



CANADA REVENUE  
AGENCY

AGENCE DU REVENU  
DU CANADA

**REGISTERED MAIL**

The Banyan Tree Foundation  
1203 – 67 Yonge Street  
Toronto, Ontario M5E 1J8

BN: 11912 3016RR0001  
File No: 0785394

Attention: Mr. Robert Thiessen

**Subject:      Notice of Intention to Revoke  
                  The Banyan Tree Foundation**

Dear Mr. Thiessen:

I am writing further to our letter dated June 24, 2008 (copy enclosed), in which you were invited to submit representations as to why the Minister of National Revenue (the "Minister") should not revoke the registration of The Banyan Tree Foundation (the "Charity") in accordance with subsection 168(1) of the *Income Tax Act* (the "ITA").

We have reviewed and considered your written response of August 7, 2008 (copy enclosed). However, notwithstanding your reply, our concerns with respect to the Charity's non-compliance with the requirements of the ITA for registration as a charity have not been alleviated. Our position is fully described in Appendix "A" attached.

**Conclusion:**

It is the CRA's position the Charity has operated for the non-charitable purpose of promoting a tax shelter arrangement and for the private benefit of its directors. The Charity has failed to demonstrate that it operated exclusively for charitable purposes and has not demonstrated its purported charitable activities occurred as represented. The Charity improperly issued receipts in excess of \$210 million for transactions that do not qualify as gifts and has failed to demonstrate the \$10.1 million paid to its directors and corporations controlled by its directors were for *bona fide* payments. It is CRA's position that for each of these reasons alone, and for the Charity's other breaches mentioned in our June 24, 2008 letter, there are serious contraventions of the *Income Tax Act* and warrant the immediate revocation of the Charity's registered status.

Consequently, for each of the reasons mentioned in our letter dated June 24, 2008, I wish to advise you that, pursuant to the authority granted to the Minister in subsections 149.1(4) and 168(1) of the ITA, which has been delegated to me, I propose to revoke the

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Ottawa, Ontario K1A 0L5

registration of the Charity. By virtue of subsection 168(2) of the ITA, 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), and 168(1)(d) of the Income Tax Act, that I propose to revoke the registration of the organization listed below under subsection 149.1(4), and paragraph 149.1(4)(b), of the Income Tax Act and that the revocation of registration is effective on the date of publication of this notice.*

<b>Business Number</b>	<b>Name</b>
11912 3016 RR 0001	The Banyan Tree Foundation Toronto, ON

Should you wish to appeal this Notice of Intention to Revoke the Charity's registration in accordance with subsection 168(4) of the ITA, 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  
25 Nicholas Street  
Ottawa, ON K1A 0L5

Please note that, notwithstanding the fact that the Charity may have filed a Notice of Objection, a copy of the revocation notice, described above, will be published in the *Canada Gazette* after the expiration of **30 days** from the day this letter was mailed. The Charity's registration will be revoked on the date of publication.

#### **Consequences of Revocation:**

As of the effective date of revocation:

- a) the Charity 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 Charity 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 ITA, respectively;
- b) by virtue of section 188 of the ITA, the Charity 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 ITA concerning revocation of registration, the tax applicable to revoked charities, and appeals against revocation, can be found in Appendix "B", 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 [www.cra-arc.gc.ca/charities](http://www.cra-arc.gc.ca/charities);

- c) the Charity will no longer qualify as a charity for purposes of subsection 123(1) of the *Excise Tax Act* (the "ETA"). As a result, the Charity 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).

Finally, I wish to advise that subsection 150(1) of the ITA 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 prescribed form, containing prescribed information, for each taxation year. The *Return of Income* must be filed without notice or demand thereof.

Yours sincerely,

Terry de March  
Director General  
Charities Directorate

Attachments:

- CRA letter dated June 24, 2008;
- Your letter dated August 7, 2008 (without attachments);
- Appendix "A", Comments on Representations; and
- Appendix "B", Relevant provisions of the ITA

**THE BANYAN TREE FOUNDATION**

**COMMENTS ON REPRESENTATIONS OF AUGUST 7, 2008**

In the Banyan Tree Foundation's (the "Charity") representations of August 7, 2008 Mr. Thiessen states, *"The reason for revocation seems to be based on the belief that the leveraged portion of each donor's gift was not cash. This is an assumption by the CRA auditors and has not been proven in a court of competent jurisdiction. The Banyan Tree Foundation issued Donor receipts based on cash received by the Banyan Tree Foundation and until the tax court provides a judgement to the contrary, the arguments for revocation should be held in abeyance."*

We respectfully disagree with this statement. As set out below, our findings are not an assumption, but are supported by the documentary evidence provided by the Charity during the course of our audits. *Per* our previous letter, our audits have revealed an artificial paper trail was provided to create the illusion that funds were available for the financing of the participant donor's loans and therefore deposited into the Charity's bank accounts and used to purchase term annuities from an off-shore insurance company. The Canada Revenue Agency (the "CRA") has confirmation the bank merely processed circular paper accounting transactions pursuant to bank directions prepared and authorized in advance, and in amounts, requested by Mr. Robert Thiessen (who acted as President of the lending corporation and the Charity) and the lawyer(s) involved.

We would note that the reasons for the revocation are not solely based on the improper issuance of tax receipts by the Charity, but are based upon a number of contraventions – each serious enough in its own right to warrant revocation. We would also note that, where it is found that a registered charity has breached the requirements of the *Income Tax Act* (the "ITA"), the CRA may immediately revoke the registration of the charity. The registered charity then has the right to file an objection to this revocation and, if that is not successful, an appeal to the Federal Court of Appeal.

**Failure to Devote Resources to Charitable Activities:**

The audit conducted by the CRA identified that the Charity, based on the overall operation of the Charity and the level of financial activity and resources so devoted, is operating primarily or collaterally for the purpose of furthering The Banyan Tree Foundation Gifting Program, a leveraged donation arrangement. It is our conclusion that the Charity's original purpose, which is simply to provide funding to qualified donees, has been exploited for the purpose of participating in and promotion of an abusive tax shelter arrangement.

Our audit has concluded that from January 1, 2002, to December 31, 2006, The Banyan Tree Foundation issued in excess of \$140 million in receipts for contributions received through its involvement in The Banyan Tree Foundation Gifting Program, a leveraged donation program and issued receipts for \$70 million for a donation arrangement involving

the University of the West Indies, Mona Campus ("UWI, Mona"). The Charity allegedly used the contributions received from the leveraged donation program to purchase \$120 million in term annuities from an off-shore insurance company and "assigned" \$65.7 million of the term annuities allegedly purchased to Canadian registered charities with the remainder being held by the Charity as investments. CRA audits revealed the Charity did not receive the leveraged portion of the participant donor's contributions for the simple reason that the lender did not have the funds available to provide for the donor's loans. Conclusively, the Charity did not have the funds to purchase the annuities and therefore did not "assign" \$65.7 million in term annuities to Canadian registered charities as reported.

In 2004, the Charity entered into a donation arrangement, involving a cash gift of \$5 million and shares allegedly valued at \$77.7 million from non-resident Bahamian individuals. As outlined in our previous letter, the Charity contributed \$4.975 million to UWI, Mona, and with the assistance of the Bahamian individuals, liquidated the shares it received and contributed the proceeds to UWI, Mona. This concerted series of transactions occurred approximately 13 times until all the shares were liquidated and the original donation of cash and shares were returned to the Bahamian individuals via corporations they controlled.

It is our position the contributions to UWI, Mona and the sale of shares were a premeditated sham to create the appearance of a legitimate donation to the Schedule VIII University. The Charity's representations divert from addressing the seriousness of the donation arrangement as well as the impact its involvement in the arrangement has by stating, *"If you believe your analysis of the transactions is correct then any revocation discussion should be held with the University of the West Indies ("UWI"), not the Banyan Tree Foundation."*

Per our previous letter, our audit has concluded that the Charity, UWI, Mona and private individuals and corporations engaged in a series of transactions designed to circumvent the ITA and give the appearance of legitimate "gifts" when in fact no gift existed. We would note that the CRA's current review is with respect to the registration of the Charity, as it pertains to its issuance of receipts and its role in these transactions. As such, we are confident that the matter as to whether the Charity has acted in contravention of the ITA and, as such, should have its charitable registration revoked, is clearly a matter to be discussed with the Charity and not UWI, Mona.

It is our position the purpose of the Charity is to promote abusive tax planning arrangements where a majority of the transactions have been artificially created and where motivation is driven by the financial gains of the Charity's directors rather than the charitable purpose for which the Charity was established. The overall conduct of the Charity demonstrates its willingness to operate for the non-charitable purpose of promoting and supporting tax planning arrangements, and therefore fails to be considered a charitable foundation *operated exclusively for charitable purposes*.

Under paragraph 168(1)(b) of the ITA, the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration because it ceases to comply with the requirements of the ITA related to its registration as such. It is our

position that The Banyan Tree Foundation has not operated for exclusively charitable purposes. For this reason alone there are grounds to revoke the charitable status of The Banyan Tree Foundation.

**Other Areas of Non-Compliance:**

Our position remains unchanged that the Charity operated for the private gain of its directors, contravened the ITA by accepting and issuing receipts for transactions that do not qualify as gifts, issued receipts otherwise than in accordance with the ITA and failed to meet its disbursement quota. The Charity has failed to address these serious areas of non-compliance identified in our June 24, 2008, letter.

Under paragraphs 168(1)(b) and 168(1)(d) of the ITA, the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration because it ceases to comply with the requirements of the ITA related to its registration as such and if it issues a receipt otherwise than in accordance with the ITA and the Regulations respectively. It remains our position that the Charity has not expended amounts to satisfy its disbursement quota and issued receipts for transactions that do not qualify as gifts at law. For this reason alone there are grounds for revocation of the charitable status of The Banyan Tree Foundation under paragraphs 168(1)(b) and 168(1)(d) of the ITA.

**Appropriateness of Revocation:**

Finally, we note that your letter argues, *"The Banyan Tree Foundation issued Donor receipts based on cash received by the Banyan Tree Foundation and until the tax court provides a judgement to the contrary, the arguments for revocation should be held in abeyance."* We disagree. The Charity has failed to demonstrate that it operates exclusively for charitable purposes, has improperly issued receipts for in excess of \$210 million in transactions that do not qualify as gifts and has breached numerous other requirements of the ITA. It is the CRA's position that these are serious contraventions of the *Income Tax Act* and warrant the revocation of the Charity's registered status.



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1203 – 67 Yonge Street  
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BN: 11912 3016RR0001  
File No: 0785394

Attention: Mr. Robert Thiessen

June 24, 2008

**RE: Audit of the Banyan Tree Foundation**

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Dear Mr. Robert Thiessen:

This letter is further to the audit of the books and records of The Banyan Tree Foundation (the "Charity") by the Canada Revenue Agency (the "CRA"). The audit related to the operations of the registered charity for the period from January 1, 2002 to December 31, 2004.

The results of this audit indicate that the Charity appears to be in non-compliance of certain provisions of the *Income Tax Act* (the "ITA") or its Regulations. The CRA has identified specific areas of non-compliance with the provisions of the ITA or its Regulations in the following areas:

AREAS OF NON-COMPLIANCE:		
	Issue	Reference
1.	Failure to Devote Resources to Charitable Activities	149.1(4), 168(1)(b)
2.	Failure to Accept Valid Gifts in Accordance with the ITA	118.1
3.	Issuing Receipts Not in Accordance with the ITA	118.1, 149.1(4), 168(1)(d)
4.	Failure to Meet its Disbursement Quota	149.1(4)(b), 168(1)(b)

The purpose of this letter is to describe the areas of non-compliance identified by the CRA during the course of our audit as they relate to the legislative provisions applicable to registered charities and to provide the Charity with the opportunity to address our concerns. In order for a registered charity to retain its registration, it is required to comply with the provisions of the ITA and Common Law applicable to registered charities. If these provisions are not complied with, the Minister of National Revenue (the "Minister") may revoke the Charity's registration in the manner prescribed in section 168 of the ITA.

Charities Directorate  
320 Queen St., 7<sup>th</sup> Floor  
Ottawa, ON K1A 0L5



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

**Identified Areas of Non-Compliance:**

**1. Failure to Devote Resources to Charitable Activities:**

The Charity is registered as a private foundation. In order to satisfy the definition of a "charitable foundation" pursuant to subsection 149.1(1) of the ITA, "charitable foundation" means a corporation or trust, "... operated exclusively for charitable purposes".

To qualify for registration as a charity under the ITA, an 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 a charity undertakes on a day-to-day basis must support its charitable purposes in a manner consistent with charity law. Charitable purposes are not defined in the ITA 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.

**a) Non-Charitable Purpose**

It is our view, based on our audit, that the Charity is pursuing a non-charitable purpose and non-charitable activities in furtherance of this purpose. In our view, the Charity is primarily operating for the purpose of supporting, promoting and participating in an abusive tax shelter arrangement. As outlined below, by engaging in an artificial series of transactions this appears to have resulted in the Charity receipting over 100 million dollars of donations while actually receiving and devoting a comparatively insignificant amount of resources to actual charitable activities.

The Charity was registered effective December 18, 1987, as the Ronald and Joan Ball Foundation. The Charity's purpose at the time of registration was "receiving and managing funds for the exclusive purpose of making gifts to qualified donees".

On October 21, 2002, the Charity relocated its head office from the city of Calgary, Alberta to Toronto, Ontario and changed the name to The Banyan Tree Foundation. The Charity also came under new control when all the former Directors of the Charity resigned and a new Board of Directors was elected. In its first year following the relocation, change of name and change in board of directors, for the fiscal period ending December 31, 2002, the Charity somewhat immediately received in excess of \$5.5 million in gifts for which it issued official donation receipts. All "gifts" were received from participant donors in the Banyan Tree Foundation 2002 unregistered tax shelter.

The Banyan Tree Foundation 2002 Gift Program involved Canadian individual participants providing personal cash of only 14.5% of the pledged donation amount and allegedly borrowing 85.5% of the pledged donation amount from a Canadian lender. As a condition of the loan, participants were required to provide an additional 8.7% of the pledged



donation amount to the lender as a security deposit on the loan. The lender was directed by the donor to provide the proceeds of the loan directly to the Charity. The loan is a 25-year interest free loan. For example, for each \$10,000 pledged donation, Canadian individuals provided \$2,320 of personal cash with \$1,450 deliverable to the Charity for their cash portion of the pledged donation and \$870 deliverable as a security deposit to the lender on an \$8,550 loan.

The Charity continued to participate in and promote the Banyan Tree Foundation Gifting Program (the "Program") as a registered tax shelter from 2003 up to present date. The donation arrangement required Canadian individuals to provide personal cash and purportedly borrow funds from the lenders as follows:

- The 2003 donation arrangement offered two levels of participation - donations of \$10,000 and donations in excess of \$100,000. Individuals participating at the \$10,000 level contributed per \$10,000 of pledged donation, \$2,730 with \$1,350 deliverable to the Charity and \$1,380 deliverable as a security deposit to the lender on an \$8,650 loan received by the donor and directed by the donor to the Charity. The loan is a 10-year interest-bearing loan. For individuals participating at the \$100,000 or more level, they contributed per \$100,000 of donation, \$23,200 with \$11,000 deliverable to the Charity and \$12,200 deliverable as a security deposit to the lender on an \$89,000 loan received by the donor and directed by the donor to the Charity. The loan is a 10-year interest-bearing loan.
- The 2004 donation arrangement also offers two levels of participation - donations of \$10,000 and donations in excess of \$100,000. Individuals participating at the \$10,000 level contributed per \$10,000 of donation, \$2,900 with \$1,450 deliverable to the Charity and \$1,450 deliverable as a security deposit to the lender on an \$8,550 loan received by the donor and directed by the donor to the Charity. The loan is a 10-year interest-bearing loan. For individuals participating at the \$100,000 or more level, they contributed per \$100,000 of donation, \$26,130 with \$11,000 deliverable to the Charity and \$15,130 deliverable as a security deposit to the lender on an \$89,000 loan received by the donor and directed by the donor to the Charity. The loan is a 10-year interest-bearing loan.

The security deposit was to be invested on behalf of the donor by the lender and was represented as being sufficient to yield a return equivalent to the interest, if applicable, the principal owing on the donor's promissory note, and any taxes owing on the growth of the security deposit.

The financing of the loans is purportedly provided by Rochester Financial Limited ("Rochester"), a Canadian corporation. Rochester allegedly lends the donor the amount of the loans and is directed by the donors to deliver the amount to the Charity. The Charity allegedly uses the amount transferred by Rochester on behalf of the donor to purchase annuities with an off shore insurance company, Hampton Insurance Company Limited ("Hampton"). The Charity then assigns the annuities to Canadian registered charities and claims the assignment of annuities as gifts to qualified donees.

The Charity has alleged that a U.S. financier, PNH Financial Inc. ("PNH") loaned the funds to Rochester who in turn loaned the funds to the donors who directed Rochester to provide the funds to the Charity on their behalf. A corporation related to Hampton allegedly loans the funds to PNH. PNH was 100% owned by the sole shareholder of Rochester.

Mr. Robert J. Thiessen, Executive Director of the Charity, held himself as President of Rochester and ran the day-to-day operations of the corporation including authorizing banking transactions.

Based on CRA's review, Rochester did not have the funds available to provide for the donor's loans that are represented as having been made and invested by the Charity. Therefore, the Charity could not have had the funds available from Rochester to purchase the annuities. A series of documents exist between all parties involved to create the notion that funds were moved between each party. It is our position that an artificial paper trail was provided to create the illusion the Charity received the leveraged portion of the donor's pledged donation and subsequently transferred these funds to purchase the annuities.

In general, it appears from the Canadian banking records of the Charity and Rochester that funds in the amounts of the donor loans were directed from Rochester to the Charity, from the Charity to a lawyer trust account to allegedly purchase the term annuity contracts, and from the lawyer trust account to Rochester, to allegedly fund the loans. In some cases, the funds were transferred between two lawyers' trust accounts. However, Rochester did not have the funds in its bank account to start the apparent circular flow of funds.

The bank accounts of the Charity, Rochester and the lawyer's trust account(s) were all held at the same Toronto branch of the bank. The bank confirmed it merely processed circular paper accounting transactions in the amounts of the donor loans through the bank accounts held by Rochester, the Charity and the lawyer(s), all at the request of Mr. Thiessen. The circular paper accounting entries were processed pursuant to bank directions prepared and authorized in advance by Mr. Thiessen (who acted as president of Rochester and the Charity) and the lawyer(s). The entries the bank processed through the bank accounts were described by the bank as paper accounting entries, in and out transactions, with no financial impact. Furthermore, the bank confirmed that it did not provide Rochester with an overdraft or loan to provide for the source of funds for the donor loans. The bank also did not earn any fees or interest to process the paper accounting entries.

Mr. Thiessen, the Charity, Rochester, the lawyer(s), PNH and Hampton acted in concert to facilitate the donation arrangement and were not dealing at arm's length. It is our position that Rochester did not fund the donor loans and as such the loans did not occur and are not *bona fide*. Therefore, in turn, the Charity did not have the funds to purchase the term annuity contracts from Hampton. It is our view that the circular paper entries processed by the bank at the request of Mr. Thiessen were intended to give the appearance of a legitimate loan, donation and a charitable use of the funds, when, in fact, this did not occur.

The term annuity contracts purportedly provide for annual payments for 25 years. The payments are a blend of interest and principal with an imputed interest rate of merely 0.9% to 1.37%. However, the annual payments are not guaranteed by Hampton but are allegedly

based on the performance of the underlying assets of the purported segregated fund. The Canadian recipient charities receive payments allegedly from Hampton pursuant to the term annuity contracts. It is our position that the source of funds to make the payments did not come from the alleged investment in the term annuity contracts by the Charity but from other cash provided by the donors (i.e., the security deposit).

The Charity also provided the donors the opportunity to contribute, in cash, 100% of their donation and receive a certain percentage of their donation refunded to them as a loan. These donors provided 100% of personal cash and received a refund of 85.5% in 2002 and either 85.5% or 89% in 2003 and 2004 depending on the donors' level of participation, donations of \$10,000 or donations in excess of \$100,000. The refund was net of the security deposit required in some cases. The cash contributions are made to the Charity who makes payments, directly or indirectly, to Rochester and Rochester issues the refund cheques to the donors.

The result of these arrangements is that, in essence, the Charity received actual cash through the tax shelter of approximately \$802,285<sup>1</sup> in 2002, \$5,682,844<sup>2</sup> in 2003 and \$6,515,065<sup>3</sup> in 2004 yet issued receipts for the Program totalling \$102,010,125 during this period. From the actual cash returns, the Charity incurred administrative, fundraising fees and other non-charitable expenses of \$476,158 in 2002; \$4,855,456 in 2003 and \$6,280,857 in 2004, as per its annual information returns filed; or on average, 80% of actual cash was incurred for non-charitable expenses. Given the nature of donation arrangements, most of the "donations" and related expenditures are incurred within the last quarter of the calendar year resulting in a substantial portion of the incurred expenditures being payable at year-end. A review of the Charity's financial statements reveals most of the payables are paid in the year following their incurrence.

The term annuity contracts are "assigned" to qualified donees and the Charity reports the full value of the term annuities assigned as a gift to a qualified donee in the year of assignment. However, we note the charities assigned the annuities do not report the value of the annuity as a gift in the year of assignment (i.e. the year received) nor do the charities report the annuity as an asset. Instead the charities are only reporting the annual payments as gifts when the payments are received.

The Charity allegedly purchased term annuities from 2002 to 2004 in the amount of \$87,700,000. The Charity has reported it "assigned" a total of \$65,700,000 to qualified donees with the remaining annuities held by the Charity as long-term investments. Our review has concluded that, at a maximum, a total of \$6,365,700 has been paid to the qualified donees - allegedly as annual annuity payments. Given that the Charity did not have the funds to purchase the annuities, as the loans could not and were not advanced by Rochester, it is our conclusion that these payments cannot have been made from purchased annuities. It appears these amounts could only have been paid from the donor out-of-pocket cash i.e. the

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<sup>1</sup> Total tax-receipted gifts \$5,533,000 - \$4,730,715 alleged loans= \$802,285

<sup>2</sup> Total tax-receipted gifts \$42,638,125 - \$36,955,281 alleged loans=\$5,682,844

<sup>3</sup> Total tax-receipted gifts \$53,839,000 - \$5,000,000 alleged donation from 6191088 Canada Inc. - \$42,323,935 alleged loans= \$6,515,065

amount directed to the Charity and the amount "invested" as the donor's security deposit, left over after administrative, fundraising and other expenses.

The information found during the audit shows that the Charity devotes all its resources to promoting the registered tax shelter gift program. In our view, the Charity has gifted, from the donor out-of-pocket cash, small amounts to registered charities to give the appearance of charitable activity. The Charity advertises that it has "gifted" over \$149 million to recipient charities, in large part representing the purchase of annuities, yet, based on our review, this is simply not true.

We note that the recipient qualified donees were recently notified that their December 31, 2007, annuity payments were being delayed due to market conditions. To date, the qualified donees have not received the annuity payments due December 31, 2007. In fact, the Charity has notified the qualified donees that the status of the annuity payment for 2007 is unknown and has offered to accept a return of the annuity from the qualified donees.

Based on our audit, it is clear that the Charity's sole purpose is to promote the Program. The preponderance of the Charity's time, effort and financial resources are devoted to the promotion of what is an abusive tax planning arrangement.

Our review has concluded that the Program is an abusive arrangement designed to give the appearance that loans are made to participant donors. Our review has concluded that the loans did not occur but were simply processed in a circular manner to give the illusion that these funds were advanced.

Transactions are carefully arranged to give the appearance that gifts are being made to registered charities. Despite representing that it has purchased and assigned annuities to registered charities, it is clear the Charity did not have the means to purchase the annuities. We note the scheme has been carefully designed to limit the access the registered charities (to which these annuities are assigned) have to the annuities to simply receiving small payments. Despite the fact that the Charity alleges that it has purchased \$87.7 million in annuities from an arm's length company, these annuity payments have now been halted.

In our view, the Charity's primary purpose is not simply to raise funds to gift to qualified donees, but is instead to promote the Program. As above, it is our conclusion this arrangement is an abusive one where the majority of the transactions are artificial and very little of the reported amounts receipted actually flow to the qualified donees. Based on our review, as set out later in this letter, the preponderance of funds are paid to the promoters of the arrangement or to related companies for administrative services. It is our opinion that the true purpose of the Charity is to promote an abusive tax planning arrangement, which is not a charitable purpose at law, and engages in non-charitable activities to support this scheme. It is further our view, therefore, that by pursuing this non-charitable purpose, the Charity has failed to demonstrate that it meets the test for continued registration under 149.1(1) as a charitable foundation "constituted and operated exclusively for charitable purposes". For this reason, it appears to us that there are grounds for revocation of the charitable status of The Banyan Tree Foundation.

**b) Personal Benefit:**

Paragraph 149.1(1)(b) of the ITA stipulates that no part of a charity's income is payable or otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settler thereof. The CRA considers the meaning of the term "trustee", for registered charity purposes, to include those persons who stand in a fiduciary relationship to the charity, having general control and management of the administration of a charity, including directors of corporations established for charitable purposes. This is, essentially, a rule against self-dealing, reflecting the general rule of equity that a trustee must not profit out of his position of trust, nor must he place himself in a position where his duties as a trustee conflict with his own interests. It is also a statutory embodiment of the common law test that individuals with ties to a charity should not profit from their association with the charity. The Charity's Letters Patent, article IX, also state "*The Corporation is to carry on its operations without pecuniary gain to its members and any profits or other accretions to the Corporation are to be used in promoting its objects.*"

The CRA's position regarding the remuneration of directors is that *bona fide* payments for actual services rendered do not constitute a "personal benefit" of the type prohibited by the ITA for the directors of registered charities. Accordingly, a registered charity may remunerate its directors or entities controlled by its directors for other services actually perform on behalf of the charity, as long as those payments are reasonable under the circumstances, and in the normal course of operations. The Charity has entered into agreements with various corporations who share common ownership with the directors of the Charity whereby the corporations are remunerated for administrative and fundraising services rendered.

Between fiscal periods ending 2002 to 2004, the Charity incurred nearly \$6.2<sup>4</sup> million in expenses, or 47% of total operating expenses, to its directors and to corporations controlled by the Charity's directors. The expenses were for administrative services and finder's fees calculated as a percentage of total donations received from the Charity's participation and promotion of the Program. Our review of the information provided indicates there has not been sufficient separation between the director's affairs and the financial and business interests of individuals responsible for administration and management of the Charity's programs and that the Charity's programs have been operated in such a way as to benefit those interests. It is our conclusion, based on the evidence before us, the Charity, Promittere Capital Group and/or Promittere Capital Group Inc. ("Promittere"), 6146384 Canada Inc, RJT Investments Corp. and Kalyx Securities Ltd (collectively, the "Related Group") have been controlled and operated by the same group of individuals, that the Charity exists as little more than a shell with the capacity to issue receipts for income tax purposes, and that this capacity has been exploited as a means by which revenues are generated as fees payable to the Related Group in addition to payments made to the directors. We do not consider the payments to be *bona fide* payments for services rendered or reasonable. The terms of the contracts between the related persons are such that, of the actual cash received, substantially all is siphoned off as administrative and finder fee expenses.

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<sup>4</sup> Including 2006, the Charity has incurred over \$10.1 million in expenses to related parties as per the annual information returns filed.

We note that Promittere acts as administrative agent and fundraiser for the Charity, performing all administrative activities on behalf of the Charity plus referring donors to participate in the Program. Per the information provided, Promittere receives 2.4% of receipted donations for administration services, plus 0.5 % of perpetual donations for administrative services, plus up to 8% of receipted donations less finders' fees paid to other Agents for finders' fees. Agents, including directors of the Charity and the Related Group earn between 5-8% of receipted donations as finder's fees for referring donors to participate in the donation arrangement. As above, the Charity receives a certain percentage of the total donations recorded in actual cash returns, 11-14.5%; therefore we calculate at least 10.4% (2.4% + 8%) of the total donations received are diverted to administration and finders' fees (fundraising). While this figure may seem insignificant, recognizing that these are based on receipted amounts and the loans did not exist, this represents approximately 70 – 94.5% of the actual cash returns received by the Charity.

The affairs of the Charity have been principally under the control of Mr. Thiessen, acting simultaneously as Executive Director of the Charity; sole shareholder of RJT Investments Corp.; related to the partners/shareholders of Promittere; and related, via common-law marriage, to the sole shareholder of Kalyx Securities Ltd. In our view, the Charity directs the out-of-pocket funds contributed by "donors" towards administrative and fundraising fees payable to the Related Group thereby benefiting the Related Group and its shareholders/partners. Mr. Thiessen and Mr. Doug Lawson, while serving as President and Director of the Charity respectively, derived significant direct financial benefit from the Related Group's contracting arrangements with the Charity.

The fee structure adopted by the Charity is one that directly links compensation to the total value of the official donation receipts issued regardless of whether the Charity actually receives property equivalent to the receipts issued. Further, the fee structure is intended to benefit the persons and related persons favourably.

In 2003, the Charity, through a series of transactions, transferred cash from its reserves to one of its directors for the purposes of obtaining a mortgage. The Charity allegedly borrowed funds from Hampton to purchase annuities in excess of the amount required, or in excess of the donor loans typically "purchased". Within days of acquiring the \$3,044,719 promissory note, the Charity repaid \$2,343,000 in cash. At the same time, 1106999 Ontario Ltd (currently operating as Rochester Financial) entered into a loan agreement with Hampton to borrow \$2,343,000 with the sole purpose of providing a mortgage to Robert Thiessen and Deanna Naus. The series of transactions create a paper trail of promissory notes, loans and mortgages receivable and payable between the parties involved. However, it is clear that the overall purpose of the transactions was to move funds out of the Charity and place them in the hands of Mr. Thiessen.

Given the manner in which the Charity has structured its financial affairs, it is our view that it is operating for the private gain of its directors and the promoters of the tax shelter, to the detriment of its charitable purpose.

It is further our view, therefore, that by operating for the private gain of its directors, the Charity has failed to demonstrate that it meets the test for continued registration under 149.1(1)



as a charitable foundation "operated exclusively for charitable purposes" or as a charitable organization that "no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof". For this reason, it appears to us that there are grounds for revocation of the charitable status of The Banyan Tree Foundation.

c) Transactions with the University of the West Indies, Mona Campus:

The Charity entered into a donation arrangement in 2004, whereby it received a cash gift of \$5,000,000 and the shares of West Point Ventures Limited ("West Point"), with an alleged value of \$77,700,000, from non-resident Bahamian individuals via Canadian corporations. It was purported to the CRA that the Bahamian individuals desired to make the donation of cash and shares to The University of the West Indies, Mona Campus, ("UWI"); a qualified donee for Canadian tax purposes. The Bahamian individuals purportedly chose to donate to the UWI indirectly via the Canadian corporations and the Charity in order to reduce the cost of the donation they had otherwise determined to make (i.e. by selling the Canadian corporations unused donation deduction).

The Charity appears to have proceeded to donate \$4,975,000 of the cash it received to the UWI and with the assistance of the Bahamian individuals, purportedly liquidated the West Point shares during 2004 and 2005 and allegedly donated the proceeds to UWI. The shares were purportedly sold by the Charity to non-resident corporations in batches worth roughly \$5,000,000.

UWI forwarded the initial \$4,975,000 provided by the Charity, to non-resident corporations who used the funds to allegedly purchase the shares of West Point from the Charity. The Charity worked in concert with the UWI, the Bahamian individuals, and the non-resident corporations to circulate approximately 13 times, nearly \$5,000,000 to make it appear as though the shares were liquidated and the proceeds utilized to donate to the UWI; an amount in excess of \$77,700,000. Ultimately, the initial \$5,000,000 and the West Point shares were returned to the Bahamian individuals via corporations they controlled. The Bahamian individual(s) involved also controlled Hampton.

The Charity netted approximately \$388,500, or 0.5%<sup>5</sup> of the value of the alleged gift of the West Point shares, as administrative fees to Promittere for the ultimate benefit of Mr. Thiessen.

The Charity purported that it received the shares of West Point as a long-term gift with the specific direction from the Bahamian individual that the Charity hold the gift or any property substituted from it, for a period of 25 years.

It is our position, among others, that the donation of the West Point shares to the Charity was a sham. The transfer of the West Point shares to the Charity was designed to give the appearance that there was a legitimate donation of the shares - a liquidation of the shares in excess of \$77,700,000 and the alleged gifting of the funds to the UWI - to make it

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<sup>5</sup> \$77,700,000 x 0.5%=\$388,500

appear that there had been a legitimate charitable use of the funds, when, in fact, none existed. It was predetermined that the Charity, directly or indirectly, via UWI, would return the majority of the liquidated funds and shares to the ultimate donors, the Bahamian individuals.

The Charity, UWI, the Bahamian individuals, and the non-resident corporations involved worked in concert with the common intention to deceive the CRA by giving the impression that a cash donation of \$5,000,000 and a donation of the West Point shares valued in excess of \$77,700,000 was made to the Charity and that the Charity liquidated the shares and made substantial and frequent donations to the UWI for its use in its own charitable activities. We conclude the purpose of the arrangement was to artificially create corporate donation deduction created for each of the Canadian corporations involved for the purpose of increasing the profit from the subsequent sale of these corporations.

In our view, this arrangement clearly demonstrates the intent of the Charity and UWI to lend its support and tax receipting privileges to non-charitable purposes. In this arrangement, the Charity has clearly agreed to receive cash and property and "gift" the cash received through the sale of the shares to UWI. The majority of the cash "gifts" made to UWI are, in fact not gifts to a qualified donee, but were earmarked to be forwarded, by UWI directly or indirectly, to the non-resident corporations purchasing the property from the Charity. In effect, it is our view the Charity has lent its support to an arrangement designed to mask the true nature of transactions in an attempt to circumvent the provisions of the *Income Tax Act*. In our view, participation in such transactions is grounds for revocation under paragraph 168(1)(b) of the ITA.

Further, it is the CRA's view that the Charity was not entitled to issue receipts for these transactions. The cash and shares were not donated to the Charity without obligation or consideration in return. It is clear that the purpose of these donations, as above, was to artificially create a large tax deduction in Cushjohn Investments Ltd., the donor of the shares and the numbered company that provided the cash. Neither the cash nor the shares were freely the Charity's property, as these had been "donated", but as a part of a side-arrangement whereby they were to be transferred indirectly to several off shore companies. Further, in our view, the transactions did not qualify as a gift as there was a clear expectation of return by the donors – specifically that the individuals knew they could increase the sale value of the companies involved by flowing donations through the Charity and creating a donation tax credit in the company. The Charity, in turn, agreed not to keep the shares and cash but, for a fee, direct these on to the purchasers through a series of predetermined artificial transactions. In our view, these transactions were not gifts to the Charity and, as such, the Charity has issued a receipt other than in accordance with the ITA which is grounds for revocation under 168(1)(d).

Finally, we are of the opinion that the transactions with UWI were not gifts from the Charity. Again, it is clear from the series of transactions that the cash sent to UWI was not given beneficially for the use of the UWI. Rather, in a side-arrangement, the cash was earmarked to be returned through the non-resident corporations back to the Charity several times over, to facilitate this scheme. As such, we do not consider these amounts as gifts to UWI and therefore, it is our view The Banyan Tree Foundation has not devoted its resources

to its own charitable activities or as "gifts" to qualified donees, which is grounds for revocation under paragraph 149.1(4)(b) or alternatively 149.1(4)(b.1).

## **2. Failure to Accept Valid Gifts in Accordance with the ITA:**

It is our position that the Charity has contravened the ITA by accepting and issuing receipts for transactions that do not qualify as gifts. We offer the following explanations to support our position.

### **a) No *Animus Donandi***

Under the common law, a gift is a voluntary transfer of property without consideration. However, an additional essential element of a gift is *animus donandi* - that the donor must be motivated by an intention to give. It must be clear that the donor intends to enrich the donee, by giving away property, and to generally grow poorer as a result of making the gift.

It is our view that the vast majority of the transactions involving the Charity fail to meet this latter element. The common theme, found throughout all of these transactions, is that through a series of transactions and a minimal monetary investment, "donors" profit through the tax credits so obtained. It is clear that the primary motivation of the donors is intent to profit, and, as such, these transactions fail to qualify as gifts at law.

In support of this position, we note that:

- The promotional material promises the donor will receive a tax credit at the highest marginal tax rate for the value of the gift and provides charts calculating the donors return on cash investment of at least 44% and as high as 100%;
- The donor receives an official donation receipt for the 11-14.5% cash contribution and the 85.5-89% pledged amount of the donation;
- "Donors" enter into non-interest or at prescribed interest bearing loan agreements with Rochester to provide for the remaining 85.5-89% pledged amount;
- Transactions are pre-arranged and handled entirely by promoters or other pre-arranged third parties. Participants in these arrangements are merely expected to put forward a minimal investment to receive generous tax receipts in return; and
- Minimal information is provided to the prospective "donors" as to how the "donations" will benefit the Charity, or to the activities of the Charity they are supporting. The Charity provides a listing of the charities purportedly receiving funding; however, the Charity does not update the donors as to which charities it supported as a result of the annual campaigns or the reasons why.

These points, in our opinion, are evidence these transactions are primarily motivated by a donor wishing to enrich him/her rather than an intent to make a gift to charity. Although the donors entered into loan agreements to provide for the majority of funds that were allegedly

donated to the Charity to generate the donation tax credit, it was promoted to the donors at the time of their donation that their liability under the loan agreement would be limited to the cost of the security deposit which would be invested to earn returns sufficient to purportedly repay the loan.<sup>6</sup> In our opinion, were we to accept that these transactions occurred as represented which we do not, it would be our position that the participants were not making gifts, but making a payment with intent to profit. The Charity promised participants that they would neither have to pay their loans, due to the "security deposit investments", and would profit by filing their taxes and claiming the donation tax credit/deduction. In our view, these transactions, given the combination of the tax credits and other benefits received, lack the requisite *animus donandi* to be considered gifts.

As such, it is our position that there is no intention to make a "gift" within the meaning assigned at 118.1 of the ITA and these transactions do not qualify for tax receipting purposes. For this reason, it appears to us that there are grounds for revocation of the charitable status of The Banyan Tree Foundation under paragraph 168(1)(d) of the ITA.

As set out below, it is also our view that these transactions consisted almost entirely of paper transactions that were designed to, in a circular fashion, return the "loaned" funds back to the lender.

**b) Property donated:**

We are of the view that property purportedly donated to the Charity through the tax shelter arrangement does not appear to be property that has been donated or received by the Charity.

The participants themselves contribute, as described above, a mere 11% to 14.5% of the property purportedly received by the Charity through the tax shelter arrangement. The remainder of the property "donated" consists of alleged funds from low or non-interest bearing loans made to individuals by Rochester who was directed to deliver the loan amount to the Charity directly. We have concluded that Rochester did not have the funds to source the donor loans. As such, the purported donated property, beyond the actual cash contributed by participants (much of which is siphoned off for administrative, fundraising and security deposits), does not exist other than as notations on paper.

As previously outlined, the Charity has alleged that a U.S. financier, PNH Financial Inc., loaned funds to Rochester who in turn loaned the funds to the donors, who directed Rochester to provide the funds to the Charity on their behalf. The Charity further asserts that it used these funds to purchase term annuity contracts with an offshore insurance company, Hampton, and subsequently assigned these contracts to recipient Canadian charities. However, as reiterated above, it is our position that Rochester did not, and could not, fund the donor loans. As such, it is clear that the loans never occurred. Therefore, in turn, the Charity did not have the funds to purchase the annuity contracts from Hampton. It is our view the circular paper entries processed by the bank at the request of Mr. Thiessen were intended to

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<sup>6</sup> The CRA has been presented with no information to suggest that these security deposits were actually invested to repay the loans. In fact, it is simply inconceivable that these amounts could be invested and realize returns of the kind represented by the promoters – covering the principle, interest and taxes of the loan.

give the appearance of a legitimate loan, donation and a charitable use of the funds, when, in fact, this did not occur.

The Canadian recipient charities received payments up to January 2007, allegedly from Hampton pursuant to the term annuity contracts. It is our position that the payments were funded from the cash provided by the donors (i.e., the security deposit).

c) Pending 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 new legislation also outlines rules particular to gifts where a taxpayer incurs a limited recourse debt. This legislation, while still pending, is applicable in respect of gifts made after December 5, 2003.

It is our view the participant donor received an advantage, as defined at proposed subsection 248(32), as a result of the cash contribution to the Charity, in the form of receiving a limited-recourse, low-interest debt. A limited-recourse debt is broadly defined to include any unpaid amounts if there is a guarantee, security, or similar indemnity or covenant in respect of the debt. The value of this advantage should have been deducted from the eligible amount of the gift.

In addition, proposed subsection 248(34) generally provides that the gift portion of any transaction involving a limited recourse debt is deemed to be no more than the amount of the initial cash payment. A taxpayer may additionally claim a gift with respect to a repayment of the principal amount of the limited-recourse debt in the year it is paid. As such, the Charity was not entitled to issue a receipt associated with the limited recourse debt (in this case with reference to the promissory note) and in this regard it is our view that The Banyan Tree Foundation has issued a receipt for a gift or donation otherwise than in accordance with this ITA, which is cause for revocation by virtue of paragraph 168(1)(d).

d) Fair Market Value:

Under the ITA, a registered charity may issue a receipt for a donation of property other than cash, but it must ensure that the accurate fair-market value ("FMV") is determined and recorded on the receipt. It is our view that the Charity has contravened this requirement by not properly determining the FMV of the West Point shares donated and has issued receipts other than for the actual value of the property gifted.

The Charity initially issued an official donation receipt in the amount of \$77,700,000 for the West Point shares which was based on a letter accompanying the donation. On December 22, 2004, based on representations made to the CRA by the prospective purchasers of the donation deduction, the alleged donor and indirectly by the Charity, CRA issued a letter indicating that it considered the donation, for purposes of the ITA, "*to be no greater, in quantum, than \$65,000,000*". The Charity subsequently issued an amended

official donation receipt in the amount of \$65,000,000. It is our position that frank and full disclosure was not made to the CRA as sought and subsequently, the value of the shares has been determined to be nominal. Therefore, it is our position that the FMV of the West Point shares was nominal and the donation receipt issued in the amount of \$65,000,000 by the Charity was inflated.

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 ITA and its Regulations. It is our position that the Charity has issued receipts otherwise than in accordance with the ITA and the Regulations. For each reason identified above, there are grounds for revocation of The Banyan Tree Foundation's charitable status.

### **3. Issuing Receipts Not in Accordance with the ITA:**

The law provides various requirements with respect to the issuing of official donation receipts by registered charities. These requirements are contained in Regulations 3500 and 3501 of the ITA and are described in some detail in Interpretation Bulletin IT-110R3 *Gifts and Official Donation Receipts*.

The audit reveals that the donation receipts issued by the Charity do not comply with the requirements of Regulation 3501 of the ITA and IT-110R3 as follows:

- Official donation receipts issued utilized two separate templates for donations received. One template utilized does not employ a serial number therefore, we cannot ascertain the number of receipts issued (Regulation 3501(1)(c)).

Regulation 3501(4) of the ITA stipulates that an official receipt issued to replace an official receipt previously issued, shall clearly show that it replaces the original receipt and, in addition to its own serial number, shall show the serial number of the receipt originally issued. Regulation 3501(5) requires that a spoiled official receipt form shall be marked "cancelled" and such form, together with the duplicate thereof, shall be retained by the registered organization or the other recipient of a gift as part of its records. The Charity retains copies of receipts, which were issued with incorrect information; however, the receipts are not marked "voided", or "cancelled".

Under paragraphs 168(1)(d) of the ITA, 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 ITA and its Regulations. It is our position the Charity issued receipts for transactions that do not qualify as gifts at law. For this reason alone, there are grounds for revocation of the charitable status of The Banyan Tree Foundation under paragraph 168(1)(d) of the ITA.



#### **4. Failure to Meet its Disbursement Quota:**

In order to maintain its status as a charitable organization within the meaning of paragraph 149.1(4)(b) of the ITA, a registered charity must, in any taxation year, expend amounts that are equal to at least 80% of the aggregate amounts for which it issued donation receipts in its immediately preceding taxation year. A charity is allowed by virtue of 149.1(20) of the ITA to offset any shortfalls in its disbursement quota by applying any excesses in its disbursement quota from its immediately preceding taxation year and five or less of its immediately subsequent taxation years.

Based on our calculations, the Charity has not met its disbursement quota for the fiscal periods ending December 31, 2002 to December 31, 2004 due to a variety of reasons:

1. "Gifts" to UWI are not being recognized as gifts made to a qualified donee as the amounts were earmarked for non-charitable purposes. Refer to our discussion above.
2. "Gifts" of annuities to recipient Canadian charities are not being recognized at the total value of the annuity reportedly donated to them. The Charity has not demonstrated the annuities were in fact purchased or were assigned unconditionally to each recipient. We have taken into consideration, and into our calculation, the actual annuity payments received by the recipient Canadian charities in the year the payments were distributed.
3. "Gifts" of West Point and Lewis S&P 500 shares lack the necessary donor directions to be deemed gifts of enduring property; therefore, we have not included these in the disbursement quota calculation.

A ten-year gift is a donation that is made subject to a donor's written trust or direction that the gift be held by a registered charity for 10 years or more. Under the ITA, a ten-year gift is a gift of enduring property. These gifts are generally excluded from the disbursement quota however, when ten-year gifts are spent or transferred to a qualified donee, they must be included in calculating the disbursement quota.

In 2004, the Charity reported a gift of 50,000 West Point shares with a reported value of \$77.7 million and a gift of 209 Series C Units Lewis S&P 500 Fund shares valued at \$2,704,460.

In a note to its financial statements the Charity records that gifts were received with specific directions from the donor that the Charity holds the gifts or property substituted from it, for a period of 25 years. However, with respect to the gift of the West Point shares, it was represented to the CRA by Mr. Thiessen, that the Charity requested the 25-year restriction be placed on the gift as a condition of accepting the gift. Due to circumstances unknown, the alleged donor advised the Charity's auditors that it waived this provision effective December 31, 2005. For the gift of Lewis S&P 500 shares, the gift appears to have been reversed in 2006 as the gift *"was without substance."*

We are not of the opinion that either gift was a gift of enduring property. Even if we accept that the original direction was made, it is clear that the gift of West Point shares was not treated as enduring property given that this direction was waived shortly thereafter and the Charity proceeded to dispose of the property shortly after receiving

it. As such, we remain of the view that the gift must be included in its disbursement quota calculation as a tax-receipted gift in the year the gift was received.

4. "Gifts" made to Special Olympics for a sponsorship payment in 2005, Ontario Rugby Union in 2003, and Canadian Warmblood Horse Breeder's Association in 2003, are not gifts to a qualified donee as per the ITA 149.1(1).

Sponsorship fees are amounts paid to a registered charity and are not considered gifts to a qualified donee because the sponsor received something in exchange. For this payment, the Charity received sponsorship of gala table favours.

The Ontario Rugby Union and Canadian Warmblood Horse Breeder's Association are not registered charities and therefore gifts claimed by the Charity cannot be considered gifts to qualified donees. A charity cannot simply gift funds to non-qualified donees without any degree of direction or control over the use of the funds, as this is a contravention of the ITA for which revocation is possible. In our view, not only do these transactions not qualify for disbursement quota purposes, they are additional grounds, in and of themselves, for the revocation of The Banyan Tree Foundation's status.

We have calculated the Charity's cumulative disbursement quota shortfall as:

<b>Fiscal Period</b>	<b>DQ Excess</b>	<b>DQ Shortfall</b>	<b>Cumulative DQ (Excess) Shortfall</b>
2002	\$711	\$ -	\$ 711
2003	\$ -	\$ 4,151,726	-\$ 4,151,015
2004	\$ -	\$ 33,852,233	-\$ 38,003,248
2005	\$ -	\$ 91,476,499	-\$129,479,747

As per paragraph 168(1)(b) of the ITA, the Minister may, by registered mail, give notice to the charity that the Minister proposes to revoke its registration because it ceases to comply with the requirements of the ITA related to its registration as such. For this reason, it appears to us that there are grounds for revocation of the charitable status of The Banyan Tree Foundation.

**The Charity's Options:**

**a) No Response**

You may choose not to respond. In that case, the Director General of the Charities Directorate may issue a Notice of Intention to Revoke the registration of the Charity in the manner described in subsection 168(1) of the ITA.

**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 Charity, the Director General of the Charities Directorate will decide on the appropriate course of action, which may include the issuance of a Notice of Intention to Revoke the registration of the Charity in the manner described in subsection 168(1) of the ITA.

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.

Should you require further information, clarification, or assistance, please contact Holly Brant at (613) 957-2212 or by facsimile at (613) 946-7646.

Yours sincerely,

Danie Huppé-Cranford  
Director  
Compliance Division  
Charities Directorate