in mind when finalizing their by-laws.

Both the Companies Act (Alberta) and the Canada Corporations Act have similar requirements with respect to audits (i.e. the Companies Act requires that an auditor make a yearly report to the shareholders (i.e. members) with respect to the company’s financial statements and the report must state whether the financial statements fairly represent the financial position of the company and the results of its operations in accordance with GAAP).

However, the Companies Act (Alberta) states that, provided that the not-for-profit or charity has five or fewer members and has assets not exceeding $500,000, the members may, unanimously and in writing, consent to dispense with the audit on a yearly basis. As such, smaller corporations may exempt themselves from the onerous audit requirements imposed by this statute.

2. Ontario

In Ontario, not-for-profits and charities may be incorporated under the Corporations Act (Ontario). Generally, the requirements under the Corporations Act (Ontario) are the same as those found in the Canada Corporations Act discussed above.

However, the Ontario government has recently established an audit exemption for smaller not-for-profit organizations and charities. In this case, if the annual income is less than $100,000 the members may
consent, unanimously and in writing, to dispense with the audit on a yearly basis.

Ontario’s Ministry of Government Services is in the process of reviewing and reforming the Corporations Act (Ontario). The purpose of the project is to develop a new legal framework to govern the structure and activities of charities and not-for-profit organizations. A recent consultation paper released by the Ministry suggests that audit requirements may be a specific area of reform.

3. Other Provinces

Not-for-profit organizations and charities wishing to establish in other provinces can incorporate under the Canada Corporations Act or specific provincial legislation. The provincial legislation should be examined to determine the audit requirement.

4. Conclusion

The members, directors and employees may want to have the financial statements audited in order to help protect the directors and officers from criticism and/or to provide comfort to the members. It is always open to the organization to have its financial statements audited. However corporations incorporated under some legislation have exemptions available. If these exemptions are followed precisely the extra expense of the audit may be avoided.
III. FEDERAL BUDGET 2007 – CHANGES AFFECTING CHARITIES

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The 2007 federal Budget contained a number of new proposals affecting charities. These proposals have gone mostly unnoticed by the public and media. If however, they will have significant implications, especially for charities that are private foundations.

A. DONATIONS TO PRIVATE FOUNDATIONS

First, the Budget proposes to eliminate the taxation of capital gains arising from donations of publicly listed securities to private foundations. Donations of public securities to public foundations and charitable organizations have been fully exempt from tax on capital gains since May 2, 2006. In addition, the Budget also proposes to allow an arm’s length person to be eligible for a special deduction when a qualifying donation is made to private foundations. Such special deductions are currently available when an arm’s length employee acquires a publicly listed security under an employee stock option and donates the security to a public charity within 30 days. The effect of this deduction is to exempt the associated employment benefit from tax. These changes will apply to gifts made on or after March 19, 2007.

B. NEW EXCESS BUSINESS HOLDINGS REGIME

1. Introduction

The proposals appear to put donations to public and private charities on an equal footing. However, in conjunction with the elimination of taxes on capital gains and stock option benefits associated with these donations, the Budget proposes to introduce an excess business holdings regime for private foundations. This regime will place limits on foundation shareholdings, which limits take into account the holdings of certain non-
arm’s length persons (a non-arm’s length person is any person, or member of a group of persons, that controls the foundation, and any person not dealing at arm’s length with such a controlling person or group member). This change seeks to answer “self-dealing” concerns that persons connected with a foundation may be able to use the combined (foundation and their own) shareholdings to influence matters for their own benefit.

The excess business holdings regime is not limited to publicly listed shares. Unlisted shares will also be affected.

The regime also identifies three ranges of shareholdings by a foundation and requires private foundations to monitor the percentage of each class of shares held by the foundation and non-arm’s length persons.

A foundation will be in a “safe harbour” if its holdings total two (2%) per cent or less of all outstanding shares of that class. In this circumstance, no divestment or monitoring and reporting by the foundation will be required, regardless of the percentage of shares of the class held by non-arm’s length persons.

If a foundation’s holdings of one or more share classes exceeds two (2%) per cent of the outstanding shares of that class, the foundation will be required to determine and report to the Canada Revenue Agency shares held at the end of the year by the foundation and shares held by non-arm’s length persons. In addition, a foundation may be required to report any material transactions – those involving the acquisition or disposition of more than one hundred thousand ($100,000) dollars worth of shares of a particular class or more than one half (0.5%) per cent of all outstanding shares of that class. Such reporting will be required for material transactions made by the foundation or non-arm’s length person for any period during which the foundation is outside the safe harbour.

Under certain circumstances, the foundation will be required to divest excess holdings. In particular, where a foundation is outside the safe harbour and the foundation and all non-arm’s length persons combined hold more than twenty (20%) per cent of all outstanding shares in any share class of a corporation. Penalties (described below) will be applied to
the foundation unless the combined foundation and non-arm’s length person holdings are reduced to twenty (20%) per cent or less or until the holdings of the foundation do not exceed two (2%) per cent.

To avoid frustration of this regime, anti-avoidance measures will be put into place.

2. **Transitional Provisions**

Transitional rules will allow foundation to divest excess business holdings present on March 18, 2007 over a 5 to 20 year period. However, excess holdings will be required to be reduced by twenty (20) percentage points every five (5) years beginning from the foundation’s first taxation year commencing on or after March 19, 2007.

Foundations must elect and comply with a number of rules in order to be subject to the transitional rules. They must report all of the shareholdings as of March 18, 2007 (in combination with non-arm’s length shareholdings) in excess of the twenty (20%) per cent threshold. Moreover, all monitoring and reporting requirements will apply equally to shares qualifying for transitional relief as to shares received on or after March 19, 2007. In addition, donations to a foundation that has not completed its transition by the end of its first taxation year beginning on or after March 19, 2012 will not qualify after that time for the zero inclusion rate for gains and income. This limitation will continue to apply until the foundation completes its transitional period by eliminating its excess business holdings.

Private foundations with existing significant combined shareholdings (especially in cases where the shareholdings are illiquid) may have difficulty complying with these transitional provisions. In circumstances where the private foundation owns shares of a private company, there may be no market for the shares.

3. **Public Disclosure**

During the monitoring and divestment phases outlined above, information regarding excess business holdings will be made available to the public. Whether a foundation is outside a safe harbour in
regard to any corporation, the name of any such corporation and the total percentage shareholdings of the foundation are items that may be made publicly available. However, the identities of non-arm’s length persons will not be publicly disclosed, other than to the Canada Revenue Agency.

4. Non-Arm’s Length Persons

For the purposes of reporting, non-arm’s length persons include any person, or member of a related group of persons, that controls the foundation and any person not dealing at arm’s length with such a controlling person or group member. Under the Income Tax Act, persons who are related are considered to be not at arm’s length, as are trusts and persons beneficially interested in them. Further, non-related persons may be not at arm’s length, based on the particular facts. Therefore, it may be very difficult to determine who is not at arm’s length with the controlling person or member of the controlling group. The Budget proposes that a person will not be considered to be related to a controlling person (or to a member of a controlling group) if that person is at least 18 years of age and living separate and apart from the controlling person or member, and the Minister of National Revenue has agreed that the person is dealing at arm’s length. Therefore, a positive step must be taken, in the form of an application to the Minister of National Revenue, to obtain this relief.

5. Compliance Periods

The length of the compliance period available to divest excess business holdings will depend on how the excess arose, including whether there has been a purchase of shares by the foundation or by a non-arm’s length party, whether there has been a donation to the foundation by a non-arm’s length party or an arm’s length party, whether there has been a repurchase of shares by the corporation and whether there has been a donation by way of request.

The CRA retains discretion to specify conditions under which it might defer the year of the divestment obligation by up to five additional years.
6. Conditional Gifts

The obligation to divest will not be imposed on donations of shares made before March 19, 2007 that were made subject to a trust or direction that they be retained by the foundation, if the terms of the gift prevent the foundation from disposing of them. In addition, donations made between March 19, 2007 and March 19, 2012 pursuant to the terms of a will signed or an inter vivos trust settled before March 19, 2007 will also be subject to the same provision. Although the five (5)-year window is a relieving provision, many inter vivos trusts cannot easily be amended, and many Wills will not be changed within this period, resulting in a number of conditional gifts being received by private foundations after March 19, 2012. A private foundation may not be able to easily comply with the divestiture rules.

Shares held pursuant to a conditional gift restriction will be taken into account in determining the excess business holdings regime. Therefore, the private foundation may be required to divest itself of other shares in order to meet the ownership limits. Again, ownership in illiquid investments may make this divestiture difficult.

7. Penalties

Penalties will apply if excess business holdings of a foundation have not been divested as required. The initial penalty will equal five (5%) per cent of a value of excess holdings, but will increase to ten (10%) per cent if the foundation has received a penalty in any of the previous five (5) years. Repeated fractions may result in the revocation of a foundation’s charitable registration.

Furthermore, where a foundation is subject to an excess business holdings penalty and the foundation has failed to provide information as required, that excess business holdings penalty will be doubled.

C. MISCELLANEOUS RULES

The Budget introduced two new anti-avoidance rules to address perceived abuses in the charitable sector.
First, under current rules, donors of non-qualified securities to private foundations are generally not permitted charitable donations credits or deductions until the foundation actually disposes of securities. The Budget proposes that if a donor transfers his or her non-qualified securities to a trust affiliated with the donor, in which the charity is a beneficiary, the same restrictions will apply as if the donor had donated the shares in his or her own name.

Second, the Budget addresses the situation where property is donated to a public charity or private foundation and then loaned back to, or otherwise made available to, the donor. The current "loanback" rule is used to reduce the value of a gift that is made for the purpose of a charitable donation tax credit if the property is loaned back to the donor or a person dealing non-arm’s length with the donor. The Budget proposes to extend the loanback rule to cover cases where charities accommodate arm’s length donors who make donations with the requirement that property be loaned back.

IV. FILING REQUIREMENTS WITH CANADA REVENUE AGENCY

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A. INTRODUCTION

Most of the clients of our not-for-profit and charity focus group are either registered charities or not-for-profit organizations such as trade associations and professional associations. We find a surprising number of registered charities and associations are not aware of their obligations to file with Canada Revenue Agency ("CRA") on a timely basis.

We also find that some not-for-profit organizations think that simply because they do not have shareholders they are not taxable.
The *Income Tax Act* and regulations provide additional requirements which must be satisfied in order to ensure that these organizations are not required to pay income tax.

**B. REGISTERED CHARITIES**

All charities registered with CRA must file a T3010A Registered Charity Information Return (the "Information Return") within six (6) months of the charity’s year end. A senior official at the Charities’ Directorate recently indicated that forty (40%) per cent of charities do not file their Information Return on a timely basis.

Recent amendments to the income tax rules provide for "intermediate sanctions" and as a result the timely filing of the Information Return has become more important. In the past failure to file could only lead to the revocation of the registered charitable status and that remedy was used sparingly as it was considered too serious to be used when a return was late. The intermediate sanctions now provide for a $500 penalty for late filing. However, in a recently published guideline, CRA indicated that it would apply a zero tolerance policy for non-filers. If a registered charity does not file its Information Return after it has been reminded to do so it will have its charitable registration revoked. It reminds everyone that the Information Return is the vehicle in which the charity accounts to its donors and to Canadians generally for its tax advantaged status. It also provides information to the government in order to enable it to administer and enforce the *Income Tax Act*.

You may be surprised to hear that CRA has reported that 1,368 charities had their registered status revoked during the most recent year statistics are available, for "failure to file".

CRA has a policy of sending a reminder to each charity of the need to file the Information Return about five (5) months after its year end. However many charities particularly smaller ones, do not keep their records up to date and sometimes the reminders go to addresses and to individuals which are no longer relevant to the charity. If the Information Return is not received
within seven (7) months of the fiscal year end, CRA sends a “Notice of Intention to Revoke a Charity’s Registration” and the name will be placed on CRA’s web site. If nothing is received the CRA will begin revocation proceedings in the tenth (10th) month.

In one recent case, a charity filed its Information Return on June 20, 2007, 11 days before the due date. CRA sent out an automatic reminder letter to the charity which was received July 4, 2007.

It is a good practice to ensure that at each annual meeting and at the directors’ meeting held on the same day that senior management of a charity, or if it does not have any staff, the President, provide confirmation that the Information Return for the year has been filed.

C. NOT-FOR-PROFIT ORGANIZATIONS

Not-for-profit organizations, such as associations and societies, also have income tax filing obligations. If incorporated, the non profit organization must file a T2 Corporate Return and financial statements annually, within six (6) months of the year end. Additionally, a T1049 Not-for-Profit Information Return must be filed annually, within six (6) months of the year end if a) investment income for the year is greater than $10,000 or b) assets total more than $200,000 or c) a return has previously been filed.

Simply because an organization has no shareholders and is incorporated under the Canada Corporations Act or applicable provincial legislation does not mean that it may not have to pay income tax.

In recent months we have advised several organizations which had, because of good management, a very successful annual convention or trade show or tremendous growth in membership and found that they had established a substantial surplus. If a surplus continues to be generated over several years, it may be difficult to establish that the organization is not only incorporated, but also operated, without a view to profit.

In these circumstances we have advised the organizations of ways to minimize the
possibility of having to pay income tax in the future. Sometimes this involves establishing a separate charitable foundation to which funds can be given. The charitable foundation may provide scholarships, research funding or funds to other registered charities, often operating in an area aligned with the activities of the association itself.

**D. SUMMARY**

All registered charities should ensure that they have the Information Return completed and filed within six (6) months of the year end. All not-for-profit organizations should ensure that their appropriate tax compliance forms are filed within six (6) months of their year end.

Any charities or not-for-profit organizations who are not familiar with this should speak to their lawyer or accountant to ensure that they do not create problems for themselves going forward.

**V. CHARITIES – ARE YOUR MEMBERSHIP FEES SUBJECT TO GST?**

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For charities, ensuring compliance with the GST is difficult as the rules that apply are very complex. One area of particular concern is determining which of its sales are subject to GST. Determining whether a sale is taxable or exempt is important not only for knowing whether or not to charge sales tax, but also for recovering GST paid on inputs related to the sale.

This article will discuss in particular the rules concerning whether or not membership sales are subject to GST.

**A. GENERAL RULES OF MEMBERSHIPS**

For memberships, the general rule is that sales of memberships are exempt, unless the
membership entitles the member to one of the following:

1. supervision or instruction in any recreational or athletic activity;
2. an admission, or a discount for an admission, in respect of a place of amusement if such an admission would itself be subject to GST; or
3. a right to participate in a recreational or athletic activity, or to use facilities, at a place of amusement.

For category number one, if the memberships are intended to be provided primarily to underprivileged or disabled persons, or to children fourteen (14) years of age or under (due to the nature of the activities), then it is still exempt. For memberships intended to be provided to children, however, the membership would be taxable if the membership relates to a program involving overnight supervision throughout a substantial portion of the program.

For numbers two and three, the memberships are still exempt if the value of the admission, discount or right is insignificant in relation to the amount paid for the membership.

Finally, it should be noted that if all or substantially all of the memberships that a charity provides are free, then the memberships are considered exempt supplies.

B. CRA’S INTERPRETATION

It can be seen that the rules set out above are open to interpretation. In particular, what is meant by the italicized words above – “primarily” and “insignificant”? In order to provide guidance to both taxpayers and its own auditors, CRA has interpreted these words essentially by replacing them with mathematical formulas. According to the CRA, “primarily” means fifty (50%) per cent or more and “insignificant” means less than thirty (30%) per cent. Therefore, for example, if the value of an admission to a place of amusement that comes with a membership is less than thirty (30%) per cent of the total value of the memberships, then CRA considers the membership to be exempt.

These interpretations are relatively easy to apply and provide a degree of certainty to all parties. Generally it would be prudent for not-for-profit organizations to observe them to the extent
possible. There is some dispute, however, as to whether such rules really reflect the intent of the legislation. Such ambiguity may be relevant if a not-for-profit organization is considering whether to dispute an assessment made by the CRA related to membership sales.

This interpretation of "primarily" as meaning fifty (50%) per cent or more has generally been accepted in the case law, but other less stringent interpretation has also been used by the courts. The courts have interpreted the word as meaning "chiefly", "principally" or "of first importance", which can mean less than fifty (50%) per cent. Under this other interpretation, as long as the memberships that provide for recreational or athletic activities are intended to be provided "chiefly" or "principally" to underprivileged or disabled persons or to children then they are exempt. With respect to these types of memberships, CRA may lose sight of the fact that an intention test applies. Therefore as long as a not-for-profit organization has the intention of selling such memberships primarily to the described persons, the sales are exempt even if the actual sales fall below the "primary" test.

As for the term "insignificant", it could be argued that it could refer to significantly less than thirty (30%) per cent, which would result in more memberships being taxable. Elsewhere in the GST legislation, for example, there is an indication that "insignificant" could mean less than ten (10%) per cent (see section 197 of the Excise Tax Act).

C. CONCLUSION

Determining whether the sale by a charity of a membership is taxable or exempt is complex, and it is just one example of such complexity. Others include sales and leases of real property and sales related to fund-raising activities. Therefore it is important that the person responsible for GST reporting be properly trained and advised in order to avoid future liabilities.
This article provides a brief overview of the changes to the law regarding lobbying the Government of Canada from the perspective of a non-profit or charitable organization. For starters the name of the Lobbyist Registration Act has been changed to an Act Respecting Lobbying and will be cited as the Lobbying Act (the "Act").

A. WHAT REMAINS THE SAME:
WHAT IS LOBBYING?

First Test

It will come as no surprise that the essence of lobbying is communicating with a public office holder, most often a government employee or elected official, on behalf of an employer in regards to matters that relate to trying to change something or prevent a change. Those matters are defined in the Act as:

1) the development of any legislative proposal by the Government or any member of the Senate, or the House of Commons
2) the introduction of any bill or resolution at either House of Parliament, or the passage, defeat, or amendment of any bill or resolution that is before either House of Parliament
3) the making or amendment of any regulation
4) the development or amendment of any policy or program of the Government of Canada or,
5) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in the right of Canada.

These categories are very broad and cover almost any public policy advocacy work. Chances are if you are communicating with the Government about a change you are lobbying.

Exemptions

The law does provide exemptions for the countless number of communications between...
citizens and government that are not about changing the law, regulations, or policies, but merely discussions about administration, enforcement, interpretation, or simple requests for information. These types of communications are not lobbying.

Appearing in front of a committee since it is already fully transparent is exempt.

Applying for a grant or funding may or may not be lobbying. Applying within a program that already exists may be exempt but getting support from an MP would be lobbying and require registration. Advocating for a new program to provide funding would be lobbying.

Second Test

The Act states that the requirement to register is triggered when enough lobbying activity occurs to occupy a "significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee". This means that if any person or persons, either acting as an individual, or in combination with others spends the equivalent of twenty (20%) per cent of one person’s time lobbying, (i.e. communicating – see above) – then there is a requirement to register. The time spent includes preparing for meetings, travel time, and other miscellaneous activities that are engage in for the purpose of lobbying.

This part of the Act identifying what activities trigger a requirement to register, i.e. lobbying, and the twenty (20%) per cent rule, was not changed by the Federal Accountability Act.

B. WHO MUST FILE?

The Act spells out the officer responsible for filing returns means the most senior person in an organization who is compensated for the performance of their duties. In an organization, this would normally be the Executive Director or President.

C. TIME LIMIT FOR FILING A RETURN

The Officer responsible for filing a return shall file a return not later than two (2) months after the day on which the requirement to file a return first arises. Thereafter a return must be filed every six (6) months except in certain circumstances (see below).
D. CONTENTS OF THE RETURN

As one would expect, the contents of the return would include the name and address of the organization and the officer responsible for filing the return. Furthermore, the return should describe, in some form, the nature of the activities that are at issue. For non-profit organizations a description of the membership must be provided. Furthermore all employees any part of whose duty is to lobby i.e. communicate on the five (5) types of decisions (test 1) must be listed.

E. SIGNIFICANT CHANGES

A Requirement to File Monthly Certain Communication

Any communication which could be defined as lobbying with a minister, a minister’s staff, a deputy minister, or equivalent, an associate deputy minister or an assistant deputy minister, or the equivalent must now be reported on a monthly basis.

Of all of the changes made by the FAA regarding lobbying, this is the most significant.

F. PENALTIES

Failure to file a return, or filing a late, inaccurate or incomplete return is a "strict liability offence". As such the defence that one did not know of the obligation or simply made a mistake, is not a defence. Knowingly breaching the Act is, as you would expect is also an offence. The new law makes provisions for fines up to fifty thousand ($50,000) dollars or six (6) months in jail for the less serious infractions (on summary conviction) and up to two hundred thousand ($200,000) dollars and two (2) years in jail for the when the crown proceeds by indictment.

G. COMING INTO FORCE

While the Bill has been passed and proclaimed, certain elements are in force now and others are yet to be in force. The sections regarding changes to the law of lobbying will "come into force on a day or days to be fixed by order of the Governor in Council". In other words, the new law will take effect at a day to be determined by Cabinet and will correspond to the passing of regulations
envisioned by the Act. For example, the regulations will prescribe what forms need to be filled out when reporting on a conversation with a senior public office holder.

_Err on the Side of Caution_

The culture around the whole issue of setting up standards regarding lobbying and enforcing the rules has become quite severe in Ottawa. The issue of corrupt practices by lobbyists received extensive amounts of attention in the last election campaign and the laws have been changed to reflect concerns about the industry. Historically, rules have not been enforced. It was very rare in the past for charges to be laid. This will change going forward and readers are advised to err on the side of caution. If in doubt, register.

_Get Legal Advice_

Until you gain some familiarity with the law and what is required, it is always a good idea to consult a lawyer who has some familiarity with these issues.

### VII. SPRING OF FEAR: THE CAMPBELL COMMISSION REPORTS ON SARS

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#### A. INTRODUCTION

SARS swept through Toronto in March, 2003 with the impact of a major natural disaster. But, unlike other natural disasters like Hurricane Katrina, this perfect storm landed on the doorstep of Ontario’s healthcare system. In the end, forty-four (44) people died and nearly three-hundred and thirty (330) people became seriously ill with the virus. Many of the victims were healthcare practitioners.
B. LAWSUITS AND ENQUIRIES

In the wake of SARS, a number of lawsuits were launched on behalf of individuals who contracted the virus or their families. All this litigation is still before the courts. Various inquiries were initiated as well, the most prominent being the provincial government’s Commission to Investigate the Introduction and Spread of SARS in Ontario – or the Campbell Commission, as it is more widely known – headed by the late Justice Archie Campbell, a well-respected judge of the Ontario Superior Court.

Entitled “Spring of Fear”, Campbell’s report was released amid a flurry of media attention, but most of the media interest subsided after a few days. There should be no doubt about its long-term importance, however.

The full 1,200 page report, which comes in five volumes, contains a detailed analysis of Ontario’s experience with SARS and makes several recommendations for improving infection control, worker safety and patient care. It also sounds a number of warnings for the future.

During SARS there was a general understanding that it was an unexpected, unknown illness that could not have been anticipated or prevented. However, Campbell comments in his report that today, “there is no longer any excuse for governments and hospitals to be caught off guard, no longer any excuse for healthcare workers not to have available the maximum reasonable level of protection through appropriate equipment and training, and no longer any excuse for patients and visitors not to be protected by affective infection control practices”. Thus, the bar has been raised for hospitals to respond effectively to infectious disease outbreaks.

C. RECOMMENDATIONS

In the final instalment of his report Campbell deals specifically with the issue of responsibility. He concludes that SARS was able to take hold because of systemic weaknesses in worker safety, infection control
and public health. “The evidence throws up no scapegoats,” he says. He also finds that the particular hospitals involved in the SARS crisis were not to blame and recognizes that the outbreak could have happened in almost any hospital in the province. He commends the doctors, nurses and other healthcare workers who worked on the front lines, putting their lives at risk to help others. He concludes that, ultimately, SARS was stopped by healthcare professionals, scientists and specialists who were prepared to take strong measures, which worked in the end.

One of Campbell’s recommendations is for better worker safety. Hospitals are described as dangerous places, like mines or factories. Campbell says infection control and worker safety disciplines generally operated as separate silos during the SARS crisis. He emphasizes the need for effective co-operation to establish a strong safety culture. He also calls for more aggressive investigations and prosecutions under workplace safety legislation by the provincial Ministry of Labour. In response to these recommendations, it can be assumed the Ministry of Labour will respond vigorously to disease outbreaks in the future, with increased surveillance and possible prosecutions of healthcare institutions.

The Campbell Commission Report is clearly not light reading. However, those involved in infection control need to pay close attention to it and to its recommendations. The clear message from the report is that more work is needed to improve infection control in Canada.
A. OUR GROUP

Borden Ladner Gervais is Canada’s largest law firm with full service offices in Vancouver, Calgary, Toronto, Waterloo Region, Ottawa and Montréal.

We have a Group established specifically to provide legal advice in an accurate, timely and cost-effective manner to not-for-profit organizations and charities. Each of our offices has specialists who have expertise and experience dealing with not-for-profit organizations and charities. Our clients in the not-for-profit sector require legal counsel from a law firm which has available when needed, expertise in charity law, employment law, trade-marks, income tax, GST, real property tax, corporate law, by-laws, incorporation, governance, technology, litigation, contract law and other areas of legal specialization.

B. KEEPING YOU CURRENT

Through our "Not-For-Profit Law Update" and "Alert" Newsletters and our seminars, we keep our clients and friends in the not-for-profit sector informed of changes in the law as they apply to their organizations.

C. OUR LAWYERS PARTICIPATE

We are pleased that many lawyers in each of our offices volunteer their personal time and skills by fundraising for, by sitting on boards and committees of, and by volunteering in the front lines with healthcare organizations, social service groups and other community-based, national and international charities.

D. DISCLAIMER

The "Not-For-Profit Law Update" Newsletter is prepared as a service to management and
directors of non-share capital corporations known to the lawyers of Borden Ladner Gervais LLP. It is intended to inform those engaged in this important and growing sector of current issues and developments in law affecting not-for-profit organizations. It is not intended to be a complete statement of the law, nor to contain any opinions of our firm on any subject.

Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns.

E. NOTES

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