

CANADA¹

I. Overview of Country

Canada is a federal nation, with ten provinces (not counting three arctic territories) each with its own legislature and a federal parliament. The Canadian Constitution, i.e., the Constitution Acts 1867 to 1982, which is Canada's supreme law, divides legislative authority between the provinces and the federal government by listing their respective areas of competency. Nine of the provinces are based in English common law; one, Quebec, follows the civil law tradition in matters of private law but the common law in matters of public law. Only the Supreme Court of Canada has authority to bind all courts in the country with a single ruling.

Section 2 of the Canadian Charter of Rights and Freedoms expressly provides for freedom of association. Under the heading "Fundamental Freedoms" the section states:

Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.²

Section 2, however, provides only part of the relevant Constitutional framework.³ Other Charter provisions significantly qualify the scope of Section 2 rights, including Section 1, which states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," Section 33, which, at least in theory, authorizes direct legislative overrides of certain Charter rights, and Section 27, with its express reference to multiculturalism.⁴ The Canadian Charter thus contrasts with the First Amendment of the United States Constitution, which makes no provision for direct rights balancing.⁵

Canada has a long and robust tradition of reliance on nonprofit and voluntary associations to address the needs and interests of its population.⁶ Indeed, by many measures Canada has one of the largest and most vibrant nonprofit and voluntary sectors in the world.⁷ This sector encompasses service organizations in areas such as health, education, social services, community development, and housing; organizations that serve expressive functions in arts and culture, religion, sports, recreation, civic advocacy, environmental protection; and business, labor, and professional associations.⁸

¹ The following memorandum was prepared by pro bono counsel for the ABA Center for Human Rights. It is intended as background information only and should not be relied upon as legal advice on a particular case. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

² See Part I of the Constitution Act, 1982 (containing the Canadian Charter of Rights and Freedoms).

³ See Ronald J. Krotoszynski, Jr., *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech*, New York University Press (2006) at Chapter 3 (Canada), page 27.

⁴ *Id.*

⁵ *Id.*

⁶ Michael Hall, Cathy Barr, M. Easwaramoorthy, S. Sokolowski, Lester Salamon, *The Canadian Nonprofit and Voluntary Sector in Comparative Perspective*, a Report by Imagine Canada as part of the Johns Hopkins Comparative Nonprofit Sector Project (2005), at page 1 of Summary.

⁷ *Id.*

⁸ *Id.*

With one possible exception, the research that supports this report has not uncovered evidence that the Canadian government has attempted or is attempting to narrow Canadians' access to or use of nonprofit and voluntary organizations. Indeed, at the federal level Canada in 2009 through its Canada Not-for-Profit Corporations Act simplified and modernized the procedures for forming and operating not-for-profit corporations.⁹ One substantial controversy, further discussed below, however, bears mention. Many critics of the present Conservative government assert that the Canadian Revenue Agency, motivated by political factors, has unfairly audited some not-for-profit organizations critical of the Conservative government.¹⁰ This report takes no position in that controversy but notes its existence.

II. Registration / Incorporation Procedures

A. For-Profit Organizations

a. Laws

A Canadian for-profit corporation may be created, i.e., incorporated, under either federal or provincial law, but not both.¹¹ The main advantage of incorporating federally is that the corporation has the right to use the same name across Canada. In contrast, a provincially incorporated company must verify the availability of its name in each province where it carries on business.

Federal Law. For-profit corporations are formed federally under the Canada Business Corporations Act (“CBCA”).¹² Almost any type of business can incorporate under the CBCA, although banking, insurance, and loan and trust companies, as well as not-for-profit corporations, are incorporated under different laws.¹³ The CBCA does not place restrictions such as minimum size on businesses that may incorporate.¹⁴ One or more individuals 18 years of age or older who are of sound mind and not in a state of bankruptcy may form a corporation under the CBCA.¹⁵ One or more corporations or bodies corporate may also incorporate a business under the CBCA.¹⁶

The CBCA requires that at least 25 per cent of the directors must be resident Canadians.¹⁷ Where a corporation has only one or two directors, at least one must be a resident Canadian.¹⁸

The federal procedure for incorporation of a for-profit corporation under the CBCA is simple and user-friendly. The Canadian federal government agency that administers the process is called Corporations Canada, a branch of Industry Canada. The first step is to choose a name.¹⁹ A name search report is essential; a list of name search houses is available on the Corporations Canada website.²⁰ The second step is to submit the following documents, examples of which are available on the Corporations Canada website: Articles of Incorporation; Initial Registered Office Address; and First Board of Directors. The applicant may describe the main purpose of the corporation, or the activities it will carry

⁹ S.C. 2009, c. 23; laws.justice.gc.ca/eng/acts/c-7.75/.

¹⁰ See, e.g., *Stephen Harper's CRA: Selective Audits, "Political" Activity, and Right-Leaning Charities*, Broadbent Institute (October 2014) (hereinafter, “Broadbent Institute Report”).

¹¹ Industry Canada Website, Business Corporations page; www.ic.gc.ca/eic/site/cd-dgc.nsf

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ CBCA, Section 105(3)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Corporations Canada Website, “Business Corporations,” “Guides to Federal Incorporation.”

on, in the prescribed areas of the articles, although most applicants do not, preferring to leave all options open for the scope of business they may undertake. Payment is currently \$200 (when applying online) or \$250 (when applying by paper).²¹ On-line applications are generally processed within one or two business days.²² Paper filings may take a few days longer.²³

When Corporations Canada receives the Articles of Incorporation, it verifies that they have been properly completed and that the proposed name is acceptable.²⁴ If so, the agency then sends the applicant a Certificate of Incorporation, showing the name of the corporation, the corporation number, and the date of incorporation, along with the Articles of Incorporation.²⁵ These actions are ministerial in nature.

Once the corporation is approved, it must remain in good standing.²⁶ To do so, it must submit an Annual Return and pay the annual \$20 fee.²⁷ The Annual Return is a short document that provides basic information about the corporation regarding whether the corporation has held its annual meetings and whether it is a public (distributing) company or private (non-distributing) company with fewer than 50 shareholders.²⁸ This information allows Corporations Canada to assure that the corporation complies with the basic requirements of the CBCA.²⁹ It also allows Corporations Canada to maintain its database of federal corporations.³⁰

A corporation is deemed not to be in good standing with the CBCA if it: fails to file its Annual Return for a period of one year; fails to pay the required fees; and/or submits an incomplete return.³¹ Corporations Canada has the power to dissolve a corporation that has not complied with certain requirements of the CBCA.³² In such cases, Corporations Canada sends a notice to the corporation and its directors advising them of the Director's intention to dissolve the corporation.³³ If the corporation does not respond or its response is inadequate, the Director will issue a Certificate of Dissolution following the expiration of the deadline stated in the notice.³⁴ It is possible to revive a corporation after dissolution.³⁵ To do so, the corporation, or an interested party (such as a creditor or a shareholder), must file Articles of Revival and pay the \$200 fee.³⁶

The annual return is not the corporation's income tax return, which must be filed with the Canada Revenue Agency.³⁷

Provincial Law. Canadian provincial laws on for-profit incorporation are similar to those for federal law incorporation, although they may differ to some degree with respect to costs, user-

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Corporations Canada Website, "Keeping Your Corporation in Good Standing" and "Frequently Asked Questions."

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

friendliness, and the details of the required forms. The incorporation process for the province of Ontario is illustrative. The basic steps are like those for federal incorporation: choosing and registering a business name and filing articles of incorporation, in this instance with the Ontario Ministry of Government and Consumer Services, Companies and Personal Property Security Branch in accordance with the Ontario Business Corporations Act.³⁸ In addition, the business must obtain whatever permits that particular business requires, and obtain a business number registration.³⁹ These are ministerial actions, most of which can be accomplished quickly online. The cost of filing articles of incorporation in Ontario is currently \$300 for online filing, \$360 for filing by mail.⁴⁰

b. Cases

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians' access to and use of nonprofit and voluntary organizations.

B. Not-For-Profit Organizations

a. Laws

As with for-profit corporations, not-for-profit corporations may be incorporated under federal or provincial law, but not both.

Federal Law. Not-for-profit organizations are incorporated federally in Canada under the Canada Not-for-Profit Corporations Act ("NFP Act"), enacted in 2009.⁴¹ The purpose of the NFP Act is "to allow the incorporation or continuance of bodies corporate as corporations without share capital, including certain bodies corporate incorporated or continued under various other Acts of Parliament, for the purposes of carrying on legal activities."⁴² Volunteer and nonprofit groups wishing to carry on activities are not required to incorporate under the NFP Act. The rationale for incorporating would be to obtain a separate legal status for the organization and to obtain possible tax benefits for itself and its donors.⁴³ As will be explained later, incorporation under the NFP Act does not by itself entitle the not-for-profit corporation to tax benefits; additional steps are necessary.

As with for-profit incorporation under the CBCA, one or more individuals 18 years of age or older who are of sound mind and not in a state of bankruptcy may form a not-for-profit corporation under the NFP Act, and bodies corporate may also incorporate.⁴⁴ Unlike for-profit incorporation under the CBCA and some provincial statutes, the NFP Act does not restrict the percentage of non-Canadians who can serve as directors.

Again like for-profit incorporation under the CBCA, the federal procedure for incorporation of a not-for-profit corporation under the NFP Act is simple and user-friendly. Here too, the Canadian federal government agency that administers the process is Corporations Canada, a branch of Industry Canada.

³⁸ Canada Business Ontario, Business Start-Up Guide, cbo.eco.ca/en; Government of Ontario, ONe-Source for Business, gov.on.ca

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ S.C. 2009, C. 23.

⁴² *Id.* at Part 3, Section 4.

⁴³ Corporations Canada Website, "Reasons to Incorporate a Not-for-Profit."

⁴⁴ NFP Act at Part 2, Section 6.

The first step is to choose a name.⁴⁵ The second step is to submit the following documents, examples of which are available on the Corporations Canada website: Articles of Incorporation; Initial Registered Office Address; and First Board of Directors.⁴⁶ The applicant is required to describe the main purpose of the corporation, or the activities it will carry on, in the prescribed areas of the articles.⁴⁷ This contrasts with for-profit incorporation: not-for-profits generally take great care to define the purposes of the corporation carefully as these purposes are relevant to establishing the corporation as either a charity or a nonprofit organization under the Income Tax Act. Payment is the same as for for-profit incorporation: currently \$200 (when applying online) or \$250 (when applying by paper).⁴⁸ Unlike for-profit incorporation, on-line processing of applications for not-for-profit incorporation is not currently available, although the necessary forms are available on the website.

After Corporations Canada receives the application, it will review it to see if it includes all necessary documents; the forms are complete and signed; and the fee is included.⁴⁹ If the application is incomplete, it will be returned along with a letter that explains what is missing or why the application is invalid. If the application is complete, Corporations Canada will review the application to ensure that it complies with the NFP Act, such as a proper corporate name.⁵⁰ If more information is needed to assure compliance with the NFP Act, the application will be returned along with a letter that explains what is needed. Once the application is accepted, Corporations Canada will issue a certificate of incorporation.⁵¹ Corporations Canada's service standard for processing applications to incorporate under the NFP Act is five working days.⁵²

Once the corporation is approved, it must remain in good standing.⁵³ To do so, it must submit an Annual Return and pay the annual \$20 fee.⁵⁴ As part of the Annual Return, the corporation must declare whether or not it is a soliciting corporation.⁵⁵ A soliciting corporation refers to a company that receives \$10k or more in funding from "public sources" in a given year.⁵⁶ Soliciting corporations have a higher level of financial accountability. For example, they must have at least three directors, must file their annual financials with Industry Canada, and are more likely to be required to subject their financials to audits or review level engagements.⁵⁷ The idea of a soliciting corporation does not exist, for example, in the Ontario statute.

Provincial Law. Each Canadian province and territory has its own process for forming a separate legal entity to operate as a not-for-profit, and the details of the process and specific requirements for forming NFPs vary by jurisdiction.⁵⁸ A non-exhaustive list of examples of the differences includes:

- the type of charter documents that must be prepared and filed (e.g., articles of incorporation v. letters patent v. constitution and by-laws);

⁴⁵ Corporations Canada Website, "Creating a Not-for-Profit."

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Industry Canada Website, Corporations Canada, "FAQ for Not-for-Profit Incorporation."

⁵³ Corporations Canada Website, "Creating a Not-for-Profit."

⁵⁴ *Id.*

⁵⁵ See Industry Canada website at <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05011.html>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The author of this report obtained the information in this "provincial law" subsection from Andrew Lord and Kate Bake-Patterson of the Davis LLP Canadian law firm, to whom the author expresses his gratitude.

- the requirement for a minimum number of members (none in Ontario; a minimum of five in British Columbia, which can be burdensome if, for example, an existing not-for-profit wants to establish a British Columbia subsidiary);
- the process for filing an application (very much paper based in British Columbia; can be filed online in some other provinces);
- In some provinces, e.g., Ontario, the process for incorporating a not-for-profit corporation is not same as for incorporating a charity, with the latter subject to greater scrutiny; and
- the degree to which the jurisdictions have modernized their laws regarding the formation and governance of not-for-profits (as mentioned, the federal government has enacted the new NFP Act and Ontario has a new statute ready to proclaim into force; British Columbia is expecting a bill in the very near future; other activity is underway in some other jurisdictions).

Against this background of significant variance among provincial laws, and with the caveat that a detailed examination of the laws and practices in each of the provinces is beyond the scope of this report, the research for this report has not uncovered substantial evidence of politically or otherwise improperly motivated efforts by the provincial governments to harass, restrict access to, or limit the operation of not-for-profit corporations.

b. Cases

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians' access to and use of nonprofit and voluntary organizations.

C. Analytical comparison of the legal process of registration

A comparison of the procedures for incorporating and maintaining the corporate status of for-profit versus not-for-profit corporations under Canadian law (federal and provincial) reveals few substantial differences between them, and none that support an inference that the Canadian governments for political or otherwise improper purposes have circumscribed, or are intending to circumscribe, the rights of Canadians to form and operate not-for-profit organizations.

III. Tax Laws

Canadian tax law is vast and complex. The following provides a high-level overview.

A. For-Profit Organizations

a. Laws

Corporate income tax is levied in Canada by both the federal and provincial governments. All provinces except Quebec and Alberta, however, have entered into agreements with the federal government so that taxable income is computed according to federal legislation (with some exemptions) and the federal government is responsible for collecting income tax on behalf of the provinces.⁵⁹ The Canada Revenue Agency ("CRA") is the federal agency responsible for handling taxation issues.⁶⁰

⁵⁹ *Corporate Income Tax in Canada*, memorandum prepared by Blakes, Cassells & Grayson LLP (hereinafter "Blakes Memorandum"), Available Online: internationaltaxreview.com

⁶⁰ Canada Revenue Agency website ("CRA Website"), cra-arc.gc.ca/tx.

Canada residents are subject to tax on their worldwide income.⁶¹ Generally, a company will be considered resident in Canada if it is incorporated in Canada or its management is located in Canada.⁶² Non-resident companies are taxable on income derived from carrying on a business in Canada (under many tax treaties, however, a foreign company only has to pay Canadian tax if it has a permanent establishment in Canada).⁶³ Canadian courts have interpreted “carrying on a business” as having a low threshold of non-resident activity in Canada.⁶⁴ Non-resident companies are also subject to Canada tax on gains realized from dispositions of certain types of property.⁶⁵

The effective federal rate of for-profit income tax is currently 15%.⁶⁶ Provincial rates vary significantly depending on the province and the type of income earned by the company.⁶⁷ The general rate imposed by the province of Ontario, for example, is currently 11.5%.⁶⁸ One half of any capital gain realized by a Canadian taxpayer is included in the taxpayer’s income and is subject to tax at normal rates.⁶⁹

Several reductions in federal and provincial rates are possible depending on the circumstances of the particular case. A substantial one is the small business deduction, which relates to the first C\$500,000 of active business income earned in Canada by a small Canadian controlled private company (“CCPC”).⁷⁰ A corporation will not be a CCPC if it is controlled, directly or indirectly, by one or more non-resident persons or fails to meet certain other eligibility criteria.⁷¹

As a rule, a for-profit corporation can deduct any reasonable current expense it paid or will have to pay to earn business income, including advertising, legal and other professional fees, and travel.⁷²

b. Cases

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians’ access to and use of nonprofit and voluntary organizations.

B. Not-For-Profit Organizations

Here too Canadian tax law is complex, and only an overview is feasible within the scope of this report.

a. Laws

⁶¹ Blakes Memorandum at 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ CRA website, “Corporation Tax Rates.”

⁶⁷ Blakes Memorandum at 2.

⁶⁸ See KPMG Summary of Canadian tax law at

<http://www.kpmg.com/ca/en/issuesandinsights/articlespublications/pages/taxrates.aspx>

⁶⁹ CRA Website, “Corporation Tax Rates.”

⁷⁰ *Id.*

⁷¹ CRA Website, “Corporations: Association and Control.”

⁷² CRA Website, “Businesses,” “Business Expenses.”

As mentioned in the prior section, tax benefits are among the primary reasons for incorporation of a not-for-profit corporation. These tax benefits are of two types: tax exemption for the organization itself and tax income deductions or credits for donors to the organization.⁷³ The tax benefits flowing from designation of a not-for-profit corporation as a “registered charity” under the Income Tax Act differ from those from designation as a “nonprofit organization.”⁷⁴

Registered Charities. Section 149(1)(f) of the Canada Income Tax Act provides that “no tax is payable . . . on the taxable income of a person . . . when that person was . . . a registered charity.”⁷⁵ Under the Canadian Constitution, the provinces have exclusive jurisdiction over “Hospitals, Asylums, Charities, and Eleemosynary Institutions,” all of which can be classified as charities under English common law.⁷⁶ Nonetheless, as a practical matter the provinces yield responsibility to the federal government to regulate charities through the Income Tax Act.⁷⁷

If a not-for-profit corporation attains the status of a “registered charity” under the Income Tax Act, (1) it is exempt from tax, and (2) donors to the charity can take a deduction from income for their donations.⁷⁸ To attain this status, the not-for-profit corporation must meet the definition of “charity” and must register with the Canada Revenue Agency.⁷⁹ The Canada Revenue website explains that:

A registered charity is an organization established and operated for charitable purposes, and must devote its resources to charitable activities. The charity must be resident in Canada, and cannot use its income to benefit its members. A charity also has to meet a public benefit test. To qualify under this test, an organization must show that: •its activities and purposes provide a tangible benefit to the public;•those people who are eligible for benefits are either the public as a whole, or a significant section of it, in that they are not a restricted group or one where members share a private connection, such as social clubs or professional associations with specific membership;•the charity's activities must be legal and must not be contrary to public policy.⁸⁰

The CRA Website further explains (some text omitted without elliptical dots):

The term charitable is not defined in the Income Tax Act, so we consider common law (court decisions) to determine what is charitable at law. During the review process, we examine both the purposes and activities of an organization. The following factors will prevent an organization from being registered as a charity:

Organizations established and resident outside Canada will not qualify for registration.

Organizations established for the purpose of making a profit will not qualify for registration. To qualify for registration, an organization must be non-profit and have purposes (also called objects) that are charitable at law. To be charitable at law, an

⁷³ Robert Hayhoe, *An Introduction to Canadian Tax Treatment of the Third Sector*, The International Journal of Not-for-Profit Law, Feb. 2004 (“Hayhoe Article”).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ CRA Website, “Registered Charity.”

organization must have purposes that fall under one or more of the four heads (categories) of charity: •the relief of poverty;•the advancement of education;•the advancement of religion; and •certain other purposes that benefit the community in a way the courts have said is charitable.

Organizations that gift funds or resources to organizations that are not qualified donees will not qualify for registration. A registered charity can only use its funds and resources in two ways: •It can carry on its own charitable activities (activities conducted under the charity's direction and control). •It can make gifts to other organizations that are qualified donees (usually other registered charities). Individuals and most organizations outside Canada are not qualified donees.

Organizations that provide personal benefits (directly or indirectly) by making any part of their income payable to or available to any of their members, shareholders, directors, or trustees will not qualify for registration.

Organizations established to benefit a particular individual or a private group, are considered to be established for private benevolence and will not qualify for registration.

Organizations with political purposes will not qualify for registration. The courts have determined political purposes to be those that seek to: •further the interests of a particular political party; or support a political party or candidate for public office; or• retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

Organizations established to primarily operate a commercial activity (revenue-generating) with the intent to earn a profit will not qualify for registration. Charitable organizations and public foundations may carry on related business activities that accomplish or promote their charitable purposes.⁸¹

The CRA Website further states: “To register as a charity, the organization has to be either incorporated or governed by a legal document called a trust or a constitution. This document has to explain the organization’s purposes and structure.”⁸²

Registering a charity is an important and substantial undertaking.⁸³ After a charity is registered, it has many obligations to meet each year, such as filing an information return and meeting a spending requirement.⁸⁴ A charity has obligations to the recipients of its charitable activities, to its volunteers, to its donors, and to the general public.⁸⁵ If a charity changes its mind after registration and wants to wind up or dissolve, it must ask to have its registered status revoked.⁸⁶ A revoked charity must give all its assets to another registered charity, or pay a revocation tax equivalent to the full value of its remaining assets.⁸⁷

⁸¹ *Id.*

⁸² *Id.*

⁸³ CRA Website, “Registration.”

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

The application form to register as a charity has many parts and requests extensive information, including organizational structure, governing documents, charitable purposes and fundraising activities, activities outside Canada, revenue from sale of goods, political activities, ownership of property, financial transactions with organization officials, budget, government grants, expenditures, and names of the organization's officials.⁸⁸

When the Canada Revenue Agency first receives an application, it verifies that it is complete, i.e., that all the information and documents requested on the application form are included.⁸⁹ If an application is complete, CRA sends the applicant an acknowledgement letter.⁹⁰ The letter states the approximate amount of time it will take before the application is assigned to an officer for review.⁹¹ If an application is incomplete, CRA rejects it and returns it to the applicant.

CRA may contact the applicant for more information and documentation to help it decide on an application.⁹² If CRA determines that an applicant's purposes or activities are clearly not charitable, it will send a letter stating that it has denied the applicant's registration.⁹³ If CRA denies registration, the applicant can appeal the decision by filing a notice of objection within 90 days. If CRA approves registration, it will send a Notification of Registration.⁹⁴ A properly completed (i.e., simple) application that does not contain any documents in draft format can usually be reviewed within two months.⁹⁵ If the application does not contain enough information for the CRA to determine whether the organization qualifies for charitable registration, the wait time will increase to six months.⁹⁶

An important issue arising out of the definition of charity in Canada concerns the political purposes doctrine. Under both the common law of charity and the Income Tax Act, an organization with exclusively charitable purposes that is a registered charity must not engage in political activity.⁹⁷ Though this distinction is sometimes obvious (for example, it is clear that a registered charity must not engage in partisan election politics), it is not always clear.⁹⁸ The dividing line between the permitted charitable purpose of advancing education and the forbidden political purpose of advocacy can be difficult to draw. There is currently significant agitation in the Canadian voluntary sector in favor of letting advocacy organizations register as charities.⁹⁹ This would provide tax benefits to these organizations' donors; the advocacy organizations themselves, as nonprofits, are already tax exempt.

A notable aspect of the law in this area involves the expenditure limits the Income Tax Act imposes on political activities. The CRA explains its policy in this area on its website:

When a charity takes part in political activities, the Act requires that substantially all of its resources must be devoted to charitable activities. The term resources is not defined in the Act, but we consider it to include the total of a charity's financial assets, as well as everything the charity can use to further its purposes, such as its staff, volunteers, directors, and its premises and equipment.

⁸⁸ *Id.* at attached "Application to Register a Charity Under the Income Tax Act."

⁸⁹ CRA Website, "Registered Charity."

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ CRA Website, "Questions and Answers About Applying for Registration [as a Charity]."

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Hayhoe Article at 3 (Internet version)

⁹⁹ *Id.*

We usually consider substantially all to mean 90% or more. Any charity using at least this amount of its various resources for charitable work can be assured that we will not revoke its registration on the basis that it is not devoting enough of its resources to charitable activities. Therefore, as a general rule, we consider a charity that devotes no more than 10% of its total resources a year to political activities to be operating within the substantially all provision.

However, we recognize that this may have a negative impact on smaller charities. In an effort to alleviate this hardship, we will exercise our discretion and not revoke the registration of smaller charities for the excessive use of their resources on political activities as long as they meet the following administrative guidelines:

- Registered charities with less than \$50,000 annual income in the previous year can devote up to 20% of their resources to political activities in the current year.
- Registered charities whose annual income in the previous year was between \$50,000 and \$100,000 can devote up to 15% of their resources to political activities in the current year.
- Registered charities whose annual income in the previous year was between \$100,000 and \$200,000 can devote up to 12% of their resources to political activities in the current year.¹⁰⁰

Critics of Canada’s laws on registered charities have argued that the contrasting treatment of for-profit businesses and charities with respect to political activities is unfair. One newspaper article, quoting from and discussing the Broadbent Institute Report, states:

“Since businesses can deduct advertising expenses from their income, they can lobby the public through advertising without any imposed statutory restrictions. A recent example has been the omnipresence of the multimillion-dollar [Enbridge] Northern Gateway radio, television, internet and newspaper ad campaign favouring the project. All of these advertisements would presumably be tax deductible and therefore subsidized by general taxpayers.

In contrast to companies’ tax-deductible political advertising campaigns, charities must carefully ensure that all activities of a political nature are kept within the 10 per cent limit. This contrasting treatment of business and charities under the Income Tax Act has the effect of encouraging businesses to take political action in support of commercial and private interests — while hindering the counterbalancing efforts of charities working to protect public interests.”

The report provides the example of cigarette companies fighting smoking laws to defend profits while cancer societies advocated smoking laws for the public good (to prevent cancer). The “political activities” of the cigarette companies would have been tax deductible, whereas the charities advocating tougher smoking laws would have had to follow the ten per cent rule.¹⁰¹

¹⁰⁰ CRA Website, Political Activities, Policy Statement, Section 9.

¹⁰¹ DeSmog Canada, *Canada’s Charitable Law Urgently Needs Reforming*, March 25, 2015, desmog.ca/2015/03/25/Canada-charitable-law-urgently-needs-reform.

The CRA's audit process for charities and criticism that this audit process has been biased against organizations critical of the government are addressed in Part V of this report.

Nonprofit Organizations. Nonprofit organizations are exempted from income tax by paragraph 149(1)(l) of the Canada Income Tax Act.¹⁰² They differ from registered charities in that donations to nonprofit organizations are not deductible from income by the donors.¹⁰³ The Income Tax Act defines nonprofit organizations as follows:

a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada.¹⁰⁴

Basing the entire tax regulation of nonprofit organizations on such a short definition has left a number of issues for judicial determination.¹⁰⁵ Many articles describe the Canadian tax treatment of nonprofit organizations.¹⁰⁶

Pursuant to 149(1)(l) set out above, a nonprofit organization is tax exempt only if it is a club, society, or association. Courts have held that these terms are not to be given a technical meaning; an organization with virtually any legal form can qualify as a nonprofit organization.¹⁰⁷ More important, the definition of a nonprofit organization explicitly excludes charities, defined elsewhere in the Income Tax Act as organizations with exclusively charitable purposes or activities.¹⁰⁸

The definition of "nonprofit organization" goes on to list various approved nonprofit purposes, but all can be subsumed under the basket clause of "any other purpose except profit." Further, to meet the definition of a nonprofit organization in the Income Tax Act, the organization must not make any of its income available to its members. The nonprofit and non-distribution requirements, based as they are on very general statutory language, have resulted in relatively extensive litigation as the Canada Revenue Agency has challenged the tax exemption of nonprofit organizations, which have been obliged to appeal to court to establish their tax exemption.¹⁰⁹ These challenges arise most frequently for organizations that earn a profit but argue that profit was not their purpose in carrying on the profitable activity.¹¹⁰

b. Cases

Canadian courts in a few instances have addressed the issue of what constitutes impermissible "political activity" such that a charity loses, or is denied, status as a registered charity. The following have been held to be political activities that invalidated charitable status: exchange visits between

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Income Tax Act, para. 149(1)(l)

¹⁰⁵ Hayhoe Article at 3 (Internet version)

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

delegations from Toronto and its twin city in the U.S.S.R. for the purpose of fostering better relations between the two countries¹¹¹; lobbying efforts opposing medical experimentation on animals¹¹²; activities supporting and promoting the rights of tenants¹¹³; and activities and lobbying in opposition to pornography.¹¹⁴ A charitable organization which had as its object the worldwide abolition of torture carried out political activities that went beyond activities ancillary to its purposes and its charitable registration was revoked.¹¹⁵ A charitable organization that engaged in anti-abortion and pro-life publicity campaigns had its charitable status revoked; the court held that the activities were political and not charitable in nature.¹¹⁶

Research for this report has not uncovered any published decisions addressing the CRA audits, or results from the audits, that occurred in Canada after 2012 and have generated notable controversy.

C. Analytical comparison

Tax advantages – for the nonprofit or volunteer organizations and for their donors – form the primary *raison d’être* for forming not-for-profit corporations. Consequently, questions of the liberty Canadians enjoy to form and operate such corporations focus largely on tax issues. The tax issue that in Canada has proven most controversial, and most in need of critical review, is the political activity limitation imposed on registered charities. Criticism of this limitation has arisen in two different contexts: (1) a comparison of political activity permitted by for-profit corporations versus such activity permitted for registered charities, and (2) whether the Canadian government for political reasons has been selective in enforcing the political activity limitation against some registered charities but not others.

As to the first of these contexts, as noted above critics of Canada’s registered charity laws have raised concerns that seem plausible that for-profit corporations are allowed without limitation to engage in political activities that registered charities can engage in only subject to substantial limitations – limitations that if exceeded, or arguably exceeded, subject the charities to audits and possible loss of their registered charity status. This seems to allow asymmetrical access to political activities.

The second of these contexts is addressed in Part V, Audits.

IV. Financial Transaction Laws

A. For-Profit Organizations

a. Laws

Foreign investment into Canadian for-profit corporations by non-Canadians is subject to The Investment Canada Act.¹¹⁷ The purpose of the Investment Canada Act initially was limited to review of significant investments in Canada, but recent amendments have expanded its scope to provide also for review of foreign investments that may raise national security concerns.¹¹⁸ The Investment Canada Act

¹¹¹ *Toronto Volgograd Committee v. Minister of National Revenue* (1988), [1988] 3 F.C. 251 (Fed. C.A.).

¹¹² *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 27 E.T.R. 40 (Ont. H.C.).

¹¹³ *Notre Dame de Grâce Neighbourhood Ass’n v. Minister of National Revenue* (1988), 30 E.T.R. 99 (Fed. C.A.).

¹¹⁴ *Positive Action Against Pornography v. Minister of National Revenue* (1988), [1988] 2 F.C. 340 (Fed. C.A.).

¹¹⁵ *McGovern v. Attorney General* (1981), [1982] Ch. 321 (Eng. Ch. Div.).

¹¹⁶ *Human Life International In Canada Inc. v. Minister of National Revenue* (1998), 1998 CarswellNat 366 (Fed. C.A.); leave to appeal refused (1998), 236 N.R. 187 (note) (S.C.C.)

¹¹⁷ Industry Canada Website, “Investment Canada Act.”

¹¹⁸ Borden Ladner Gervais, *Doing Business in Canada*, 2014 (summary of legal aspects of investing in Canada; available on Internet at www.blg.com) (“BLG Memorandum”) at 17.

applies to all “non-Canadians,” which includes any person not a citizen or permanent resident of Canada and any entity not controlled or beneficially owned by Canadians.¹¹⁹ Every investment in Canada by a non-Canadian to establish a new business or acquire control of an existing Canadian business requires the non-Canadian to file either a straight-forward “Notification” of the investment or a more in-depth “Application for Review,” depending on the book value of the assets being acquired.¹²⁰ In addition to the requirements of the Investment Canada Act, both the federal and provincial governments impose corporate ownership restrictions in certain strategic or sensitive industries, such as financial institutions, broadcasting, telecommunications, and air transportation.¹²¹

Canadian for-profit companies are also subject to securities law.¹²² Unlike the United States, where these laws are administered primarily by the Securities Exchange Commission, Canada has provincial securities regulators. At a high level, the manner of regulation is similar in Canada and the United States: unless certain exemptions are available (e.g., accredited investor exemption), companies that issue securities must issue prospectuses and those who trade in securities must be registered.

b. Cases

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians’ access to and use of nonprofit and voluntary organizations.

B. Not-For-Profit Organizations

There are no prescribed limits on the amount that can be donated to a charity by a foreign donor.¹²³ Given that the corporations incorporated under the NFP Act are non-share corporations, the Investment Canada Act, which restricts foreign ownership of Canadian corporations, does not apply. This does not, however, mean that a large donation from certain foreign sources would not attract attention from the CRA. For example, there is a Charities Registration (Security Information) Act that empowers the CRA to review and, if necessary, revoke the charitable status of, charities that are supporting certain listed entities or to any other organization engaged in terrorist activities or in activities that support terrorist activities.¹²⁴ Canada also participates in international anti-terrorism efforts to combat the improper use of charities. Charities can lose their status if they are found to be supporting criminal activities, domestic or foreign. For example, a charity lost its status because it was found to be supporting

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² The information in this paragraph was provided to the author by Andrew Lord, Esq., of the Davis LLP law firm. See also Tara Gray, Library of Parliament, *Reforming Canadian Securities Regulation* (2005)

¹²³ This does not mean, however, that a whopping donation from certain foreign sources would not attract some close attention from CRA. For example, there is a Charities Registration (Security Information) Act that empower s the CRA to review and, if necessary, revoke the charitable status of, charities that are supporting certain listed entities or to any other organization engaged in terrorist activities or in activities that support terrorist activities. See Governmenta of Canada Website, “Public Safety Canada Website,” “Currently Listed Entities.” Canada also participates in some international anti-terrorism efforts to combat the improper use of charities. See CRA Website, “Charities in the International Context.” In practice, if a charity with little or no donation history suddenly reports a huge donation from a foreign source, it is more likely that CRA will take a closer look.

¹²⁴ Government of Canada Website, “Public Safety Canada,” “Currently Listed Entities,”; gc.ca/cnt/ntnl-scr/cntr-trrrsm.

Hamas.¹²⁵ In practice, if a charity with little or no donation history suddenly reports a huge donation from a foreign source, it is likely that CRA will take a closer look.

Canada also has a *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which could have application to foreign transactions involving not-for-profits and charities.¹²⁶

A newspaper article from August 2014 states that the Canada Revenue Agency's small list of approved foreign charities has been whittled down from few to none, meaning Canadian donors hoping to give money to former American President Bill Clinton's foundation, for example, cannot receive a tax credit for doing so.¹²⁷ According to the article, the vacant list is the result of changes to the charity registration rules made in 2012, as a result of which foreign charities must apply to the CRA to be registered as qualified foreign charity, and must either be involved in disaster relief, humanitarian aid, or "activities in the national interest of Canada."¹²⁸

b. Cases

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians' access to and use of nonprofit and voluntary organizations.

C. Analytical Comparison

It is difficult to compare Canadian for-profit and not-for-profit laws with respect to the financial transactions topic. On the one hand, for-profit corporations, but not not-for-profits, are subject to the Investment Canada Act and securities exchange laws. On the other hand, as noted above there are few, or no, foreign charities on the Canada Revenue Agency's list of approved charities. The research for this report, however, did not uncover any limitations on the amount of money that registered Canadian charities can receive from non-Canadian sources, so long as no criminal aspect, such as money laundering, is involved.

V. Auditing/Reporting Requirements

A. For-Profit Organizations

a. Laws

Every corporation subject to the Canada Business Corporations Act must file an annual return with Corporations Canada every year.¹²⁹ An annual return must be filed if the corporation's legal status with Corporations Canada is "active" (that is not dissolved, discontinued or amalgamated with another corporation).¹³⁰ The status of the corporation can be found on the Corporations Canada online database.¹³¹ The Annual Return can be filed either online (\$20) or by mail (\$40).¹³²

¹²⁵ <http://www.cra-arc.gc.ca/chrts-gvng/chrts/whtsnw/trrst-ntty-eng.html>; see also CRA Website, "Charities in the International Context."

¹²⁶ <http://www.fintrac-canafe.gc.ca/publications/guide/Guide1/1-eng.asp>.

¹²⁷ Jeff Gray, The Globe and Mail, "Canada Revenue Agency Delists Foreign Charities," August 18, 2014, Online: www.theglobeandmail.com/report/canada-revenue-agency-delists-foreign-charities/article.

¹²⁸ *Id.*

¹²⁹ Industry Canada, ""Business Corporations."

¹³⁰ *Id.*

¹³¹ *Id.*

The information provided on the annual return helps keep the Corporations Canada's database of federal business corporations up to date.¹³³ The information, which is available to the public through the website, lets investors, consumers, financial institutions and many others make informed decisions about the corporation.¹³⁴ Big or small, every corporation is legally obligated to file.¹³⁵

The CBCA also requires all corporations, both large and small, hold at least one annual meeting of members every calendar year and not more than 15 months after its previous annual meeting.¹³⁶ The directors may also call special general meetings of members. While any topic affecting the corporation can be discussed, the annual meeting must at least address the following: •presentation of the financial statements; •consideration of the auditor's report; •appointment of the auditor; and •election of directors, if applicable.¹³⁷

Each corporation is required to prepare annual financial statements for examination by the auditor.¹³⁸ These statements will be presented to the members at the annual meeting along with the report of the auditor.¹³⁹ All corporations are required to have an auditor.¹⁴⁰ The auditor must be appointed by the members at each annual meeting.¹⁴¹ Unless all of the members agree otherwise, the auditor must be independent of the corporation and therefore cannot be a director, an officer or an employee of the corporation or any of its affiliates.¹⁴²

The auditor is required to make an examination of the accounting records and the financial statements.¹⁴³ The auditor must report to the members on the examination at the annual meeting.¹⁴⁴ The auditor must state whether the financial statements fairly present the financial position of the corporation and the results of its operations during the past year.¹⁴⁵

If an annual return is not filed on time, the status of the corporation's annual filings in the online database of federal corporations will be displayed as "overdue" and the corporation will not be able to obtain a Certificate of Compliance.¹⁴⁶ The corporation may be dissolved if it fails to file its annual returns.¹⁴⁷ The name of the corporation to be dissolved will be published in the Corporations Canada Monthly Transactions.¹⁴⁸

b. Cases

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Corporations Canada, "General Overview of the Canada Corporations Act Part II."

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Industry Canada, "'Business Corporations.'"

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians' access to and use of nonprofit and voluntary organizations.

B. Not-For-Profit Organizations

a. Laws. The CRA Website states that the CRA is responsible for monitoring the operations of registered charities within Canada to make sure they comply with the requirements of the Income Tax Act.¹⁴⁹ Audits are an important element of this process.¹⁵⁰ The Act requires that registered charities devote all of their resources, including financial, human, and physical resources, to charitable purposes.¹⁵¹ To verify how a charity uses its resources, the CRA looks at the information in a charity's annual returns, financial statements, and other documents.¹⁵² The CRA Website states that the administrative procedures it follows is directed to ensuring that it treats all charities fairly, impartially and consistently throughout the audit process.¹⁵³

The CRA Website states that, aside from the most serious cases of non-compliance, the CRA takes an education-first approach to compliance.¹⁵⁴ This provides charities with the opportunity to correct their actions through education or compliance agreements before the CRA resorts to other measures such as sanctions or revocation.¹⁵⁵

The CRA Website states that the following are some of the reasons a charity is selected for audit: •random selection; •to review specific legal obligations under the Act; to follow-up on possible non-compliance or complaints; and •to confirm that assets have been distributed after revocation.¹⁵⁶

According to the website, occasionally the CRA will make an on-site visit to gather information to help it understand the purposes and activities of an organization that has applied for registered charity status.¹⁵⁷ This is referred to as a pre-registration audit.¹⁵⁸

When the CRA conducts an audit of a registered charity, it does not necessarily limit the process to examining a charity's financial affairs.¹⁵⁹ Usually, in addition to reviewing its finances, the CRA also reviews any evidence that might indicate whether or not the charity is satisfying its legal obligations under the Act and is operating for charitable purposes.¹⁶⁰

There are two primary types of audit: the field audit, which is conducted on the charity's premises, and the office audit, conducted at the CRA's offices. The size and complexity of a charity's operation will often dictate the type of audit required.¹⁶¹ The audit process usually includes examining the charity's ledgers, journals, bank accounts, expense accounts, investments, agreements, contracts,

¹⁴⁹ CRA Website, "Registered Charities."

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

governing documents, annual reports, minutes or other records of board and staff meetings, and other documents that relate to the charity's activities.¹⁶²

Generally, before finalizing the audit report, the field auditors will review and discuss their preliminary findings with one or more of the charity's representatives¹⁶³. This review ensures that the auditors have received all the information they need to consider when they evaluate the audit.¹⁶⁴ When the audit is completed, a letter is sent to the charity outlining the results of the audit. •If the charity's operations and activities appear to comply with the Act, the CRA will confirm that there will be no change to the charity's registered status. In cases where the audit has raised concerns, the letter will notify the charity of the CRA's specific concerns.¹⁶⁵

As mentioned previously, a significant controversy recently erupted in Canada regarding the CRA's audits of certain registered charities. Allegations have appeared in newspaper articles and editorials and in published reports that the present CRA targeted certain charities, specifically those that spoke out against the current Conservative federal government. A particular focus has been on whether the charities have engaged in partisan political activity, defined as "direct or indirect support of, or opposition to, any political party or candidate for public office," which is not permitted.¹⁶⁶ Salient aspects of this controversy include:

- The Canadian federal government, in its 2012 budget, set aside a special allocation of \$13.4 million to audit political activities of Canada's charities¹⁶⁷
- Since then, the CRA has undertaken audits of more than 50 charities for the purpose of investigating whether those organizations have exceeded their allowable limits for political activities, with more audits expected.¹⁶⁸
- The CRA has audited groups such as Amnesty International Canada, Pen Canada, the Canadian Centre on Policy Alternatives; many environmental charities, including the David Suzuki Foundation, Tides Canada, West Coast Environmental Law, the Pembina Foundation, and others; and Dying with Dignity Canada (whose charitable tax status was revoked).¹⁶⁹

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ CRA Website, "Political Activity: Policy Statement, Reference Number CPS-022," September 2, 2003.

¹⁶⁷ Postmedia News, "Budget 2012: Planned Cut by Department" (March 29, 2012), Online:

<http://news.nationalpost.com,2012/03/29> budget-2012-planned-cuts-by-department; see also Carol Linnitt, DeSmog Canada "13.4 million allocated to carry audit of Canadian charities beyond 2017, documents show" (Feb. 18, 2014), Online: <http://www.desmog.ca/2014/02/16/13-4m-allocated-carry-audit-canadian-charities-beyond-2017-documents-show>.

¹⁶⁸ Environmental Law Centre, University of Victoria, *Tax Audits of Environmental Groups: The Pressing Need for Law Reform*, March 2015, Online: uvic.ca/press/document/Tax-audits-of-Environmental-Groups, (hereinafter "Tax Audits of Environmental Groups Report"); Broadbent Institute, *Stephen Harper's CRA: Selective Audits, 'Political' Activity, and Right-Leaning Charities*, at footnote 14 (hereinafter "Broadbent Institute Report"); The Canadian Press, "Foreign-Aid charities join forces to challenge Revenue Canada audits, rules," August 11, 2014, Online: www.cbc.ca/news/politics/foreign-aid-charities-join-forces-to-challenge-revenue-canada.

¹⁶⁹ Tax Audits of Environmental Groups Report at page 3; The Canadian Press, "Dying with Dignity Canada Stripped of Charitable Tax Status," www.ctvnews.ca/Canada/after-cra-audit-dying-with-dignity-group-stripped-of-charitable-status.

- Many of the groups which have been audited have asserted that audits are selective and politically motivated.¹⁷⁰
- Many newspaper articles and editorials, academics, and reports have accused the CRA of using audits to silence opposing political views.¹⁷¹
- A one-page summary from one of the CRA audits, obtained under Canada’s Access to Information Act, indicates that a charity was targeted for audit because its “research/educational materials may be biased/one-sided.”¹⁷²
- The CRA and the Conservative Government have denied accusations that the audits were politically motivated.¹⁷³
- The CRA Website contains detailed explanations of the laws that govern political activities.¹⁷⁴
- Many of the audited groups have stated that the audits have imposed substantial burdens on them and have led to an “advocacy chill.”¹⁷⁵

Additional filing requirements are imposed in some circumstances under some statutes, most notably for soliciting corporations under the Canada Not-for-profit Corporations Act (CNCA).¹⁷⁶ A soliciting corporation is a CNCA corporation that has received more than \$10,000 in income from public sources in a single financial year.¹⁷⁷ A soliciting corporations must subject their financial statements to increasing level of review (ranging from no review to full audit) as they bring in more revenues corporations must file their financials with Corporations Canada.¹⁷⁸ NFPs may also have other filing or reporting obligations where they receive government funding. Such requirements would be governed by the applicable funding agreements.

b. Cases.

¹⁷⁰ The Canadian Press, “Foreign-Aid charities join forces to challenge Revenue Canada audits, rules,” August 11, 2014, Online: www.cbc.ca/news/politics/foreign-aid-charities-join-forces-to-challenge-revenue-canada; “Charities under audit fire band together for answers from Canada Revenue Agency: Editorial,” August 11, 2014, Online: www.thestar.com/opinion/editorials/2014/08/11/charities-under-audit-fire-and-together-for-answers-from-canada-revenue-agency.

¹⁷¹ See Tax Audits of Environmental Groups Report generally and at footnote 3 and accompanying text; DeSmog Canada, “Canada’s Charitable Law Urgently Needs Reforming,” March 25, 2015, Online: www.Huffingtonpost.ca; Broadbent Report; The Canadian Press, “More than 400 academics demand CRA cancel ‘politically motivated’ audit of left-leaning think-tank,” September 14, 2014, Online: news.nationalpost.com/2014/09/14/its-an-environment-that-has-been-rather-stifling-when-it-comes-to-intellectual-work.

¹⁷² The Canadian Press, “‘Bias’ concerns led tax agency to target left-leaning think-tank,” September 2, 2014, Online: www.cbc.ca/news/politics/bias-concerns-led-tax-agency-to-target-left-leaning-think-tank.

¹⁷³ See www.canadiantaxlitigation.com/author/abozzelli, blog titled “Foreign Charities and the Changing Landscape of CRA Charity Audits, posted on October 22, 2014, collecting several statements issued by CRA denying allegations of politically motivated audits; CBC News, “CRA charity audits: Committee has ‘no plans’ to look into alleged interference,” August 18, 2014, Online: www.cbc.ca/news/politics/cra-charity-audits-committee-has-no-plans-to-look-into-alleged-interference.

¹⁷⁴ CRA Website, “Charities Program Update 2014”; CRA Website, “Political Activities.”

¹⁷⁵ The Canadian Press, “Foreign-Aid charities join forces to challenge Revenue Canada audits, rules,” August 11, 2014, Online: www.cbc.ca/news/politics/foreign-aid-charities-join-forces-to-challenge-revenue-canada; The Canadian Press, “‘Bias’ concerns led tax agency to target left-leaning think-tank,” September 2, 2014, Online: www.cbc.ca/news/politics/bias-concerns-led-tax-agency-to-target-left-leaning-think-tank; Tax Audits of Environmental Groups Report.

¹⁷⁶ Industry Canada Website, “Corporations Canada,” “Requirements for Soliciting Corporations Under the Canada Not-for-Profit Act.”

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

See discussion of cases in Part III (B)(b), i.e., Tax Laws, Not-for-Profit Organizations, Cases.

C. Analytical Comparison.

The CRA's audit process for not-for-profits as to the purposes of the organizations appears generally more extensive than that for for-profit corporations. This more pronounced general focus is understandable, given the different nature and rationale of for-profits and not-for-profits. A more difficult question arises, however, with respect to the specific issue of selective audits of not-for-profits, particularly charities. The authors of this report, of course, cannot presume to resolve the controversy noted above on this topic. They can, however, observe that the issue is highly relevant to the reasons for this report, i.e., the freedom allowed nonprofits and voluntary organizations to form and operate without government interference; that allegations of selective audits are not isolated, but fairly widespread, and have continued for several years; that several substantially supported reports have been published alleging selective audits; that the Canadian Government has denied that the audits were politically motivated or otherwise improper; that the Canadian Revenue Agency has addressed the issue extensively on its website and elsewhere; and that the issue seems yet unresolved.

VI. Penalties for Non-Compliance

A. For-Profit Organizations

a. Laws.

As previously noted, under the CBCA and provincial business corporations statutes, private companies are required to audit their financial statements each year unless the shareholders unanimously consent otherwise.

As to publicly traded companies, the ten provinces and three territories are responsible for securities regulations.¹⁷⁹ Securities regulators from each province and territory have teamed up to form the Canadian Securities Administrators, or CSA for short.¹⁸⁰ The CSA is primarily responsible for developing a harmonized approach to securities regulation across the country.¹⁸¹ In recent years, the CSA has developed the "passport system" through which a market participant has access to markets in all passport jurisdictions by dealing only with its principal regulator and complying with one set of harmonized laws.¹⁸² As the CSA website notes, cease trade orders ("CTOs") are decisions issued by provincial or territorial securities regulatory authorities or similar regulatory bodies against a company or an individual.¹⁸³ CTOs are issued for reasons such as failing to meet disclosure requirements or as a result of an enforcement action that involves an investigation of potential wrongdoing. There are two categories of Orders: Orders that ban trading in securities of a reporting issuer or a non-reporting issuer, regardless of whether the Order resulted from a continuous disclosure default, an enforcement action or other; and Orders that ban trading by certain individuals and/or companies, regardless of whether the Order resulted from a continuous disclosure default of the issuer (such as a management cease trade order), an enforcement action or other.¹⁸⁴

b. Cases

¹⁷⁹ Canadian Securities Administrators Website, securities-administrators-ca.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians' access to and use of nonprofit and voluntary organizations.

B. Not-For-Profit Organizations

a. Laws. The CRA can use the following tools, ranked in order of their potential severity, to obtain compliance: education letters, compliance agreements, sanctions, or the revocation of a charity's registration.¹⁸⁵ The facts of a particular case will determine which compliance measure will be adopted.¹⁸⁶

Education letters. An education letter does not adversely affect a charity's registration. The letter identifies where the charity has not complied with the Act or CRA policy. The letter provides guidance to the charity so that it can take the required steps to become fully compliant.¹⁸⁷

Compliance agreements. In more serious cases of non-compliance, the CRA may enter into a compliance agreement to correct the situation. The agreement outlines the non-compliance issues and the remedial actions that the charity has agreed to undertake, sets out the timelines for the necessary changes, and outlines the consequences if the charity fails to abide by the agreement. Representatives of both the charity and the CRA sign the agreement. A compliance agreement may be proposed in situations where a charity was unaware of the legal requirements or thought it was meeting the requirement, but made an error in the calculation or interpretation of the law.¹⁸⁸

Sanctions. In more serious cases of non-compliance, sanctions may be imposed. Sanctions include a temporary suspension of a charity's tax receipting privileges and its status as a qualified donee or financial penalties. A financial penalty is first proposed and the charity is given an opportunity to address our concerns if it feels that a penalty should not be applied. If the CRA does not hear from the charity or do not accept its representations, it will notify the charity with a Notice of Assessment that a penalty has been imposed.¹⁸⁹

Revocation of registration. Where the CRA finds a serious case of non-compliance with the Act, it will revoke the charity's registered status. This includes cases where one or more of the following factors are present: •The organization had a previous record of serious non-compliance, and the current form of non-compliance is both serious and intentional; The non-compliance has had a substantial, adverse effect on others (beneficiaries, donors, or funders), particularly where the organization cannot or will not remedy the harm done; and •The organization cannot or will not bring itself into compliance.

The Charities Directorate of the CRA may revoke the registration of any registered charity that fails to comply with the requirements of the Income Tax Act. [ITA, s 168(1).] Where the Minister revokes the registration of a charity, the charity becomes liable for a revocation tax equivalent to the fair market value of all its property, minus amounts expended during a one-year 'winding-up period' on charitable activities and gifts to arms'-length charities. [ITA, s 188(1), (1.1), (1.2), (1.3).] At the end of the one-year period, the charity must pay to the federal Receiver General the remainder of the revocation tax (minus amounts expended to other charities). [ITA, s 189(6.1)(c).]¹⁹⁰

¹⁸⁵ CRA Website, "How We Promote Compliance."

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Tax Audits Of Environmental Groups Report at footnote 5.

b. Cases.

Research has not uncovered cases relevant to the core issues of this report, i.e., governmental efforts to restrict for political or other improper purposes Canadians’ access to and use of nonprofit and voluntary organizations.

C. Analytical Comparison

The penalties on a for-profit corporation for failing to comply with filing or annual report requirements can be severe, in that the corporation could lose the primary purpose of incorporation, i.e., separate legal status and limited liability. The penalties on a not-for-profit for noncompliance, if they lead to revocation of charitable status, are different in nature, but also severe, in that the not-for-profit would lose its tax benefits and, as noted above, may be liable for a revocation tax.

OVERVIEW CHART

Issue	For-Profit Organizations	Not-For Profit Organizations	Similarities / Differences
Registration Procedures	Choose name; file articles of incorporation that generally do not entail detailed description of corporate purposes; pay fees	Choose name; file articles of incorporation that describe in detail charitable or nonprofit purposes; pay fees	More similar than different; major difference is that not-for-profits must describe their charitable or nonprofit purposes in greater detail
Tax Laws	Both federal and provincial taxes imposed; Canadian residents subject to tax on worldwide income; substantial reductions in tax rates for small businesses	Both federal and provincial tax laws apply, but provincial laws less important; two tax benefits for NFP status: tax exemption for the NFP and tax deductions for donors; tax exemption organizations get the first; registered charities get both; controversy has arisen regarding political activity limitation imposed on charities	Very different tax treatment; NFPs can receive tax exemptions and tax benefits to donors (charities only) but must meet strict standards; political activities of charities highly limited; numerous allegations have been made in reports and newspaper articles of selective enforcement of political activities limitation
Financial Transaction Laws	Foreign ownership subject to Investment Canada Act; securities exchange regulations apply	Not subject to Investment Canada Act or securities regulations, but subject (as are for-profits) to anti-terrorism and money laundering laws	Different treatment, but differences do not seem to translate directly into limitations on Canadians’ access to and use of NFPs

Auditing/Reporting Requirements	For-profits must comply with filing requirements and annual reports	NFPs must comply with filing requirements and annual reports; annual reports much more extensive than for for-profits	Different treatment; greater scrutiny of NFPs, especially charities; allegations of selective audits of charities who oppose Conservative government
Penalties	Failure to comply with annual reports requirement can result in loss of status as a corporation	CRA uses education letters, compliance agreements, sanctions and revocation to enforce compliance	Different treatment; revocation of charitable status can result in not only loss of tax benefits but revocation tax