Canada Revenue Agency | Agence du revenu du Canada

REGISTERED MAIL

The Malvern Rouge Valley Youth Services
1275 Unit 5 Morningside Ave
Scarborough ON M1B 3W1

BN: 852234129

Attention: Mr. Jerome Sylvan

File #: 3033163

November 14, 2011

Subject: **Revocation of Registration**
The Malvern Rouge Valley Youth Services

Dear Sir:

The purpose of this letter is to inform you that a notice revoking the registration of The Malvern Rouge Valley Youth Services (the Organization) was published in the *Canada Gazette* on November 12, 2011. Effective on that date, the Organization ceased to be a registered charity.

Consequences of Revocation:

a) The Organization is no longer exempt from Part I Tax as a registered charity and **is no longer permitted to issue official donation receipts.** This means that gifts made to the Organization are no longer allowable as tax credits to individual donors or as allowable deductions to corporate donors under subsection 118.1(3), or paragraph 110.1(1)(a), of the *Income Tax Act*, respectively.

b) By virtue of section 188 of the Act, the Organization will be required to pay a tax within one year from the date of the Notice of Intention to Revoke. This revocation tax is calculated on prescribed formT-2046, *Tax Return Where Registration of a Charity is Revoked* (the Return). The Return must be filed, and the tax paid, on or before the day that is one year from the date of the Notice of Intention to Revoke. A copy of the Return is enclosed. The related Guide RC-4424, *Completing the Tax Return Where Registration of a Charity is Revoked*, is available on our website at www.cra-arc.gc.ca/E/pub/tg/rc4424.

Section 188(2) of the Act stipulates that a person (other than a qualified donee) who receives an amount from the Organization is jointly and severally liable with the Organization for the tax payable under section 188 of the Act by the Organization.

c) The Organization no longer qualifies as a charity for purposes of subsection 123(1) of the *Excise Tax Act* (ETA). As a result, the Organization may be subject to obligations and entitlements under the ETA that apply to organizations other than charities. If you have any questions about your GST/HST obligations and entitlements, please call GST/HST Rulings at 1-888-830-7747 (Quebec) or 1-800-959-8287 (rest of Canada).

In accordance with *Income Tax Regulation* 5800, the Organization is required to retain its books and records, including duplicate official donation receipts, for a minimum of two years after the Organization's effective date of revocation.

Finally, we wish to advise that subsection 150(1) of the Act requires that every corporation (other than a corporation that was a registered charity throughout the year) file a *Return of Income* with the Minister of National Revenue (the Minister) in the prescribed form, containing prescribed information, for each taxation year. The *Return of Income* must be filed without notice or demand.

If you have any questions or require further information or clarification, please do not hesitate to contact the undersigned at the numbers indicated below.

Yours sincerely,

DHCranford

Danie Huppé-Cranford
Director
Compliance Division
Charities Directorate
Telephone: 613-957-8682
Toll free: 1-800-267-2384

SEP 29 2011

REGISTERED MAIL

The Malvern Rouge Valley Youth Services
1275 Unit 5 Morningside Ave
Scarborough, ON M1B 3W1

BN: 85223 4129 RR0001
File #:3033163

Attention: Mr. Jerome Sylvan

Subject: Notice of Intention to Revoke
Malvern Rouge Valley Youth Services

Dear Mr Sylvan:

I am writing further to our letter dated November 30, 2010 (copy enclosed), in which you were invited to submit representations, within 30 days, as to why the registration of Malvern Rouge Valley Youth Services (the Organization) should not be revoked in accordance with subsection 168(1) of the *Income Tax Act*.

We subsequently received a letter dated December 14, 2010, from Evelyn R. Schusheim indicating the Organization had retained Ms. Schusheim as its legal representative. The letter also requested an additional 30 days to reply to our letter of November 30, 2010. We informed the Organization on December 16, 2010 that it must formally give consent to the Canada Revenue Agency (CRA) for us to discuss issues pertaining to the Organization with Ms. Schusheim. A Business Consent Form (RC59E10) was finally received on February 11, 2011. However, the Organization failed to submit its representations in response to our letter of November 30, 2010 before the extended deadline.

Conclusion:

Our audit revealed that the Organization had devoted a significant portion of its resources to the promotion of the Global Learning Gifting Initiative tax shelter gifting arrangement. Our audit indicated that, for the period from May 1, 2008 to April 30, 2009, the Organization had received in excess of $17 million of cash. Of this amount, over $8.3 million was received as tax-receipted donations from the participants of the tax shelter. The Organization received a further $8.7 million from another registered charity participating in the tax shelter. Our audit showed that of the approximately $17 million of cash received, the Organization paid over $14 million to the promoters of the tax shelter.

Our audit also revealed that the Organization issued tax receipts in excess of $103 million for courseware purportedly donated by the participants of the tax shelter. It is our position that the amounts on the tax receipts for the courseware were grossly inflated, as the Organization failed to ensure these receipts were issued at their fair market values as required under Regulation 3501(1)(h)(ii) of the Act.

It is our position that the Organization has operated for the non-charitable purpose of promoting a tax shelter arrangement and for the private benefit of the tax shelter promoters. The Organization has issued receipts for transactions that do not qualify as gifts; issued receipts otherwise than in accordance with the *Income Tax Act* and its Regulations; failed to file an accurate T3010 Information Return; and, acted in concert with another registered charity to unduly delay its obligation to meet its disbursement quota. Our audit findings were explained in detail in our letter of November 30, 2010, to which you failed to respond by January 31, 2011 and have yet to respond. For all of these reasons, and for each of these reasons alone, it is the position of the Canada Revenue Agency (CRA) that the Organization's registration should be revoked.

Consequently, for each of the reasons mentioned in our letter dated November 30, 2010, I wish to advise you that, pursuant to subsection 168(1) of the Act, I propose to revoke the registration of the Organization. By virtue of subsection 168(2) of the Act, revocation will be effective on the date of publication of the following notice in the *Canada Gazette*:

> *Notice is hereby given, pursuant to paragraphs 168(1)(b), 168(1)(d) and 168(1)(e) of the* Income Tax Act, *that I propose to revoke the registration of the organization listed below and that the revocation of registration is effective on the date of publication of this notice.*

Business Number	**Name**
852234129RR0001	The Malvern Rouge Valley Youth Services 1275 Unit 5 Morningside Ave Scarborough ON M1B 3W1

Should you wish to object to this notice of intention to revoke the Organization's registration in accordance with subsection 168(4) of the Act, a written Notice of Objection, which includes the reasons for objection and all relevant facts, must be filed within **90 days** from the day this letter was mailed. The Notice of Objection should be sent to:

Tax and Charities Appeals Directorate
Appeals Branch
Canada Revenue Agency
250 Albert Street
Ottawa ON K1A 0L5

A copy of the revocation notice, described above, will be published in the *Canada Gazette* after the expiration of 30 days from the date this letter was mailed. The Organization's registration will be revoked on the date of publication, unless the CRA receives an order, **within the next 30 days**, from the Federal Court of Appeal issued under paragraph 168(2)(b) of the Act extending that period.

Please note that the Organization must obtain a stay to suspend the revocation process, notwithstanding the fact that it may have filed a Notice of Objection.

<u>Consequences of Revocation</u>

As of the effective date of revocation:

a) the Organization will no longer be exempt from Part I Tax as a registered charity and **will no longer be permitted to issue official donation receipts.** This means that gifts made to the Organization would not be allowable as tax credits to individual donors or as allowable deductions to corporate donors under subsection 118.1(3), or paragraph 110.1(1)(a), of the Act, respectively;

b) by virtue of section 188 of the Act, the Organization will be required to pay a tax within one year from the date of the Notice of Intention to Revoke. This revocation tax is calculated on prescribed form T-2046 *Tax Return Where Registration of a Charity is Revoked* (the Return). The Return must be filed, and the tax paid, on or before the day that is one year from the date of the Notice of Intention to Revoke. A copy of the relevant provisions of the Act concerning revocation of registration, the tax applicable to revoked charities, and appeals against revocation, can be found in Appendix "A" attached. Form T-2046, and the related Guide RC-4424, *Completing the Tax Return Where Registration of a Charity is Revoked*, are available on our website at <u>www.cra-arc.gc.ca/charities</u>;

c) the Organization will no longer qualify as a charity for purposes of subsection 123(1) of the *Excise Tax Act* (ETA). As a result, the Organization may be subject to obligations and entitlements under the ETA that apply to organizations other than charities. If you have any questions about your GST/HST obligations and entitlements, please call GST/HST Rulings at 1-800-959-8287 (rest of Canada).

Finally, I wish to advise that subsection 150(1) of the Act requires that every corporation (other than a corporation that was a registered charity throughout the year) file a *Return of Income* with the Minister in the prescribed form, containing prescribed information, for each taxation year. The *Return of Income* must be filed without notice or demand.

Yours sincerely,

Cathy Hawara
Director General
Charities Directorate

Attachments:
- CRA letter dated November 30, 2010
- Appendix A

c.c.: Evelyn R. Schusheim

CANADA REVENUE AGENCY AGENCE DU REVENU DU CANADA

REGISTERED MAIL

The Malvern Rouge Valley Youth Services
1275 Unit 5 Morningside Ave
Scarborough, ON M1B 3W1

BN: 85223 4129 RR0001

Attention: Mr. Jerome Sylvan

File #: 3033163

November 30, 2010

Subject: **Audit of Malvern Rouge Valley Youth Services For the fiscal year ended April 30, 2009**

Dear Mr. Sylvan:

This letter is further to the audit of the books and records of the Malvern Rouge Valley Youth Services (the Organization) conducted by the Canada Revenue Agency (the CRA). The audit related to the operations of the registered charity for the period from May 1, 2008 to April 30, 2009.

The CRA has identified specific areas of non-compliance with the provisions of the *Income Tax Act* and/or its *Regulations* in the following areas::

AREAS OF NON-COMPLIANCE:		
	Issue	**Act Reference**
1.	Failure to devote all resources to charitable activities	149.1(1)
2.	Issuing Tax Receipts not in accordance with the Act	118.1(2), Regulation 3501(1)(h)
3.	Failure to File An Accurate Information Return	149.1(14)
4.	Acting in Concert	149.1(4.1)(b)

The purpose of this letter is to describe the areas of non-compliance identified by the CRA during the course of the audit as they relate to the legislative and common law requirements applicable to registered charities, and to provide the Organization with the opportunity to make additional representations or present additional information. Registered charities must comply with the law, failing which the Organization's registered status may be revoked in the manner described in section 168 of the Act.

The balance of this letter describes the identified areas of non-compliance in further detail.

Identified Areas of Non-Compliance:

1. Failure to devote all resources to charitable activities

The Organization is registered as a charitable organization. Pursuant to subsection 149.1(1) of the Act, a "charitable organization" is defined as an organization.... "All the resources of which are devoted to charitable activities carried on by the organization itself".

To qualify for registration as a charity under the Act, a charitable organization must be established for charitable purposes that oblige it to devote all its resources to its own charitable activities. This is a two-part test. First, the purposes it pursues must be wholly charitable and second, the activities that it undertakes on a day-to-day basis must support its charitable purposes in a manner consistent with charitable law. Charitable purposes are not defined in the Act and it is therefore necessary to refer, in this respect, to the principles of the common law governing charity. An organization that has one or more non-charitable purposes or devotes resources to activities undertaken in support of non-charitable purposes cannot be registered as a charity.

Once registered, a charity must only pursue activities in furtherance of the specific charitable purposes as approved by CRA. The implicit understanding is that the charity will not undertake any activity beyond those described in the application for charitable registration. This is necessary to ensure that the charity will operate within the limitations imposed by the Act.

Operating Ultra Vires

As above, registered charities are required to pursue activities in furtherance of the purposes for which they are established. There is some concern that the Organization is operating outside of its corporate mandate. As per the Organization's constitution and bylaws, it was founded to pursue the following charitable objectives and activities[1]:

- To educate youth by providing leadership training programs.
- To provide mentoring programs, workshops and seminars for parents, children and youth, addressing issues including parenting skills, anger management, conflict resolution and effective communication methods.
- To provide underpriviledged and at-risk children and youth with educational, cultural and recreational activities in a supervised, safe, caring, positive environment, and encouraging youth to participate in supervisory and administrative capacities.

The Organization also indicated its mission as follows:

[1] These are the "Aims & Objectives" outlined in the Organization's Constitution and Bylaws filed with the CRA

"Aid youth in the rediscovery of their true potential by mentorship, community involvement physical activity and social consciousness. Teaching youth that they are valuable citizens and that they can achieve more through the aid of their parents, educators and community leaders, all they need is to ask."[2]

Our audit showed that, prior to the 2009 fiscal year, the Organization's activities consist of various youth-oriented programs such as after-school reading, summer camps, music lessons, that were consistent with its charitable objectives. It appears that after entering into the Global Learning Gifting Initiative (GLGI) gifting arrangement tax shelter (Donation Program), the Organization allocated the majority of its resources to activities that did not fall within its charitable mandate. The activities being conducted appear to be driven by the need to facilitate the property being offered by participants in the Donation Program rather than with a view to the Organization's own charitable mandate.

The Organization began its participation in the Donation Program in the 2009 fiscal year. Consequently, the focus of the Organization's activities has shifted towards the promotion and facilitation of the Donation Program.

A detailed overview of the Donation Program is provided in the enclosed Appendix A. The basic premise of the Donation Program is that a participant would make a cash donation to a designated charity and concurrently receive educational courseware purportedly worth three to seven times of the initial cash outlay. The participant would then, through means pre-arranged by the Promoter, donate the courseware to the Organization. The tax receipts for the cash and the in-kind gifts of the courseware would enable the participant to generate a positive return on the initial cash payment of 56% to 112% through the combined federal and provincial donation tax credits. The Organization played a critical role in this arrangement by accepting the educational courseware from the participants and issuing tax-receipts. As will be explained later, the Organization also facilitated the routing of over 80% of the tax-receipted cash to the Promoter of the gifting arrangement.

In its first year of participation, the Organization issued total tax receipts of $111,297,910. Prior to its involvement in the Donation Program, the Organization issued total tax receipts of $2,630 and $7,147 respectively in the fiscal years of 2007 and 2008.

The Organization has also undertaken a series of new activities to distribute the educational courseware received through the Donation Program. Prior to the 2009 fiscal year, the Organization used a director's residence as its site of operations. As a result of the Organization's influx of courseware, and the need to be capable of using it, the Organization rented a new facility to be used as a computer centre; hired a contractor to establish the computer centre at the new facility; hired full-time staff to provide technical support and instruction for the users; paid to the courseware developer to maintain an internet portal as the access point for the courseware. In total, the Organization incurred costs exceeding $1 million to facilitate the delivery of the educational courseware. To put these expenses in perspective, the Organization's total expenses for the previous fiscal period were $14,630.

[2] This is the "Mission" as per Appendix A attached to the Organization's "Application to Register a Charity Under the Income Tax Act" as received by CRA on June 1, 2006

The Organization's total reported expenses for the 2009 fiscal year was $74,302,109. By our calculation, the expenses related to the Donation Program totaled $73,863,394 (see Appendix B). As such, we conclude that the activities associated with the Donation Program have become the primary focus of the Organization.

It is our view that the Organization is operating outside of its charitable mandate by pursuing the activities of administering the educational courseware. Our review of the courseware shows that it is a collection of computer tutorials on commonly-used office software applications, work-place communication and managerial skills. The courseware titles suggest that they are selected specifically for the career development or job training purposes of individuals who are currently employed or entering the workforce. As such, we fail to see how the courseware is related to the Organization's charitable purposes of assisting at-risk youths and addressing relationship issues between youths and their parents. Furthermore, the stated charitable purposes of the Organization indicated that at-risk youths were to be the target beneficiaries of the Organization's programs. However, our review of the courseware user's registration records indicates that the availability is open-ended rather than being restricted to the Organization's target beneficiaries. There is no indication from the registration forms that the Organization intends to evaluate, or has evaluated, the needs for the courseware of the users and how satisfying these needs would further its charitable purposes.

The Organization provided a written reply to CRA's audit questionnaire during our interview with Jerome Sylvan, the Organization's chairman, on September 21, 2009. Your written reply explained that the Donation Program advances the Organization's objectives by providing courseware training that enhances the youth's educational and academic capabilities and to provide job training. However, our review of the Organization's constitution, stated mission, and historical activities indicated that it was not established to provide job training. Furthermore, we note that the Organization's charitable purposes do not include promoting education in general. Rather, the stated mission and the constitution suggest that the Organization would utilize educational activity to help at-risk youths improve their self-knowledge, relationship with parents and other authority figures, and integrate into the community. We failed to see how learning about "Closing the Sale"[3] and "Financial Basics for Non-Financial Managers"[4] would further this purpose. Finally, Mr. Sylvan informed us that there are no more than 15 participants[5] in each of the youth-oriented programs that the Organization had been providing prior to its participation in the Donation Program. On the other hand, the Organization had registered over 6,000 users, many of which are adults, for the courseware by the end of the 2009 fiscal year. The contrast in the demographic of the courseware users and that of the Organization's other programs further indicated that the delivery of courseware was a departure from the Organization's charitable aims and objectives. For all of the above reasons, we disagree with the Organization's contention that the Donation Program advances the Organization's objectives.

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[3] One of the courseware titles received through the Donation Program.

[4] See Footnote 3.

[5] Mr. Sylvan counted 15 youths participating in the reading program, 7 or 8 in the miniatures program, and 10 in the guitar program.

By all accounts, the delivery of the courseware did not enhance the charitable purposes of the Organization. Although we acknowledge that the Organization undertook activities that were consistent with its charitable purposes, we note that the Organization had devoted the majority of its resources to courseware related activities. Therefore, it is our conclusion that the Organization had operated beyond its charitable mandate during the period under audit.

Collateral Non-Charitable Activities

Given our view that the delivery of the educational courseware is inconsistent with its charitable purposes, it is our view that the Organization is promoting and facilitating the Donation Program primarily, if not exclusively, to confer tax benefits on the participants. Operating for the purposes of conferring tax benefits is not a charitable purpose at law. It is therefore our conclusion that that the Organization had operated for a collateral non-charitable purpose by participating in the Donation Program.

As previously summarized, the Organization has committed the majority of its resources to facilitate the Donation Program and the subsequent delivery of the educational courseware. Aside from the financial impact, this new set of activities also represented a drastic change to the operation of the Organization, including the acquisition of a new facility and the hiring of new staff. Therefore, we found it disconcerting that the Organization apparently made no attempt to consider the potential impact on its original charitable programs prior to undertaking these activities. Of the Organization's board meeting minutes reviewed, we identified no discussion, prior to participating in the Donation Program, on whether these activities were consistent with the current charitable objectives or whether the Organization was pursuing an expanded set of charitable objectives. The CRA's records showed that the Organization did not inquire about the charitable nature of the activities associated with the courseware or request to amend its charitable objectives prior to undertaking the new set of activities.

The Organization has displayed a lack of due diligence in failing to consider the charitable nature of the activities related to the Donation Program and the subsequent delivery of the educational courseware. It is our position that the Organization was not seeking to further its current charitable objectives or pursuing any charitable purpose through its participation in the Donation Program. Rather, the Organization lent its tax-receipting privileges and tax-exempt status to accommodate the Donation Program in order to confer tax benefits on the participants. Therefore, we conclude the Organization failed to devote all its resources to its charitable activities as required by subsection 149.1(1) of the Act.

Operating as a Conduit

From the Organization's participation in the Donation Program, it is our view the Organization is primarily operating as a conduit for an identified tax shelter and is furthering the for-profit motives of the tax shelter and its Promoter. As per above, the Organization was not established nor operated for the delivery of educational coursewares until its participation in the Donation Program. It is our opinion that the collateral purpose, if not primary purpose of the Organization was, in fact, to support and promote the tax shelter arrangement. Operating for the purpose of promoting a tax shelter arrangement is not charitable at law.

As explained above, the Organization has not demonstrated that the Donation Program or the educational courseware advances its charitable purposes. Per our review of the documentation provided, and per our interview with the Organization's chairman, Jerome Sylvan, the Organization has not demonstrated how the terms of the agreements with the Promoter were negotiated nor how it valuated the courseware received; or how the courseware is used in its programs. Overall, our discussion with Mr. Sylvan reveal the Organization has merely relied upon the information provided by the Promoter without question and has not sought its own independent opinion or verification of the program presented to the Organization.

The actions and information provided by the Organization in the Donation Program lead us to believe that the Organization is merely operating as a conduit for a tax shelter and has agreed to participate in exchange for financial compensation. In the donation arrangement, the Organization agrees to accept the donations of cash and courseware from participants, including other participating charities, and agrees to purportedly utilize 100% of the courseware as part of its own programs while paying the Promoter a set fee.

The Organization does not appear to have conducted an independent review of the donation program to determine whether the program was compliant with the Act. The Organization, despite being asked to accept and distribute over $110 million in cash and in-kind property, did not seek to *independently* verify the programs the Organization entered into. One cannot rely upon a legal opinion provided to another party, as the underlying facts relied upon are unique to each party and therefore may not be specifically attributable to all parties relying upon the opinion. The Organization's failure to demonstrate its own due diligence points to a pattern of active willingness to participate in a scheme designed to produce inappropriate tax benefits.

Based on the Organization's income, the Organization is financially dependent on the Donation. For the year audited, the Organization has accepted cash and courseware contributions exceeding $110 million from participants and has accordingly retained over $2million in cash for its own programs.

It is our position by pursuing this non-charitable purpose, the Organization has failed to demonstrate it meets the test for continued registration under 149.1(1) as a charitable organization "<u>operated exclusively for charitable purposes</u>". For this reason, it appears there may be grounds for revocation of the Malvern Rouge Valley Youth Service's registered charity status under subsection 168(2) of the Act.

2. Issuing Tax Receipts Not In Accordance with the Act

It is our position that the Organization has contravened the *Income Tax Act* by accepting and issuing receipts for transactions that do not qualify as gifts. The Organization has issued tax receipts exceeding $8 million in cash and $103 million in courseware received as per its participation in the Donation Program. We have determined that the properties for which the tax receipts were issued were not gifts at law and the receipted values were grossly inflated.

Pursuant to subsection 118.1(2) of the Act, a registered charity can issue tax receipts for income tax purposes for donations that legally qualify as gifts. The Act requires the registered charity to ensure the information on its official donation receipts is accurate. The requirements for the content of the receipts are listed in Regulation 3501 of the Act. A registered charity could have its registered status revoked under paragraph 168(1)(d) of the Act for issuing tax receipts that contain false information.

It is of particular importance that the registered charity reports the correct value of the gift on the tax receipts. Given the potential uncertainty over their valuation, the Act stipulates that the "fair-market value" (FMV) of a gift of non-cash property to be reported on the tax receipts. The CRA recognizes the complexity of valuating non-cash property and recommends the use of an independent appraiser where a registered charity issues a tax receipt of significant value for gift-in-kind. We recognize that appraisals are not required under the Act or its Regulations; however, it is our view that the onus remains with the charity to ensure the value assigned to non-cash gifts received is reflective of the factual fair market value of the goods being received. For property with a value in excess of $1,000, we strongly recommend that the property be appraised by an independent third party[6]. The person determining the fair market value of the item should be competent and qualified to evaluate the particular property being donated, as well as be knowledgeable about the marketplace for the specific property. They should be knowledgeable about the principles, theories, and procedures of the applicable valuation discipline and follow the *Uniform Standards of Professional Appraisal Practice* or the standards of the profession.

Additionally, we would like to inform you that certain amendments to the Act were introduced as part of Bill C-33 tabled in Parliament on March 23, 2004, that came into force May 13, 2005. As part of the amendments, a registered charity that issues an official donation receipt that includes incorrect information is liable to a penalty equal to 5% of the eligible amount stated on the receipt. This penalty increases to 10% for a repeat infraction within 5 years.

A registered charity that issues an official donation receipt that includes false information is liable to a penalty equal to 125% of the eligible amount stated on the receipt, where the total does not exceed $25,000. Where the total exceeds $25,000, the charity is liable to a penalty equal to 125% and the suspension of tax-receipting privileges. We do not intend to apply this penalty given the serious nature of the matter of non-compliance.

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[6] An independent party is one who is not affiliated with the charity or the originator of the property.

Lack of Donative Intent

It is our position that the courseware received by the Organization under the Donation Program did not constitute a gift at law. A gift must be a gift at law in order for it to be a valid charitable gift under section 118.1 of the Act.

Justice Bowie stated in *Dwight Webb (Appellant) v. Her Majesty the Queen (Respondent), 2004 UDTC 148:*

> *"... in order for an amount to be a gift to charity, the amount must be paid* *<u>without benefit or consideration flowing back to the donor</u>, either directly or indirectly, or in anticipation of that. The intent of the donor must, in other words, be* *<u>entirely donative.</u>"* [Emphasis added]

In the case of *Her Majesty The Queen (Plaintiff) v. Dr. F. Bruce Bums (Defendant), 88 DTC 6101*, Justice Pinard of the Federal Court, Trial Division, discussed the concept of "*animus donandi*":

> *"I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as animus donandi or liberal intent...The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the donee without receiving any such compensation."*

It is our finding, based on the transactions outlined in Appendix A, that the primary motivation of the participants in the Donation Program was not to enrich the charities and assist in their fundraising, but rather, through a series of transactions, to make a profit from the tax credits so obtained.

In this case, the participant made a cash payment with the expectation that he would receive aggregate charitable donation receipts that would allow him to claim income tax credits greater than the cash payment. The cash payment was made with the expectation that:

- The participant would receive a charitable donation receipt for the value of the cash payment;
- The participant would receive "educational courseware" at no cost; and
- The participant would transfer the "educational courseware" to the Organization and receive a second charitable donation receipt for at least three times the value of the cash payment.

The series of transactions was pre-arranged with the result that the participant would claim a donation that was three to seven times the cost of participating in this gifting arrangement. It is our opinion that the participant participated in this gifting arrangement with full knowledge of this material benefit.

The promoter's website emphasized the tax advantages of the Donation Program. A simulator on the website demonstrated how a participant from Ontario could generate a tax refund of $31,415 by making a cash "donation" of $12,000. The simulator calculated a "rate of return" on the initial cash outlays. Participants may determine their "cash advantage" by inputting the actual cash donation they chose to make, which the simulator would convert at a 1 to 5 ratio into the "Gift In Kind Donation". We observed that cash advantages and rate of returns were similarly highlighted in the promotional materials of other years' versions of the Donation Program. Such promotional materials provided precise instructions on completing a package of documents and make cash payments to the charities involved. Minimal involvement was required of the participants. Transactions were pre-arranged and directed entirely by the Promoter and the Consultant.

These points, in our opinion, evidence the transactions are primarily motivated by the participant's intent to enrich himself rather than an intent to make a gift to charity. In our opinion, were we to accept these transactions occurred as represented, it would be our view that the participants were not making gifts but intending to profit from a combination of the tax credits and other benefits given to them. As such, it is our position there is no intention to make a "gift" within the meaning assigned at 118.1 of the Act and these transactions did not qualify for tax receipting purposes. For this reason, it appears to us that there may be grounds for revocation of the charitable status of Malvern Rouge Youth Valley Services under paragraph 168(1)(d) of the Act.

Benefit Received

We are also of the opinion that the participants received consideration for their "cash donation" in the form of a benefit or an advantage that was linked to and flowed from certain pre-arranged conditions. As we have previously outlined, a participant contributes a fee, guised as a donation, to [redacted] or the Organization under the Donation Program and suddenly becomes eligible for a distribution of courseware from the Trust. The cash amount contributed predetermines whether the participant will become a "beneficiary" of the Trust and, perhaps more importantly, the value of the courseware the participant is eligible to receive. This is clear both from the promotional materials and the audit evidence with respect to the pattern of transactions of the participants.

The participant received the benefit of becoming a beneficiary of the Trust and having "educational courseware" distributed to himself without cost. The participant's entitlement to receiving the "educational courseware" from the Trust was linked to the amount of cash payment. At the time of cash payment, the participant applied to become a beneficiary of the Trust to request a specific value of courseware to be distributed from the Trust equalling three to seven times the cash payment. Afterwards, the participant signed a Deed of Gift agreeing to donate the "educational courseware" to a designated charity (the Organization). It is our position that the "educational courseware" was to be distributed in consideration for:

1) the cash payment, and
2) the agreement to donate the property to the Organization

It is our view the representations with respect to the Donation Program are simply not credible. The CRA is asked to believe that despite the courseware being worth hundreds of millions of dollars, the Trust has settlers that have charitably agreed to distribute the courseware to the capital beneficiaries without compensation or with minimal compensation. The CRA is then told individuals "choose" to donate to the Organization and there is no link between their eligibility to receive property and their cash contributions – this is despite the fact that participants have little to no knowledge or connection to the Organization, the Organization has little history of operations, and there is a clear (and pre-advertised) correlation between how much participants give and how much they receive.

It is, for the reasons expressed above, our position that these transactions do not qualify as gifts the participants are fully aware that they will receive, and do receive, a benefit from making a cash contribution to a participating charity (i.e., the distribution of courseware from the trust) and that the cash contribution is in reality participation fees. Consequently, neither the transfer of "educational courseware", nor the cash payment is a valid gift per section 118.1 of the Act.

Fair Market Value

It is also our position that values reported on the tax receipts for the in-kind gift of courseware did not represent their factual fair market value. Under Regulation 3501(1)(h)(ii) of the Act, a registered charity must report the FMV of the property received on the tax receipts issued for gifts of property other than cash. The Organization issued tax receipts totalling $103,155,124 in the 2009 fiscal year for the donation of licenses or courseware received through the Donation Program.

Fair market value is not defined in the Act, therefore, we refer to the well-accepted definition of fair market value found in the decision of Cattanach J. in Henderson Estate & Bank of New York v M.N.R. 73 D.T.C. 5471 at 5476:

> *"...the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the set in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed in a general way includes what I conceive to be the essential element, which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers or the anvil of supply and demand. These definitions are equally applicable to "fair market value"..."*

As outlined by Rothstein, J.A. in *AG (Canada) v Tolley et al 2005 FCA 386*, in applying the Henderson definition of FMV, the first step is to accurately define the asset whose FMV is to be ascertained. Rothstein, J.A. discusses the relevance of donating a group of items versus an individual item and states that because the items were only acquired and donated in groups, the relevant asset was the group of items, and not the individual items in the group. Rothstein, J.A. continues by stating it is wrong to assume that the FMV of a group of items is necessarily the aggregate of the price that could be obtained for the individual items in the group.

It is our position the conclusion made by Rothstein, J.A. also applies to the donation of the licenses to use the educational courseware. Based on the quantities received by the participants and later donated to the Organization, the relevant asset is considered to be the entire group of licenses or courseware donated and not the individual license or courseware within the group.

The second step in applying the Henderson definition is to identify the market in which the merchandise was traded. Rothstein, J. A. identifies this group of items might not be sold in the same market as individual items, and highlights this distinction through a comparison of the wholesale versus retail markets. We note that the market for the courseware licenses at issue is limited solely to the Organization, as it was the sole recipient of the courseware licenses in the Donation Program in fiscal year 2009 and that there is no other comparable program or market. We are of the opinion the retail market is not the relevant market as the goods were acquired, sold and donated in blocks of goods and that the factual fair market value of the courseware licenses is the last known arm's length price paid for the goods.

The tax receipts for the courseware identified emc Partners as the appraiser for the Donation Program and listed the gifted property as "Computer Learning Program Licenses." In addition, Evans & Evans prepared a comprehensive valuation report dated December 15, 2008 valuating the licenses to use certain educational courseware titles at the time the courseware was gifted by the Contributor to the Trust for the period from November 19, 2004 to March 31, 2008. This valuation report was also commissioned by and prepared for the Promoter. Based on the CRA's review, both the emc Partners and Evans & Evans valuated the licenses at their individual sale prices in the retail market. However, as explained above, the FMV of the licenses should have been based on the wholesale price of the entire group of licenses transferred to the Organization.

Under paragraph 168(1)(d), the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration if it issues a receipt otherwise than in accordance with the Act and its Regulations. It is our position that the Organization has issued receipts otherwise than in accordance with the Act and the Regulations. For each reason identified above, there may be grounds for revocation of the Organization's charitable status.

Due Diligence

We note with concern that the Organization had demonstrated a lack of due diligence with respect to its tax-receipting practices. As previously explained, the CRA recommends the use of independent appraisers to determine the FMV of gifts of property to be reported on the tax receipts. The Organization's willingness to issue over $100 million in tax receipts for the educational courseware based solely on the valuation reports provided by the Promoter demonstrated that it had no regard for its receipting privileges granted by the Act. We believe that the Organization's lack of due diligence on this matter reinforced our earlier assertion that its primary focus had become the facilitation of the Donation Program.

Proposed Legislation

On December 5, 2003, the Department of Finance introduced new legislation with respect to charitable donations and advantages. These rules allow a taxpayer to make a gift to a charity and receive some advantage in return, however the value on the receipt must reflect the eligible amount of the gift made (i.e., the value of the receipt must reflect the gift less any advantage received by the donor). This legislation is applicable in respect of gifts made after December 5, 2003.

It is our view that the participant received an advantage, as defined at proposed subsection 248(32), as a result of the cash contribution to [redacted] or the Organization, in the form of receiving courseware licenses from their participation in the Donation Program. As such, the fair market value of the subsequent gift of that property to the Organization is deemed, by virtue of proposed subsection 248(35), to be no more than the amount of the initial cash contribution. Consequently the amount that the Organization was required under the *Income Tax Act* to record on its official donation receipts as the deemed fair market value of the gift is significantly lower than what was actually recorded by the Organization.

Under paragraphs 168(1)(d), the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration if it issues a receipt otherwise than in accordance with the Act and the Regulations. It is our position that Malvern Rouge Youth Valley Services has issued receipts otherwise than in accordance with the Act and the Regulations. For each reason identified above, there may be grounds for revocation of its charitable status.

Cash Payments and Gifts in Kind

In our view, based on the above, we do not recognize the cash contributions or the value of the courseware received as gifts made to the Organization. Further, the cash contributions represent the charge levied by the Promoter to participants to participate in the Donation Program. Whether the cash contribution was "gifted" from [redacted] the Organization or made directly to the Organization, it is clear this amount, at no point, was available to be used by the Organization for its programs.

To be considered to be a gift to a charity, it must truly be a donation in support of the Organization's programs. The donee should have the discretion as to how to use the funds or at a minimum to apply these to its charitable purposes. Transactions which are, in reality, disguised payments earmarked for non-charitable purposes are not gifts. We are of the view the Organization received gifts which were, in reality, payments from individuals to participate in the Donation Program. Substantially all of the payments were not used for charitable purposes, but were retained by the promoter and other third parties.

Of the approximately $8.7 million in cash received from [redacted] and another $8.3 million directly from the participants, the Organization reports incurring fundraising fees in excess of $14 million to the Promoter.

3. Failing to File an Accurate Information Return

Pursuant to subsection 149.1(14) of the Act, every registered charity must, within six months from the end of the charity's fiscal period (taxation year), without notice or demand, file an information return with the applicable schedules.

It is the responsibility of the Organization to ensure that the information that is provided in its information return, schedules and financial statements, is factual and complete in every respect. A charity is not meeting its requirement to file an information if it fails to exercise due care with respect to ensuring the accuracy thereof.

The Organization improperly completed the T3010 for the fiscal period ending April 30, 2009 in that items reported were omitted or inaccurate. Specifically, our audit indicated the Organization had received $8,761,716 from [redacted] in the fiscal year but failed to report the amount on line 4510 of Schedule 6 of the Registered Charity Information Return.

Under paragraph 168(1)(c) of the Act, the Minister may, by registered mail, give notice to the charity that the Minister proposes to revoke its registration because the charity fails to file a Registered Charity Information Return as and when required under the Act or a Regulation. For this reason, it appears to us that there may be grounds for revocation of the charitable status of Malvern Rouge Youth Valley Services.

4. Acting in Concert

Every charity is required by the Act[7] to meet a minimum expenditure requirement, the disbursement quota, on its own charitable activities or gifts to qualified donees in any given taxation year. We acknowledge that currently proposed amendments to the Act, once enacted by Parliament, will significantly impact a charity's disbursement quota obligation. However, we note that the proposed amendments will only apply to fiscal periods commencing after March 4, 2010. As such, the existing provisions on disbursement quota requirements would still apply for the period under audit.

In considering the application of expenditures used to meet the disbursement quota a charity must ensure that it is expensed directly on charitable activities and/or programs. This would include such payments as salaries to persons performing duties directly related to a charitable program, but would not include amounts paid for purely administrative expenses such as fundraising costs, legal or accounting fees, and the like.

Under the Act, gifts received from other registered charities do not increase a charity's disbursement quota. Meanwhile, gifts made to another registered charity can be used to satisfy a charity's disbursement quota under paragraph 149.1(2)(b) of the Act. Therefore, it is

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[7] See Paragraphs 149.1(2)(b), 149.1(3)(b), and 149.1(3)(b) of the Act.

possible for two or more charities to circumvent their disbursement quota obligations with pre-arranged transfer of funds and property amongst themselves. Such practices are prohibited by subsection 149.1(4.1) of the Act, which permits for the revocation of registered charities who act in concert with each other to unduly delay expenditures on charitable activities.

As outlined in Appendix A, over 80% of the cash that was contributed by the participants and tax-receipted by [redacted] ended up in the hands of the Promoter. As explained earlier, the cash contributed by the participants was in fact participation fees that were earmarked to be paid to the Promoter. We note that the Organization was required, by contract, to pay a fundraising fee to the Promoter equalling 16.62% of the cash and courseware donation received through the Donation Program. The inflated value of the courseware donated ensured that the fundraising fee due to the Promoter would equal the majority of the cash initially "donated" to [redacted] Therefore, [redacted] by making the cash gift to another qualified donee (the Organization), was able to route the majority of the cash to the Promoter while ostensibly meeting its disbursement quota.

By accepting the participant's cash contribution from [redacted], the Organization provided a level of legitimacy to the Donation Program while enabling [redacted] to apparently meet its disbursement quota obligation. It is our view that the cash was routed through [redacted] and the Organization in an attempt to conceal the true nature of the initial cash contribution by the participants. We note that, of the cash initially received by [redacted] from the participants, 6.03% and 9% were retained by [redacted] and the Organziation, respectively. Therefore, over 80% of the cash was routed to the Promoter ultimately.

It is our conclusion that the series of transactions outlined above was pre-arranged by the Promoter to disguise the participation fees paid by the participants as charitable donations. We further concluded that the Organization helped facilitated this arrangement by acting in concert with [redacted] to unduly delay [redacted]s obligation to meet its disbursement quota. The Organization had therefore conducted an activity that is grounds for revocation under subsection 149(4.1) of the Act.

The Organization's Options:

a) **No Response**

You may choose not to respond. In that case, the Director General of the Charities Directorate may give notice of its intention to revoke the registration of the Organization by issuing a Notice of Intention in the manner described in subsection 168(1) of the Act.

b) **Response**

Should you choose to respond, please provide your written representations and any additional information regarding the findings outlined above **within 30 days** from the date of this letter. After considering the representations submitted by the Organization, the Director General of the Charities Directorate will decide on the appropriate course of action.

If you appoint a third party to represent you in this matter, please send us a written authorization naming the individual and explicitly authorizing that individual to discuss your file with us.

If you have any questions or require further information or clarification, please do not hesitate to contact the undersigned at the numbers indicated below.

Yours sincerely,

Long Ip
Sr. Audit Advisor
Compliance Section
Charities Directorate

Telephone: 613-957-2125
Facsimile: 613-946-7646
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Ottawa, Ontario K1A 0L5

Appendix A

Overview of the Global Learning Gifting Initiative gifting arrangement ("Donation Program")

Parties Involved

1. Contributor
   -A Bahamian Corporation

2. Promoter
   -Global Learning Group Inc., a Canadian corporation.

3. Trust
   -Global Learning Trust (2004) (the "Trust"), a Canadian Trust, was settled on November 19, 2004 by a resident of Bahamas (the "Settlor").
   -The trustee of the Trust is Global Learning Trust Services Inc. (the "Trustee"), a Canadian corporation. The sole shareholder of the Trustee is a Canadian resident.

4. Vendor
   -The licensor of the Master License Agreement (the "Vendor") is a corporation resident in Florida.

4. Escrow Agent
   -Escrowagent Inc. (the "Escrow Agent"), a Canadian corporation, is the escrow agent.

5. Consultant
   -The consultant (the "Consultant") of the Donation Program is a Canadian corporation.

6. Service Provider
   -The service provider (the "Service Provider"), a Canadian corporation

7. Charities
   -The Malvern Rouge Valley Youth Services ("the Organization")
   [redacted]

8. Donors

Transactions

Donors would participate in the Donation Program by making a cash payment to either the Organization or [redacted]. The Contributor granted the Trust various single user perpetual royalty free licenses to use the coursewares. Donors would also make an application to become a capital beneficiary of the Trust. Upon acceptance as a capital beneficiary, the donors would receive a capital distribution from the trustee of the Trust in the form of "educational courseware" which the donors would then donate to the Organization. The donors would receive a donation receipt from [redacted] or the Organization for the amount of the cash payment and an additional donation receipt from the Organization for the amount of "educational courseware". The fair market value attributed to the "educational courseware" on the donation receipt from the Organization would generally be three to seven times the cash donation. The combined tax credit available from the two donation receipts would exceed the donor's cash outlay, and as noted in the promotional brochure, would result in a positive return to the donor of 56% to 112% depending on the province of residence and the tax rates in effect there.

Prior to November of 2008, [redacted] was strictly receiving and receipting for cash donations while the Organization strictly in-kind (educational coursewares). The contract between [redacted] and GLGI required [redacted] to pay 19.5% of the funds raised through the GLGI tax shelter. CRA's ATP audit showed [redacted] actual payment to GLGI was 18.38% of the funds received. No contract was found between [redacted] and the Organization, but the ATP audit showed that [redacted] advanced 75.59% of its total received funds as "donations" to the Organization. [redacted] retained 6.3% of the cash received. Finally, the contract between the Organization and GLGI requires the Organization to pay GLGI a fundraising fee equal to 16.62% of the total value of funds and property (this included the educational courseware plus the funds from [redacted]) but no more than 88% of the cash the Organization received through the GLGI tax shelter. Our audit showed that the Organization actually paid 86.5% of the total cash it received through the tax shelter to GLGI; due to the high receipted value of the educational coursewares. In the end, most of the cash provided by the donors ended up in the hands of GLGI.

[redacted] terminated its participation in November of 2008. Hence from December of 2008 to April 30, 2009 (the Organization's fiscal year end), all the cash from the tax shelter came directly to the Organization. The Organization revised its original contract with GLGI using the terms from the original [redacted]/GLGI contract. In essence, the movement of the cash remained unchanged.