July 21, 2022

REGISTERED MAIL

Leslie Brandlmayr
Director
Headwaters Foundation
1250 – 1500 West Georgia St
PO Box 62
Vancouver, BC V6G 2Z6

BN: 83102 4203 RR0001
File: 3045194

Dear Leslie Brandlmayr,

Subject: Notice of intention to revoke

We are writing with respect to our letters dated January 8, 2020, and March 2, 2021 (copies enclosed), in which Headwaters Foundation (the Foundation) was invited to respond to the findings of the audit conducted by the Canada Revenue Agency (CRA) for the period from September 1, 2015 to August 31, 2017. Specifically, the Foundation was asked to explain why its registration should not be revoked in accordance with subsection 168(1) and/or financially sanctioned under section 188.1 of the Income Tax Act.

We have reviewed and considered your written responses dated March 9, 2020, and May 3, 2021 (the Representations). Your replies have not alleviated our concerns with respect to the Foundation's non-compliance with the requirements of the Act for registration as a charity. Our concerns are explained in Appendix A attached.

Conclusion

The audit by the CRA found that the Foundation is not complying with the requirements set out in the Act. In particular, it was found that the Foundation failed to devote resources to a charitable purpose, failed to meet its disbursement quota, and failed to file an information return as and when required by the Act. For these reasons, it is our position that the Foundation no longer meets the requirements for charitable registration.

Consequently, for the reasons mentioned in our letters dated January 8, 2020, and March 2, 2021, and pursuant to subsection 168(1), 149.1(3) and 149.1(4.1) of the Act, we hereby notify you of our intention to revoke the registration of the Foundation. By virtue of subsection 168(2) of the Act, the 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)(c), subsection 149.1(3), and paragraphs 149.1(4.1)(a) and 149.1(4.1)(b) of the

Income Tax Act, of our intention to revoke the registration of the charity listed below and that by virtue of paragraph 168(2)(b) thereof, the revocation of registration will be effective on the date of publication of this notice in the Canada Gazette.

Business number	**Name**
8311024203RR0001	Headwaters Foundation Vancouver, BC

In addition, due to the egregious and material nature of non-compliance found in the audit, the CRA has decided to publish a copy of the notice in the Canada Gazette immediately after the expiration of 30 days from the date of mailing of this notice pursuant to paragraph 168(2)(b) of the Act.

Should the Organization choose to object to this notice of intention to revoke its registration, in accordance with subsection 168(4) of the Act, a written notice of objection, with 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:

Assistant Commissioner
Appeals Intake Centre
Post Office Box 2006, Station Main
Newmarket ON L3Y 0E9

However, please note that even if the Organization files a notice of objection with the CRA, this will not prevent the CRA from publishing the notice of revocation in the Canada Gazette immediately after the expiration of 30 days from the date of mailing of this notice.

The Organization has the option of filing an application with the Federal Court of Appeal (FCA), as indicated in paragraph 168(2)(b) of the Act, to seek an order staying publication of the notice of revocation in the Canada Gazette. The FCA, upon reviewing this application, may extend the 30-day period during which the CRA cannot publish a copy of the notice.

A copy of the relevant provisions of the Act concerning revocation of registration, including appeals from a notice of intention to revoke registration, can be found in Appendix B, attached.

Consequences of revocation

As of the effective date of revocation:

a) the Foundation 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 Foundation would not be allowable as tax credits to

individual donors or as allowable deductions to corporate donors under subsection 118.1(3) and paragraph 110.1(1)(a) of the Act respectively;

b) by virtue of section 188 of the Act, the Foundation 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 Form T2046, Tax Return where Registration of a Charity is revoked. Form T2046 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. The relevant provisions of the Act concerning the tax applicable to revoked charities can also be found in Appendix B. Form T2046 and the related Guide RC4424, Completing the Tax Return where Registration of a Charity is revoked, are available on our website at **canada.ca/charities-giving**;

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

Finally, we 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,

[redacted]

Sharmila Khare
Director General
Charities Directorate

Enclosures

- Appendix A, Comments on representations
- Appendix B, Relevant provisions of the Act
- CRA letter dated January 8, 2020
- Foundation’s representations dated March 9, 2020
- CRA letter dated March 2, 2021
- Foundation’s representations dated May 3, 2021

c.c.: Leslie Brandlmayr

ITR Appendix A
Headwaters Foundation
Comments on Representations

During our audit of Headwaters Foundation (the Foundation) we prepared two administrative fairness letters (AFL). The first AFL was dated January 8, 2020, and the second AFL was dated March 2, 2021. After receiving the Foundation's representations to the first AFL[1], we determined that we failed to include an adequate analysis of all of our audit findings.

In the second AFL we addressed the concerns the Foundation raised in its March 9, 2020 representations and presented the Foundation with our updated audit findings to provide the Foundation with an opportunity to present any additional representations. While the second AFL replaced the first AFL, throughout this appendix we have included in this document information related to the first AFL and the Foundation's March 9, 2020 representations to provide additional context to explain how we have arrived at our decision to revoke the Foundation's registered status as a charity.

In our AFLs, we explained that the audit conducted by the Canada Revenue Agency (CRA) for the period from September 1, 2015 to August 31, 2017, identified that the Foundation is not operating in compliance with the provisions of the Income Tax Act (the Act) in the following areas:

1. Failure to devote resources to a charitable purpose;
2. Failure to meet the disbursement quota; and
3. Failure to file an information return as and when required by the Income Tax Act and/or its Regulations

In its representations dated May 3, 2021, the Foundation stated that penalties assessed by the Minister under section 188.1 of the Act are appealed to the Tax Court of Canada rather than a judicial review. The Foundation viewed this as an important distinction as appeals to the Tax Court of Canada differ from those to the Federal Court of Appeal. We acknowledge that a penalty under section 188.1 of the Act is appealable to the Tax Court of Canada rather than directly to the Federal Court of Appeal.

We have reviewed and considered the representations of both March 9, 2020, and May 3, 2021, and we maintain our position that the non-compliance identified during our audit, with the exception of our position on the standard of review, represent a serious breach of the requirements of the Act. As a result of this non-compliance, the Foundation's registration as a charity should be revoked.

The basis for our position is described in detail below, including:

- a summary of the issues raised in our AFLs dated January 8, 2020, and March 2, 2021;
- the Foundation's representations dated March 9, 2020, and May 3, 2021; and
- the CRA's response to the representations.

[1] Dated March 9, 2020.

Although we maintain our position that each of the section 188.1 penalties we discussed in our previous letters are applicable and could be assessed from a technical perspective,[2] we will not be assessing any of the penalties as a result of the current audit given that we are now informing the Foundation of our intention to revoke its status as a registered charity.

Issues of non-compliance

1. Failure to Devote Resources to a Charitable Purpose

Private benefit

In the AFL dated January 8, 2020 (first AFL), we informed the Foundation that we were of the view that it was operated for the non-charitable purpose of facilitating a private tax planning arrangement. We further noted that the Foundation structured its affairs for the benefit of private persons to the detriment of the Foundation's charitable mandate.

In response to the first AFL, the Foundation's representations dated March 9, 2020 (first representations), contested both these findings. In regard to the tax planning arrangement, the Foundation disagreed that it operated for a non-charitable purpose and disputed the standard of review used by CRA in our analysis of this particular concern. Specifically, the Foundation was of the view that the determination of whether an activity is in furtherance of a charitable purpose is strictly a legal question and should be evaluated with the standard of correctness. In regard to the private benefit, the Foundation stated that we had not identified the person who received the private benefit or explained how the CRA had concluded that this Foundation's delivery of said private benefit had been at the detriment of the Foundation's charitable mandate.

We responded with the second AFL dated March 2, 2021 (second AFL), indicating that in our view, despite the Foundation disagreeing with the non-compliance concerns that we identified in the first AFL, the Foundation failed to provide any documentary evidence to support that it was operated for a charitable purpose. We also explained that the decisions that we made as a result of our audit findings were based on an interpretation and analysis of a mixture of both fact and law and as such, the proper standard of review for this audit is the standard of palpable and overriding error.

We further clarified that the steps of the tax planning arrangement were as follows:

1) [redacted] ([redacted])[3] donated [redacted] shares to CHIMP Charitable Impact Foundation (Chimp).
2) [redacted] sold land to Paraklesis Foundation (Paraklesis), a qualified donee, and took back a mortgage from Paraklesis as payment.
3) [redacted] requested that the mortgage be "satisfied upon receipt of 1,123,362 shares of [redacted] which Paraklesis did not own at the time.

[2] Under subsection 189(7) of the Act, the Minister (that is, the CRA) may assess any applicable financial penalties against revoked charities and/or charities the Minister is in the process of revoking.
[3] [redacted] is a private, for-profit, corporation.
[4] [redacted]) is a company traded on the Toronto Stock Exchange (TSX).

4) A series of transactions[5] occurred which resulted in the transferring of [redacted] shares from Chimp, via the Foundation, to Paraklesis.
5) Paraklesis satisfied the terms of the mortgage by transferring the [redacted] shares to [redacted], as requested by [redacted]

Based on this series of transactions, we were of the view that the private person that benefited was [redacted] as it received a tax credit for its donation to Chimp for donating assets despite the fact that the assets were ultimately returned to [redacted] as part of the pre-arranged series of transactions (that is, the tax planning arrangement).

The Foundation's response

The Foundation agreed in the representations dated May 3, 2021 (the second representations), that the standard of review for the Minister's decision to revoke charitable registration is palpable and overriding error. As discussed previously, this is the only standard applicable to this audit, since we are not pursuing section 188.1 financial penalties.

The Foundation further stated that "no statutory basis has been provided as to why transactions that allowed [redacted] to receive a tax credit for its donation to Chimp and then subsequently repurchase the [redacted] shares for fair market value run afoul of the rules governing the operations of a charitable foundation." The Foundation is of the view that the transactions involving [redacted] shares supported the Foundation's ability to meet its charitable purposes of gifting to qualified donees. As such, the transactions fulfill a charitable purpose and any private benefit that may have accrued to [redacted] is incidental because it is reasonable and proportionate to the resulting public benefit.

The Foundation also questioned why we reference 149.1(3) of the Act in our second AFL under the private benefit heading. We will address this concern later in this appendix when we discuss the concerns that the audit has identified pertaining to the Foundation's disbursement quota requirements.

CRA's response

We maintain our position that an unacceptable private benefit was conferred by the Foundation. The private benefit to [redacted] is not incidental to fulfilling any charitable purpose, as no discernible public benefit has been described. The Foundation did not respond to our concern that the [redacted] shares did not in fact stay in the charitable sector, as Paraklesis transferred the shares to [redacted] shortly after receiving them; therefore, it is our view that the charitable sector did not benefit from this series of transactions. Furthermore, it is important to note that all of the individual transactions within this series of transactions were pre-arranged. We maintain that there is no public benefit, and hence the private benefit to [redacted] cannot be incidental.

For the reasons identified above, we maintain our position that the purpose of the transactions was to facilitate a private tax planning arrangement for the benefit of private persons, which does not fulfil a charitable purpose. Without exclusively charitable purposes and activities, the

[5] This series of transactions was outlined in Appendix A of our first AFL, which is enclosed with this letter.

Foundation does not meet the definition of public foundation that is provided subsection 149.1(1) of the Act. This definition provides that a charitable foundation must be constituted and operated exclusively for charitable purposes.

Disbursements to Qualified Donees

We are of the opinion that the series of transactions related to the [redacted] shares were not entered into with the intention of making gifts to other qualified donees, or to further any other charitable purpose. The first AFL advised the Foundation of our view that the transactions did not result in a gift being made in the legal sense and that these transactions were part of a private tax planning arrangement entered into in order to delay expenditures on charitable activities.[6]

In the first representations, the Foundation stated that the transfer of [redacted] shares to Paraklesis was a gift. The Foundation also explained that it is of the view that regardless of whether it was a gift or not, it would still be a transaction that was made in furtherance of the Foundation's purposes. The Foundation explained that it "became involved to enable [redacted] shares to become a charitable asset in July because the donations may not have been made if delayed until September." In short, the Foundation contested that the series of transactions related to the [redacted] shares were made in furtherance of the Foundation's purposes of "to hold, invest, develop, manage, accumulate and administer funds and property for the purpose of distributing funds and property exclusively to registered charities."

In the second AFL we responded by explaining that in our view the inclusion of the term disbursement in the definition of charitable purposes refers specifically to "disbursements by way of gifts to qualified donees", and not merely disbursements in the general sense of the word. Given that our audit findings led to our conclusion that the Foundation's sale of the [redacted] shares was made as part of a tax planning arrangement that provided a private benefit to [redacted], we explained that it was our view that the sale could not be considered a disbursement by way of gifts to qualified donees, and that the sale did not further a charitable purpose.

The Foundation's response

In the second representations, the Foundation agreed with our view that only disbursements by way of gifts to qualified donees, and not disbursements in general, enable a registered charity to meet its disbursement quota; however, the Foundation believed that our reference to the disbursement quota was irrelevant to its concerns. The Foundation acknowledged that it concurred that the sale of the [redacted] shares was not a charitable activity, but maintained that the sale was fulfilling a charitable purpose. Furthermore, the Foundation expressed disconcert with our view, stating that if the above position taken by the CRA in the second AFL was correct, then charitable foundations would never be able to invest in financial securities as investment activities are not charitable activities in and of themselves.

[6] We discuss both of these reasons in further detail under the subheading "Entering into transactions with the intention to avoid or delay expenditures on charitable activities." which is found under the "Failure to meet the Disbursement Quota" heading.

CRA's response

We maintain our position that the sale of the [redacted] shares cannot be considered as disbursements by way of gifts to qualified donees, and that the neither the purchase nor subsequent sale of the shares were made in furtherance of the Foundation's stated charitable purposes.

While the Foundation has explained that it believes that the sale of the [redacted] shares fall within the wording of the Foundation's "registered purposes", it has not provided any evidence to support how the purchase and sale of the shares furthered these charitable purposes. As such, it is our view that the Foundation has not demonstrated that it is furthering a charitable purpose by partaking in the tax planning arrangement outlined in the first and second AFLs, meaning that the Foundation has therefore ceased to comply with the requirements of the Act for continued registration as a charity.

We further advise that while it is permissible for charitable foundations to conduct investment-related activities, if such activities were to occupy a significant portion of the foundation's time and resources, it may call into question whether the foundation is operated exclusively for charitable purposes and whether such activities have become a non-charitable purpose in its own right. For this reason, when a charitable foundation chooses to involve itself in investment activities, it must be able to demonstrate that the investment activities were conducted in furtherance of a charitable purpose.

With respect to the Foundation, it is our view that the pre-arranged series of transactions[7] related to the [redacted] shares are considered investment activities which, as noted in the second AFL, were the only significant financial transactions made by the Foundation during the audit period. It is our view that the transactions occupied a significant portion of the Foundation's time and resources and, since the Foundation has not demonstrated that the investment activities were conducted in furtherance of charitable purposes, it is our position that the Foundation was not operated exclusively for charitable purposes.

We maintain our position that the Foundation was operated for the non-charitable purpose of facilitating a private tax planning arrangement and failed to meet the requirements of subsection 149.1(1) of the Act, that it be constituted and operated exclusively for charitable purposes. For this reason, our position remains that there are grounds for revocation of the Foundation's charitable status under paragraph 168(1)(b) of the Act.

<u>Undue benefit</u>

In the first AFL, we explained that we considered consulting fees the Foundation paid on behalf of non-qualified donees in 2016 and 2017[8] to be undue benefits that the Foundation conferred to the non-qualified donees. In the first representations, the Foundation stated that we failed to properly explain why we took that position, and in response we provided a detailed outline of our audit findings in the second AFL to explain how we arrived at our conclusion that undue benefits were conferred to the non-qualified donees.

[7] This series of transactions was outlined in Appendix A of our first AFL, which is enclosed with this letter.
[8] [redacted] Archon Minerals Ltd. in 2016, and Waterwell Turbine Inc. in 2017.

The Foundation's response

In the second representations, the Foundation explained why it believes that a subsection 188.1(4) penalty cannot be applied in these instances because the amounts in question were not payments "for the personal benefit of any person who is a proprietor, member, shareholder, trustee or settlor of the charity or association".

CRA's response

It remains our view that in paying for consulting fees on behalf of non-qualified donees, the Foundation gifted the value of the consulting fees to non-qualified donees, and therefore the payments can be considered undue benefits per subsection 188.1(5). However, we are not assessing an undue benefit penalty due to our decision to revoke the Foundation's registered status.

2. Failure to meet the Disbursement Quota

As stated in the first AFL, the Foundation failed to meet its disbursement quota (DQ) requirements, which are outlined in subsection 149.1(3) of the Act. The disbursements made by the Foundation did not fulfill any charitable purpose; rather, the disbursements provided a private benefit, which is why subsection 149.1(3) of the Act was referenced under the private benefit heading.

When calculating its disbursements, the Foundation only considered gifts to qualified donees, and no other expenditures, as the expenses it was incurring to meet its DQ requirements. We explained that, in our view, contrary to what the Foundation reported, the two amounts[9] reported as gifts to qualified donees in the audit period did not qualify to meet its DQ requirements.

In the first representations, the Foundation stated that the first AFL did not quantify or stipulate the amount of expenditures that, in the CRA's view, the Foundation would need to complete to meet its DQ requirements. As such, in the second AFL we provided detailed explanations in this regard, and included a working paper as an enclosure to the second AFL that clearly quantified the Foundation's DQ shortfall.

The Foundation's response

In the second representations, the Foundation did not directly address the DQ shortfall. Rather, the Foundation discussed each of the two amounts that it reported as gifts to qualified donees (i.e., amounts of $4,712,500 given to Paraklesis and $4,000,000 given to Chimp.) Each transaction is discussed in more detail below under the headings "Entering into transactions with the intention to avoid or delay expenditures on charitable activities" and "Gifts not at arm's length", respectively.

[9] Transfer of [redacted] shares to Paraklesis valued at $4,712,500 and $4,000,000 cash transferred to Chimp.

CRA's response

We maintain our position that the Foundation has not met its DQ requirements and that the Foundation should be revoked in the manner provided in paragraph 168(1)(b). Our position is further explained below.

Entering into transactions with the intention to avoid or delay expenditures on charitable activities

and

Assisting another registered charity to delay expenditures on its own charitable activities[10]

In the first AFL we informed the Foundation that we were of the view that the $4,712,500 it reported as a gift to Paraklesis was an intentional error in reporting. It was our view that the Foundation knew, or ought to have known, that this transaction was a sale to Paraklesis and not a gift. At that time, we believed that since valuable consideration was exchanged between the Foundation and Paraklesis[11] as part of the transaction, this precluded the transaction from being a gift. We further concluded that this error was made in an attempt to present a sale as though it were a charitable activity, and with the intention to avoid or delay expenditures on legitimate charitable activities. In other words, the Foundation reported this sale as a gift to a qualified donee in order to increase its expenditures on charitable activities, resulting in the Foundation meeting its DQ requirements. Pursuant to subsection 149.1(4.1)(a) of the Act - the Minister may revoke the registration of any charity that has entered into a transaction (including a gift to another registered charity) and it may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities.

In the first representations, the Foundation stated that in its view the first AFL did not provide any explanation for why we believed that the Foundation did not meet its DQ requirements, nor did we explain why we believed that the Foundation had intentionally avoided or unduly delayed expenditures on charitable activities.

In the second AFL, we explained why we felt that the Foundation's gift to Paraklesis was artificial by concluding that the gift was only made to make it appear as though the Foundation was engaging in charitable activities by making a gift to a qualified donee[12]. As we concluded that the transfer of the [redacted] shares cannot be considered a gift because valuable consideration was received by the Foundation in return for this transfer. Finally, as we concluded that the Foundation's gifts to Paraklesis were not charitable, the Foundation could not consider the gifts to be charitable for the purposes of meeting its DQ requirements.

[10] We have discussed these two non-compliance issues simultaneously as they both relate to the Foundation's participation in the series of transactions. Meaning, by participating in the series of transactions we have concluded that the Organization was both: entering into transactions with the intention to avoid or delay expenditures on its own charitable activities and assisting another registered charity, in this case Paraklesis, to do the same.
[11] The Foundation received $4,735,985 cash from Paraklesis a few days after transferring the [redacted] shares. This is not significantly different from the $4,712,500 value which the Foundation itself reported for the shares.
[12] That is, the "gift" to Paraklesis was not made with donative intent, and therefore was not charitable in nature.

We further clarified that the Foundation did not have any assets that were generating enough income to enable the Foundation to make gifts to qualified donees. Therefore, we concluded that without the artificial gift to Paraklesis the Foundation would not have been capable of meeting its DQ requirements.

Foundation's response

In the second representations the Foundation reiterated that, in its view, unduly delaying an expenditure on charitable activities was not a purpose of any of the Foundation's transactions. The Foundation repeated its assertion that that it "only purchased the [redacted] shares as part of the aforementioned pre-planned series of transactions which had the result of adding more than $4 million of equity into the charitable sector." Meaning, in the Foundation's view, the transactions involving [redacted] shares were undertaken for charitable purposes.

The Foundation also reiterated its position from the first representations, that the transfer of the [redacted] shares to Paraklesis was legally a gift and that it was made to further a charitable purpose. The second representations explained that the Foundation intended for the transfer to be a gift and it referenced a court case, Richert v. Stewards Charitable Foundation (BCTC 2005 211), to demonstrate that "reciprocal gifts" have been recognized by the law.

CRA's response

Contrary to the Foundation's response in the second representation, as discussed above under the heading "failure to devote resources to a charitable purpose," the [redacted] shares did not remain in the charitable sector. Rather, under the terms of a pre-arranged series of transactions the shares were transferred to [redacted], a non-qualified donee. As such, we do not agree with the Foundation's claim that more than $4 million of equity was added to the charitable sector as a result of the series of transactions.

The Foundation's representations only considered the entries in the series of transactions up to and including the transfer of [redacted] shares from the Foundation to Paraklesis, but did not consider the final step in the series of transactions when Paraklesis transferred the [redacted] shares back to [redacted] When regarding the entirety of the series of transactions, this step cannot be ignored as it is the step in the series wherein the shares ceased to be an asset that was both owned, and usable, by the charitable sector. This step also provides evidence in support of our view that the purpose for the Foundation partaking in this series of transactions was not charitable in nature.

While the Foundation did not directly transfer the [redacted] shares to [redacted] (that is, to a for-profit entity), by becoming involved in a pre-arranged series of transactions which resulted in the [redacted] shares being transferred to [redacted], it enabled its resources to be used for non-charitable purposes.

The Foundation claims that its participation in the series of transactions enriched the charitable sector by $4,000,000[13], however, by examining the individual transactions within the series, it is clear that the charitable sector was not enriched in the manner described in the representations.

[13] As part of the series of transactions, the Foundation transferred $4,000,000 in cash to Chimp.

To demonstrate our view, below is a list of the transactions that occurred between [redacted], a for-profit entity, and several qualified donees:

1) On November 25, 2014, [redacted] donated 1,250,000 shares of [redacted] valued at $4.40 per share to Chimp, for a total gift of $5,500,000;
2) On June 3, 2015, [redacted] sold land valued at $4,212,606.93[14] to Paraklesis and took back a mortgage from Paraklesis as payment, requesting that Paraklesis satisfy the terms of the mortgage by transferring [redacted] 1,123,362 of the shares referred to in step 1[15];
3) The following series of transactions was agreed upon and enacted for the purpose of the shares being transferred from Chimp, via the Foundation, to Paraklesis:
    a. On July 14, 2015, the Foundation received gifts totalling $4,750,000 from two charities: Association for the Advancement of Scholarship (AAS) and Timothy Foundation (Timothy);
    b. On July 14, 2015, the Foundation purchased $4,736,062.50 in [redacted] shares from Chimp;
    c. On July 24, 2015, the Foundation transferred the [redacted] shares to Paraklesis;
    d. On July 30, 2015, Paraklesis transferred $4,735,985 in cash to the Foundation;
    e. On July 30, 2015, the Foundation gave $4,000,000 to Chimp. This payment was made using two cheques from the Foundation's bank account; cheque [redacted] for $1,000,000 and cheque [redacted] for $3,000,000.
4) On October 9, 2015, Paraklesis satisfies the terms of its mortgage agreement with [redacted] by completing a floor trade of 1,186,620 [redacted] shares at $3.55. These shares were then used as payment to cover the balance of the mortgage[16].

To summarize, this entire series of transactions resulted in:

a) [redacted] shares being in the possession of the same owner at the beginning of the series of transactions, and the end of the series[17];
b) Land being owned by Paraklesis that may or not be used for charitable purposes; and
c) No additional financial resources being added to the charitable sector:
    - Before the series of transactions occurred, the $4,750,000 given by AAS and Timothy to the Foundation was already in the charitable sector (that is, both AAS and Timothy are registered charities);
    - After the series of transactions occurred, $4,000,000 was held by Chimp while the majority of the remaining $750,000[18] was held by the Foundation.

If we focus exclusively on the portion of the series of transactions that the Foundation was directly involved in[19], there is no evidence to suggest that the Foundation's involvement in the

[14] The land portion was worth $4,195,750, but the transaction included an additional $16,856.93 in property tax. $4,195,750 + $16,856.93 = $4,212,606.93.
[15] Note that at this time, Paraklesis did not own the [redacted] shares.
[16] That is, $4,212,606.93.
[17] While some of the shares remained in the charitable sector at the conclusion of the series of transactions (i.e., 1,250,000 – 1,186,620 = 63,380), the majority of the shares (i.e., 1,186,620/1,250,000, or 94.9%) were transferred back to [redacted] during the series of transactions.
[18] $735,585 remained in the Foundation's possession. The majority of the difference between this amount and the $750,000 is attributable to fees payable by the Foundation as a result of the [redacted] share transactions.
[19] That is, step 3 of the entire series of transactions.

series of transactions contributed any material resources to the charitable sector. For this reason, we maintain our position that there was no discernible public benefit from this series of transactions, and the Foundation did not enter into these transactions for charitable purposes.

As we explained in the second AFL, as of August 31, 2017, the Foundation owned assets that were not generating any revenue. Therefore, it had inadequate revenue generating sources to make gifts to qualified donees of the amounts required for the Foundation to meet its DQ requirements. Given the lack of any discernable charitable purpose to the Foundation's involvement in the series of transactions, it is our view that the Foundation became involved in these transactions for the purpose of appearing to meet its DQ requirements. Furthermore, while the Foundation maintains that these transactions fulfilled its charitable purposes, as it claims that it was gifting to qualified donees, we believe that the purpose for making these artificial gifts was to delay expenditures on its own charitable activities. For this reason, we do not accept the Foundation's representations in this regard, and maintain our position that the Foundation was intentionally delaying expenditures on charitable activities by appearing to make gifts to other registered charities.

Regarding the Foundation's reference to the case Richert v. Stewards Charitable Foundation (BCTC 2005 211)[20], in our view the facts from that case are not congruent with the facts of the Foundation's case.

In the case of Richert v. Stewards Charitable Foundation (BCTC 2005 211), Mr. Richert purchased a $1,000 ticket to attend a Stewards Charitable Foundation's luncheon. He received an official donation receipt in the amount of $855, which was his $1,000 less the $145 value of the luncheon and a book that he received from Stewards Charitable Foundation. Mr. Richert was not satisfied with the value of the official donation receipt and desired a $1,000 receipt (i.e., the purchase price of the ticket to the luncheon). As Stewards Charitable Foundation refused to re-issue the donation receipt, Mr. Richert sued for return of his $1,000. The judge ruled that Stewards Charitable Foundation cannot return the $1,000 since it was a gift. This was contrary to Mr. Richert's position that the $145 advantage was consideration and had invalidated the gift. The $145 advantage that Mr. Richert received was, in the judge's view, a gift from Stewards Charitable Foundation to Mr. Richert (in appreciation for his $1,000) rather than consideration flowing back to Mr. Richert.

While the Foundation uses the term "reciprocal gifts" to describe the transactions between Mr. Richert and Stewards Charitable Foundation, these transactions are better described as a donation to a charity that resulted in an advantage provided to the donor. When a donor makes a gift to a qualified donee and receives an advantage in return for the gift, there are split-receipting rules which must be followed by the charity when it issues the official donation receipt to the donor. That is the primary concern addressed in the case referenced by the Foundation.

Accordingly, it is our view that the arguments raised in Richert v. Stewards Charitable Foundation (BCTC 2005 211) are unrelated to the concerns we have identified throughout our audit of the Foundation, as we are not presently considering a receipting-related issue. Rather,

[20] We refer to this case as "the Richert case" throughout the remainder of this appendix.

we are considering amounts transferred between multiple qualified donees; none of which required an official donation receipt to be issued.

Furthermore, the advantages in the form of donations that the qualified donees received during their participation in the series of transactions, were similar to the supposed gifts that they had transferred to the other qualified donees.[21] As such, we maintain our view that the amounts transferred by the qualified donees to each other, including those transfers made by the Foundation, were not gifts as none of the transactions meet the "Intention to give" requirements that are legislated in subsection 248(30) of the Act.

We maintain our position that the Foundation entered into the [redacted] share transactions in order to avoid or delay expenditures on charitable activities, and that these transactions do not constitute as charitable activities[22] for the purposes of the DQ requirement calculations which is a revocable offense under paragraph 149.1(4.1)(a) of the Act.

We also maintain our position that a purpose of the Foundation partaking in the series of transactions was to assist other registered charities in avoiding and/or delaying expenditures on their own charitable activities, which is a revocable offense under paragraph 149.1(4.1)(b) of the Act. Accordingly, we are recommending that the Foundation be revoked in the manner provided in paragraph 168(1)(b).

Gifts not at arm's length

In the first AFL, we informed the Foundation that we were of the view that the $4,000,000 gift that the Foundation made to Chimp should not be included as a charitable expenditure in the Foundation's calculation of its DQ requirements. In that letter, we explained that this gift should not be considered as a charitable expenditure due to the not at arm's length relationships between the Foundation, the entities that gifted money to the Foundation[23] and Chimp itself.

Specifically, we concluded that the Foundation received funds from entities not at arm's length, and that the $4,000,000 it gifted to Chimp was a gift made to a not at arm's length qualified donee. Hence, the requirements per paragraph 149.4(4.1)(d) have not been met.

Pursuant to paragraph 149.1(4.1)(d) of the Act, if a registered charity receives a gift from another registered charity with which it does not deal with at arm's length, then the charity that received the gift must either expend before the end of the following fiscal period - in addition to its DQ - the gifted amount on its own charitable activities or gift the gifted amount to an arm's length qualified donee.

The first representations stated that the first AFL did not include enough evidence to support our conclusion that all of the entities in the series of transactions were not acting at arm's length with

[21] The advantages being the net gain to the charitable sector resulting from each of the qualified donees partaking in the series of transactions. As explained above, steps 1-4 of the series of transactions resulted in a negligible financial advantage to the charitable sector.
[22] As gifts to qualified donees.
[23] $2,500,000 received from Timothy Foundation and $2,250,000 received from Association for the Advancement of Scholarship.

one another. In the second AFL, we provided a detailed explanation for how we had determined that all of the entities were acting at non-arm's length.

Foundation's response

In the second representations the Foundation did not refute the non-arm's length relationships that the CRA had identified in the second AFL. The only reference made to the term "not at arm's length" is where the Foundation has written that "if the Foundation had not participated [in the [redacted] share transactions], it would not have had the expenditure requirements CRA is alleging flowing from gifts which were not at arm's length." We have interpreted this to mean that the Foundation agrees with both our analysis and conclusions in regards to the fact that by agreeing to participate in the series of transactions, all of the entities – including the Foundation – were acting not at arm's length with each other for the purpose of completing the series of transactions.

CRA's response

The Foundation has not provided any information or explanation to support that it was not acting at non-arm's length with the other entities in the aforementioned tax planning arrangement when it partook in the series of transactions. As we have concluded that the transactions between the entities involved in the series of transactions were not gifts, however, neither subsection 188.1(12) nor paragraph 149.1(4.1)(d) of the Act are applicable.

3. Failure to file an information return as and when required by the Income Tax Act and/or its Regulations

In the first AFL we informed the Foundation that we were of the view that the Foundation incorrectly filed its T3010, Registered Charity Information Return. Specifically, we noted that the amount reported on line 5050, total amount of gifts made to all qualified donees, was incorrect. As previously discussed, we were of the view that the Foundation's $4,712,500 transfer of funds to Paraklesis was not legally a gift. Accordingly, it should have been reported under line 4640, revenue from sale of goods and services – and not on line 5050.

Further, we informed the Foundation of our concerns with reporting that the [redacted] shares were capital assets. We explained that in our view the shares should have been reported as short-term assets as, due to the pre-arranged transfer of the [redacted] shares to Paraklesis, the Foundation knew that it would not be owning the shares for long.

In the first representations, the Foundation explained that by reporting the [redacted] shares as capital assets, it was merely following professional advice when it completed its T3010 Information Return. The Foundation further explained that, despite our assertions to the contrary, it remained of the view that the transaction should be considered as a gift to a qualified donee.

In the second AFL, we explained that in our view it was not reasonable for the Foundation to argue that the [redacted] shares be classified as capital assets of the Foundation at any point in time. We explained that, regardless of any professional advice it received on the matter, the

Foundation itself knew that it only owned the shares for nine days and received no long-term benefit from owning them.

Further, in the second AFL we noted that the Foundation, in the first representations, acknowledged that the $4,735,985 cash that it received from Paraklesis was from sales of goods and services. Accordingly, and as explained in the first AFL, this amount should have been reported on line 4640, total of sale of goods and services. The Foundation did not report anything on line 4640 but rather $10,236,479 (which would include the $4,735,985) on line 4510, total amount received from other registered charities.

Foundation's response

In the second representations, the Foundation maintained its position that it had followed professional advice when completing its information return. However, unlike in the first representations, the Foundation acknowledged that some of the professional advice, referred to above, led to inaccuracies in the Foundation's T3010. The Foundation indicated that in its view the CRA should write an education letter to address this non-compliance concern rather than revoke the Foundation's registration.

CRA's response

The Foundation was aware of its reporting obligations. The Foundation knew or ought to have known that completing the information return with the information and amounts that it did was not accurate, and hence the Foundation is non-compliant with the requirements of the Act.

It remains our view that reporting the transfer of funds to Paraklesis as a gift was an intentional misrepresentation of the facts by the Foundation. Similarly, as previously discussed in this appendix, it remains our view that these misrepresentations were made to enable the Foundation to meet its DQ requirements.

Accordingly, we maintain our position that revoking the Foundation's registration in the manner described in paragraphs 168(1)(c) of the Act for failing to file an accurate information return is a reasonable manner to address this non-compliance.

Conclusion:

For the reasons explained above and in our letters dated January 8, 2020, and March 2, 2021, it is the CRA's position that the Foundation has failed to meet the requirements for registration as a public foundation as outlined in subsections 149.1(1) of the Act. As such, the Organization should have its registration as a charity revoked pursuant to subsection 168(1) of the Act.

APPENDIX B

Qualified Donees

149.1 (1) Definitions

charitable foundation means a corporation or trust that is constituted and operated exclusively for charitable purposes, 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, and that is not a charitable organization

charitable organization, at any particular time, means an organization, whether or not incorporated,

(a) constituted and operated exclusively for charitable purposes,

(a.1) all the resources of which are devoted to charitable activities carried on by the organization itself,

(b) 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,

(c) more than 50% of the directors, trustees, officers or like officials of which deal at arm's length with each other and with

> (i) each of the other directors, trustees, officers and like officials of the organization,
>
> (ii) each person described by subparagraph (d)(i) or (ii), and
>
> (iii) each member of a group of persons (other than Her Majesty in right of Canada or of a province, a municipality, another registered charity that is not a private foundation, and any club, society or association described in paragraph 149(1)(l)) who do not deal with each other at arm's length, if the group would, if it were a person, be a person described by subparagraph (d)(i), and

(d) that is not, at the particular time, and would not at the particular time be, if the organization were a corporation, controlled directly or indirectly in any manner whatever

> (i) by a person (other than Her Majesty in right of Canada or of a province, a municipality, another registered charity that is not a private foundation, and any club, society or association described in paragraph 149(1)(l)),
>
> > (A) who immediately after the particular time, has contributed to the organization amounts that are, in total, greater than 50% of the capital of the organization immediately after the particular time, and
> >
> > (B) who immediately after the person's last contribution at or before the particular time, had contributed to the organization amounts that were, in total, greater than 50% of the capital of the organization immediately after the making of that last contribution, or

(ii) by a person, or by a group of persons that do not deal at arm's length with each other, if the person or any member of the group does not deal at arm's length with a person described in subparagraph (i)

qualified donee, at any time, means a person that is

(a) registered by the Minister and that is

(i) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i) that has applied for registration,

(ii) a municipality in Canada,

(iii) a municipal or public body performing a function of government in Canada that has applied for registration,

(iv) a university outside Canada, the student body of which ordinarily includes students from Canada, that has applied for registration, or

(v) a foreign charity that has applied to the Minister for registration under subsection (26),

(b) a registered charity,

(b.1) a registered journalism organization,

(c) a registered Canadian amateur athletic association, or

(d) Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations.

149.1 (2) Revocation of registration of charitable organization

The Minister may, in the manner described in section 168, revoke the registration of a charitable organization for any reason described in subsection 168(1) or where the organization

(a) carries on a business that is not a related business of that charity;

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the organization's disbursement quota for that year; or

(c) makes a disbursement by way of a gift, other than a gift made

(i) in the course of charitable activities carried on by it, or

(ii) to a donee that is a qualified donee at the time of the gift.

149.1 (3) Revocation of registration of public foundation

The Minister may, in the manner described in section 168, revoke the registration of a public foundation for any reason described in subsection 168(1) or where the foundation

(a) carries on a business that is not a related business of that charity;

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the foundation's disbursement quota for that year;

(b.1) makes a disbursement by way of a gift, other than a gift made

(i) in the course of charitable activities carried on by it, or

(ii) to a donee that is a qualified donee at the time of the gift;

(c) since June 1, 1950, acquired control of any corporation;

(d) since June 1, 1950, incurred debts, other than debts for current operating expenses, debts incurred in connection with the purchase and sale of investments and debts incurred in the course of administering charitable activities; or

(e) at any time within the 24 month period preceding the day on which notice is given to the foundation by the Minister pursuant to subsection 168(1) and at a time when the foundation was a private foundation, took any action or failed to expend amounts such that the Minister was entitled, pursuant to subsection 149.1(4), to revoke its registration as a private foundation.

149.1 (4) Revocation of registration of private foundation

The Minister may, in the manner described in section 168, revoke the registration of a private foundation for any reason described in subsection 168(1) or where the foundation

(a) carries on any business;

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the foundation's disbursement quota for that year;

(b.1) makes a disbursement by way of a gift, other than a gift made

(i) in the course of charitable activities carried on by it, or

(ii) to a donee that is a qualified donee at the time of the gift;

(c) has, in respect of a class of shares of the capital stock of a corporation, a divestment obligation percentage at the end of any taxation year;

(d) since June 1, 1950, incurred debts, other than debts for current operating expenses, debts incurred in connection with the purchase and sale of investments and debts incurred in the course of administering charitable activities.

149.1 (4.1) Revocation of registration of registered charity

The Minister may, in the manner described in section 168, revoke the registration

(a) of a registered charity, if it has entered into a transaction (including a gift to another registered charity) and it may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities;

(b) of a registered charity, if it may reasonably be considered that a purpose of entering into a transaction (including the acceptance of a gift) with another registered charity to which

paragraph (a) applies was to assist the other registered charity in avoiding or unduly delaying the expenditure of amounts on charitable activities;

(c) of a registered charity, if a false statement, within the meaning assigned by subsection 163.2(1), was made in circumstances amounting to culpable conduct, within the meaning assigned by that subsection, in the furnishing of information for the purpose of obtaining registration of the charity;

(d) of a registered charity, if it has in a taxation year received a gift of property (other than a designated gift) from another registered charity with which it does not deal at arm's length and it has expended, before the end of the next taxation year, in addition to its disbursement quota for each of those taxation years, an amount that is less than the fair market value of the property, on charitable activities carried on by it or by way of gifts made to qualified donees with which it deals at arm's length;

(e) of a registered charity, if an ineligible individual is a director, trustee, officer or like official of the charity, or controls or manages the charity, directly or indirectly, in any manner whatever; and

(f) of a registered charity, if it accepts a gift from a foreign state, as defined in section 2 of the State Immunity Act, that is set out on the list referred to in subsection 6.1(2) of that Act.

Revocation of Registration of Certain Organizations and Associations

168 (1) Notice of intention to revoke registration

The Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition "qualified donee" in subsection 149.1(1) that the Minister proposes to revoke its registration if the person

(a) applies to the Minister in writing for revocation of its registration;

(b) ceases to comply with the requirements of this Act for its registration;

(c) in the case of a registered charity or registered Canadian amateur athletic association, fails to file an information return as and when required under this Act or a regulation;

(d) issues a receipt for a gift otherwise than in accordance with this Act and the regulations or that contains false information;

(e) fails to comply with or contravenes any of sections 230 to 231.5; or

(f) in the case of a registered Canadian amateur athletic association, accepts a gift the granting of which was expressly or implicitly conditional on the association making a gift to another person, club, society or association.

168 (2) Revocation of Registration

Where the Minister gives notice under subsection 168(1) to a registered charity or to a registered Canadian amateur athletic association,

(a) if the charity or association has applied to the Minister in writing for the revocation of its registration, the Minister shall, forthwith after the mailing of the notice, publish a copy of the notice in the Canada Gazette, and

(b) in any other case, the Minister may, after the expiration of 30 days from the day of mailing of the notice, or after the expiration of such extended period from the day of mailing of the notice as the Federal Court of Appeal or a judge of that Court, on application made at any time before the determination of any appeal pursuant to subsection 172(3) from the giving of the notice, may fix or allow, publish a copy of the notice in the Canada Gazette,

and on that publication of a copy of the notice, the registration of the charity or association is revoked.

168 (4) Objection to proposal or designation

A person may, on or before the day that is 90 days after the day on which the notice was mailed, serve on the Minister a written notice of objection in the manner authorized by the Minister, setting out the reasons for the objection and all the relevant facts, and the provisions of subsections 165(1), (1.1) and (3) to (7) and sections 166, 166.1 and 166.2 apply, with any modifications that the circumstances require, as if the notice were a notice of assessment made under section 152, if

(a) in the case of a person that is or was registered as a registered charity or is an applicant for such registration, it objects to a notice under any of subsections (1) and 149.1(2) to (4.1), (6.3), (22) and (23);

(b) in the case of a person that is or was registered as a registered Canadian amateur athletic association or is an applicant for such registration, it objects to a notice under any of subsections (1) and 149.1(4.2) and (22); or

(c) in the case of a person described in any of subparagraphs (a)(i) to (v) of the definition "qualified donee" in subsection 149.1(1), that is or was registered by the Minister as a qualified donee or is an applicant for such registration, it objects to a notice under any of subsections (1) and 149.1(4.3) and (22).

172 (3) Appeal from refusal to register, revocation of registration, etc.

Where the Minister

(a) confirms a proposal or decision in respect of which a notice was issued under any of subsections 149.1(4.2) and (22) and 168(1) by the Minister, to a person that is or was registered as a registered Canadian amateur athletic association or is an applicant for registration as a registered Canadian amateur athletic association, or does not confirm or vacate that proposal or decision within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal or decision,

(a.1) confirms a proposal, decision or designation in respect of which a notice was issued by the Minister to a person that is or was registered as a registered charity, or is an applicant for registration as a registered charity, under any of subsections 149.1(2) to (4.1), (6.3), (22) and (23) and 168(1), or does not confirm or vacate that proposal, decision or designation within 90

days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal, decision or designation,

(a.2) confirms a proposal or decision in respect of which a notice was issued under any of subsections 149.1(4.3), (22) and 168(1) by the Minister, to a person that is a person described in any of subparagraphs (a)(i) to (v) of the definition "qualified donee" in subsection 149.1(1) that is or was registered by the Minister as a qualified donee or is an applicant for such registration, or does not confirm or vacate that proposal or decision within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal or decision,

(b) refuses to accept for registration for the purposes of this Act any retirement savings plan,

(c) refuses to accept for registration for the purposes of this Act any profit sharing plan or revokes the registration of such a plan,

(d) [Repealed, 2011, c. 24, s. 54]

(e) refuses to accept for registration for the purposes of this Act an education savings plan,

(e.1) sends notice under subsection 146.1(12.1) to a promoter that the Minister proposes to revoke the registration of an education savings plan,

(f) refuses to register for the purposes of this Act any pension plan or gives notice under subsection 147.1(11) to the administrator of a registered pension plan that the Minister proposes to revoke its registration,

(f.1) refuses to accept an amendment to a registered pension plan,

(g) refuses to accept for registration for the purposes of this Act any retirement income fund,

(h) refuses to accept for registration for the purposes of this Act any pooled pension plan or gives notice under subsection 147.5(24) to the administrator of a pooled registered pension plan that the Minister proposes to revoke its registration, or

(i) refuses to accept an amendment to a pooled registered pension plan,

the person described in paragraph (a), (a.1) or (a.2), the applicant in a case described in paragraph (b), (e) or (g), a trustee under the plan or an employer of employees who are beneficiaries under the plan, in a case described in paragraph (c), the promoter in a case described in paragraph (e.1), the administrator of the plan or an employer who participates in the plan, in a case described in paragraph (f) or (f.1), or the administrator of the plan in a case described in paragraph (h) or (i), may appeal from the Minister's decision, or from the giving of the notice by the Minister, to the Federal Court of Appeal.

180 (1) Appeals to Federal Court of Appeal

An appeal to the Federal Court of Appeal pursuant to subsection 172(3) may be instituted by filing a notice of appeal in the Court within 30 days from

(a) the day on which the Minister notifies a person under subsection 165(3) of the Minister's action in respect of a notice of objection filed under subsection 168(4),

(b) [Repealed, 2011, c. 24, s. 55]

(c) the mailing of notice to the administrator of the registered pension plan under subsection 147.1(11),

(c.1) the sending of a notice to a promoter of a registered education savings plan under subsection 146.1(12.1),

(c.2) the mailing of notice to the administrator of the pooled registered pension plan under subsection 147.5(24), or

(d) the time the decision of the Minister to refuse the application for acceptance of the amendment to the registered pension plan or pooled registered pension plan was mailed, or otherwise communicated in writing, by the Minister to any person,

as the case may be, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiration of those 30 days, fix or allow.

Tax and Penalties in Respect of Qualified Donees

188 (1) Deemed year-end on notice of revocation

If on a particular day the Minister issues a notice of intention to revoke the registration of a taxpayer as a registered charity under any of subsections 149.1(2) to (4.1) and 168(1) or it is determined, under subsection 7(1) of the Charities Registration (Security Information) Act, that a certificate served in respect of the charity under subsection 5(1) of that Act is reasonable on the basis of information and evidence available,

(a) the taxation year of the charity that would otherwise have included that day is deemed to end at the end of that day;

(b) a new taxation year of the charity is deemed to begin immediately after that day; and

(c) for the purpose of determining the charity's fiscal period after that day, the charity is deemed not to have established a fiscal period before that day.

188 (1.1) Revocation tax

A charity referred to in subsection (1) is liable to a tax, for its taxation year that is deemed to have ended, equal to the amount determined by the formula

A - B

where

A is the total of all amounts, each of which is

(a) the fair market value of a property of the charity at the end of that taxation year,

(b) the amount of an appropriation (within the meaning assigned by subsection (2)) in respect of a property transferred to another person in the 120-day period that ended at the end of that taxation year, or

(c) the income of the charity for its winding-up period, including gifts received by the charity in that period from any source and any income that would be computed under section 3 as if that period were a taxation year; and

B is the total of all amounts (other than the amount of an expenditure in respect of which a deduction has been made in computing income for the winding-up period under paragraph (c) of the description of A), each of which is

(a) a debt of the charity that is outstanding at the end of that taxation year,

(b) an expenditure made by the charity during the winding-up period on charitable activities carried on by it, or

(c) an amount in respect of a property transferred by the charity during the winding-up period and not later than the latter of one year from the end of the taxation year and the day, if any, referred to in paragraph (1.2)(c), to a person that was at the time of the transfer an eligible donee in respect of the charity, equal to the amount, if any, by which the fair market value of the property, when transferred, exceeds the consideration given by the person for the transfer.

188 (1.2) Winding-up period

In this Part, the winding-up period of a charity is the period that begins immediately after the day on which the Minister issues a notice of intention to revoke the registration of a taxpayer as a registered charity under any of subsections 149.1(2) to (4.1) and 168(1) (or, if earlier, immediately after the day on which it is determined, under subsection 7(1) of the Charities Registration (Security Information) Act, that a certificate served in respect of the charity under subsection 5(1) of that Act is reasonable on the basis of information and evidence available), and that ends on the day that is the latest of

(a) the day, if any, on which the charity files a return under subsection 189(6.1) for the taxation year deemed by subsection (1) to have ended, but not later than the day on which the charity is required to file that return,

(b) the day on which the Minister last issues a notice of assessment of tax payable under subsection (1.1) for that taxation year by the charity, and

(c) if the charity has filed a notice of objection or appeal in respect of that assessment, the day on which the Minister may take a collection action under section 225.1 in respect of that tax payable.

188 (1.3) Eligible donee

In this Part, an eligible donee in respect of a particular charity is

(a) a registered charity

> (i) of which more than 50% of the members of the board of directors or trustees of the registered charity deal at arm's length with each member of the board of directors or trustees of the particular charity,

(ii) that is not the subject of a suspension under subsection 188.2(1),

(iii) that has no unpaid liabilities under this Act or under the Excise Tax Act,

(iv) that has filed all information returns required by subsection 149.1(14), and

(v) that is not the subject of a certificate under subsection 5(1) of the Charities Registration (Security Information) Act or, if it is the subject of such a certificate, the certificate has been determined under subsection 7(1) of that Act not to be reasonable; or

(b) a municipality in Canada that is approved by the Minister in respect of a transfer of property from the particular charity.

188 (2) Shared liability – revocation tax

A person who, after the time that is 120 days before the end of the taxation year of a charity that is deemed by subsection (1) to have ended, receives property from the charity, is jointly and severally, or solidarily, liable with the charity for the tax payable under subsection (1.1) by the charity for that taxation year for an amount not exceeding the total of all appropriations, each of which is the amount by which the fair market value of such a property at the time it was so received by the person exceeds the consideration given by the person in respect of the property.

188 (2.1) Non-application of revocation tax

Subsections (1) and (1.1) do not apply to a charity in respect of a notice of intention to revoke given under any of subsections 149.1(2) to (4.1) and 168(1) if the Minister abandons the intention and so notifies the charity or if

(a) within the one-year period that begins immediately after the taxation year of the charity otherwise deemed by subsection (1) to have ended, the Minister has registered the charity as a charitable organization, private foundation or public foundation; and

(b) the charity has, before the time that the Minister has so registered the charity,

(i) paid all amounts, each of which is an amount for which the charity is liable under this Act (other than subsection (1.1)) or the Excise Tax Act in respect of taxes, penalties and interest, and

(ii) filed all information returns required by or under this Act to be filed on or before that time.

188 (3) Transfer of property tax

Where, as a result of a transaction or series of transactions, property owned by a registered charity that is a charitable foundation and having a net value greater than 50% of the net asset amount of the charitable foundation immediately before the transaction or series of transactions, as the case may be, is transferred before the end of a taxation year, directly or indirectly, to one or more charitable organizations and it may reasonably be considered that the main purpose of the transfer is to effect a reduction in the disbursement quota of the foundation, the foundation shall pay a tax under this Part for the year equal to the amount by which 25% of the net value of that property determined as of the day of its transfer exceeds the total of all amounts each of

which is its tax payable under this subsection for a preceding taxation year in respect of the transaction or series of transactions.

188 (3.1) Non-application of subsection (3)

Subsection (3) does not apply to a transfer that is a gift to which subsection 188.1(11) or (12) applies.

188 (4) Joint and several, or solidary, liability – tax transfer

If property has been transferred to a charitable organization in circumstances described in subsection (3) and it may reasonably be considered that the organization acted in concert with a charitable foundation for the purpose of reducing the disbursement quota of the foundation, the organization is jointly and severally, or solidarily, liable with the foundation for the tax imposed on the foundation by that subsection in an amount not exceeding the net value of the property.

188 (5) Definitions – In this section,

net asset amount of a charitable foundation at any time means the amount determined by the formula

A - B

where

A is the fair market value at that time of all the property owned by the foundation at that time, and

B is the total of all amounts each of which is the amount of a debt owing by or any other obligation of the foundation at that time;

net value of property owned by a charitable foundation, as of the day of its transfer, means the amount determined by the formula

A - B

where

A is the fair market value of the property on that day, and

B is the amount of any consideration given to the foundation for the transfer.

189 (6) Taxpayer to file return and pay tax

Every taxpayer who is liable to pay tax under this Part (except a charity that is liable to pay tax under section 188(1)) for a taxation year shall, on or before the day on or before which the taxpayer is, or would be if tax were payable by the taxpayer under Part I for the year, required to file a return of income or an information return under Part I for the year,

(a) file with the Minister a return for the year in prescribed form and containing prescribed information, without notice or demand therefor;

(b) estimate in the return the amount of tax payable by the taxpayer under this Part for the year; and

(c) pay to the Receiver General the amount of tax payable by the taxpayer under this Part for the year.

189 (6.1) Revoked charity to file returns

Every taxpayer who is liable to pay tax under subsection 188(1.1) for a taxation year shall, on or before the day that is one year from the end of the taxation year, and without notice or demand,

(a) file with the Minister

> (i) a return for the taxation year, in prescribed form and containing prescribed information, and
>
> (ii) both an information return and a public information return for the taxation year, each in the form prescribed for the purpose of subsection 149.1(14); and

(b) estimate in the return referred to in subparagraph (a)(i) the amount of tax payable by the taxpayer under subsection 188(1.1) for the taxation year; and

(c) pay to the Receiver General the amount of tax payable by the taxpayer under subsection 188(1.1) for the taxation year.

189 (6.2) Reduction of revocation tax liability

If the Minister has, during the one-year period beginning immediately after the end of a taxation year of a person, assessed the person in respect of the person's liability for tax under subsection 188(1.1) for that taxation year, has not after that period reassessed the tax liability of the person, and that liability exceeds $1,000, that liability is, at any particular time, reduced by the total of

(a) the amount, if any, by which

> (i) the total of all amounts, each of which is an expenditure made by the charity, on charitable activities carried on by it, before the particular time and during the period (referred to in this subsection as the "post-assessment period") that begins immediately after a notice of the latest such assessment was sent and ends at the end of the one-year period

exceeds

> (ii) the income of the charity for the post-assessment period, including gifts received by the charity in that period from any source and any income that would be computed under section 3 if that period were a taxation year, and

(b) all amounts, each of which is an amount, in respect of a property transferred by the charity before the particular time and during the post-assessment period to a person that was at the time of the transfer an eligible donee in respect of the charity, equal to the amount, if any, by which

the fair market value of the property, when transferred, exceeds the consideration given by the person for the transfer.

189 (6.3) Reduction of liability for penalties

If the Minister has assessed a particular person in respect of the particular person's liability for penalties under section 188.1 for a taxation year, and that liability exceeds $1,000, that liability is, at any particular time, reduced by the total of all amounts, each of which is an amount, in respect of a property transferred by the particular person after the day on which the Minister first assessed that liability and before the particular time to another person that was at the time of the transfer an eligible donee described in paragraph 188(1.3)(a) in respect of the particular person, equal to the amount, if any, by which the fair market value of the property, when transferred, exceeds the total of

(a) the consideration given by the other person for the transfer, and

(b) the part of the amount in respect of the transfer that has resulted in a reduction of an amount otherwise payable under subsection 188(1.1).

189 (7) Minister may assess

Without limiting the authority of the Minister to revoke the registration of a registered charity or registered Canadian amateur athletic association, the Minister may also at any time assess a taxpayer in respect of any amount that a taxpayer is liable to pay under this Part.

January 8, 2020

Leslie Brandlmayr
Director
Headwaters Foundation
1250 – 1500 West Georgia St
Box 62
Vancouver, BC V6G 2Z6

BN: 83102 4203 RR0001
File: 3045194

Dear Leslie Brandlmayr,

Subject: Audit of Headwaters Foundation

This letter results from the audit of the Headwaters Foundation (the Foundation) conducted by the Canada Revenue Agency (CRA). The audit related to the operations of the Foundation for the period from September 1, 2015 to August 31, 2017.

On January 8, 2020, the Foundation was advised that the CRA identified specific areas of non-compliance with the provisions of the Income Tax Act (the Act) and its Regulations in the following areas.

AREAS OF NON-COMPLIANCE		
	Issue	**Reference**
1.	Failure to devote resources to a charitable purpose	149.1(3), 168(1)(b)
2.	Failure to meet the disbursement quota and entering into a transaction with the intention to avoid or delay expenditures on charitable activities	149.1(4.1)(d), 168(1)(b), 188.1(12) 149.1(4.1)(a), 168(1)(b), 188.1(11)
3.	Failure to file an information return as and when required by the Act and/or its Regulations	149.1(3), 149.1(14), 168(1)(c)

This letter describes the areas of non-compliance identified by the CRA relating to the legislative and common law requirements that apply to registered charities, and offers the Foundation an opportunity to respond and present additional information. The Foundation must comply with the law; if it does not, its registered status may be revoked in the manner described in section 168 of the Act.

Background

The Foundation was registered as a public foundation under the fourth head of charity on December 3, 2010, with the following purposes:

"The purposes of the Foundation are:

a) to solicit and receive gifts, bequests, trusts, funds and property and beneficially, or as a trustee or agent, to hold, invest, develop, manage, accumulate and administer funds and property for the purpose of distributing funds and property exclusively to registered charities and "qualified donees" under the provisions of the Income Tax Act; and

b) to undertake activities ancillary and incidental to the attainment of the aforementioned charitable purposes."

The Foundation was somewhat dormant from 2011 to 2013. In 2014, the Foundation received $6.5M in gifts from what appears to be non-arm's length charities. Donations were then converted into assets. By August 31, 2018, the same assets are still on the Foundation's balance sheet, with an additional investment in [redacted] one of the assets acquired with the donated funds. The only income earned over that time is accrued (not paid) interest on a promissory note.

During our audit we identified unusual transactions between the Foundation, CHIMP Charitable Impact Foundation (Chimp), and Paraklesis Foundation (Paraklesis). It was noted that there were high dollar gifts being reported in all three entities. More specifically, there was a series of transactions involving [redacted] shares. [redacted] is a public company whose shares are listed on the Toronto Stock Exchange (TSX).

We have obtained and analyzed the documentation supporting these transactions and as such, we believe the Foundation has been involved in a series of transactions best described as a tax plan. The sequence of the transactions identified during our audit of the Foundation is outlined in Appendix A. Briefly, the series of transactions was initiated by a transfer of funds to the Foundation in order to allow it to acquire 1,250,000 [redacted] shares. The shares were then transferred, resulting in the shares' ultimate ownership by Paraklesis.

Our audit concerns in the Foundation relate specifically to the treatment of these transactions as charitable activities or gifts to qualified donees.

Identified areas of non-compliance

a) Failure to devote resources to a charitable purpose

A charitable activity is one that directly furthers a charitable purpose - which requires a clear relationship and link between the activity and the purpose it purports to further. The Act permits public foundations to either make gifts to other organizations that are qualified donees or to carry on their own activities. In the case of making a gift, paragraph 149.1(3)(b.1) provides that a public foundation may be revoked if it makes a gift other than to a qualified donee or in the course of charitable activities carried on by

it. In summary, a public foundation may carry on its own charitable activities, it may make gifts to qualified donees or, it may make a gift in the course of charitable activities carried on by it.

It is our position that the Foundation was operated for the non-charitable purpose of facilitating a private tax planning arrangement, similar to the situation in *Prescient Foundation v MNR* where the Court held that "these transactions amounted to participating in a tax planning arrangement for the private benefit of others and, as such, were not entered into for charitable purposes."[1] We make the same conclusion in the case of the Foundation. The Foundation structured its affairs for the benefit of private persons to the detriment of the Foundation's charitable mandate.

Trust law imposes on a registered charity's directors the obligation to properly manage the assets of a charity. While it is often difficult for directors to foresee whether an asset they propose to acquire on behalf of the charity will be a good investment, the rules of prudent administration require that they take reasonable steps to ensure that the investment is a wise one which will ultimately be favourable for the charity. It is our view that the Foundation's directors did not acquire the shares for investment purposes since the shares were only held for a brief period of time (approximately nine days) before being purportedly gifted to another registered charity (Paraklesis).

There is a second private benefit in the consulting fees reported by the Foundation. We have concluded that the $36,038 in 2016 was consulting fees paid by the Foundation for the benefit of [redacted] and Archon Minerals Ltd, and that the $14,385 in 2017 was consulting fees paid by the Foundation for the benefit of [redacted]. None of these persons are qualified donees. Hence, all the consulting fees were gifts to non-qualified donees. Gifting to non-qualified donees meets the definition of an undue benefit contained in subsection 188.1(5).

Per subsection 188.1(4)[2], the Foundation could be liable for a penalty equal to 105% of the amount of the undue benefits. In the case of the Foundation, the amount of the expenditure subject to the penalty would be the $32,500 in 2016 and $7,755.30 in 2017[3]. However, since we are proposing to revoke the Foundation at this time, we are not proposing to assess this penalty.

These expenditures do not help the Foundation meet its charitable purposes, nor are they costs laid out in the administration of the Foundation. Therefore the Foundation has not devoted all of its resources to its charitable purposes and in fact has devoted more than

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[1] See *Prescient Foundation*, FCA 120 [2013] 5 CTC 25, para 36 per Mainville JA.

[2] The legislation reads: A registered charity or registered Canadian amateur athletic association that, at a particular time in a taxation year, confers on a person an undue benefit is liable to a penalty under this Part for the taxation year equal to
(a) 105% of the amount of the benefit, except if the charity or association is liable under paragraph (b) for a penalty in respect of the benefit; or
(b) if the Minister has, less than five years before the particular time, assessed a liability under paragraph (a) or this paragraph for a preceding taxation year of the charity or association and the undue benefit was conferred after that assessment, 110% of the amount of the benefit.

[3] The calculation of the penalty would be $34,125 ($32,500 * 105%) in 2016 and $8,143 ($7,755 * 105%) in 2017.

half of its operational expenditures in each fiscal on services which do not further its charitable purposes.

As per subsection 149.1(1) of the Act, a charitable foundation must be constituted and operated exclusively for charitable purposes. It is our position that the Foundation engaged in a private tax planning arrangement in order to confer significant tax benefits on private persons. Operating for the benefit of a private person is not a charitable purpose. Further, the Foundation has conferred an undue benefit by using its resources to pay for non-charitable expenditures incurred by non-qualified donees that were not in furtherance of the Foundation's own charitable purposes. As such, we believe there is sufficient grounds to revoke the charitable status of the Foundation under paragraph 168(1)(b) of the Act.

b) Failure to meet the disbursement quota and entering into a transaction with the intention to avoid or delay expenditures on charitable activities

The Act requires public foundations to make a minimal disbursement each year equal to the disbursement quota (DQ). The calculation of the DQ is contained in subsection 149.1(1) of the Act. Furthermore, since the making of gifts to qualified donees is the Foundation's sole stated purpose, the DQ is a method for the CRA to analyse if the Foundation is operating in a manner to further its charitable purposes.

The Foundation reports a DQ excess in the 2015 fiscal year arising solely from gifts to qualified donees. This was $4,712,500[4] transfer of [redacted] shares by deed of gift to Paraklesis and $4,000,000 transfer by cheque to Chimp. We have concerns with both of these transfers.

Transfer to Paraklesis

The transfer of [redacted] shares to Paraklesis was not the only transaction between the Foundation and Paraklesis. After the July 15, 2015, transfer by deed of gift, Paraklesis reported a gift to the Foundation of $4,736,000, which was a wire transfer to the Foundation.

These transactions were reported as gifts by both the Foundation and Paraklesis. Legally, a gift is a voluntary transfer of property without valuable consideration. However, both entities received valuable consideration. The Foundation obtained valuable consideration from Paraklesis in the form of the July 30, 2015, transfer of cash. Paraklesis obtained valuable consideration in the form of [redacted] shares, title to which was transferred on September 16, 2015.

The amounts that the Foundation paid to acquire the shares and the amounts transferred to it from Paraklesis are the same and the transfers occurred only fifteen days apart. This exchange of consideration, or sale, was part of a pre-arranged series of transactions in which all entities knew what was going to happen in the future.

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[4] Agreed value per deed of gift

It is our position that the Foundation had no donative intent because there was no intention to be impoverished by these transactions. On the contrary, the Foundation was fully aware that they would be paid for the transfer of [redacted] shares to Paraklesis.

It is no coincidence that the consideration in the form of cash and the consideration in the form of [redacted] shares have an equivalent value. Per the deed of gift of July 24, 2015, the agreed value of [redacted] shares is $4,712,500 and the cash transferred was $4,736,000. Overall, there was a transfer of shares from the Foundation in exchange for equivalent consideration in the form of cash. This is properly classified as a sale of shares.

Per paragraph 149.1(4.1)(a) of the Act if a registered charity enters into a transaction (including a gift to another registered charity) and it may reasonably be considered that a purpose of that transaction was to avoid or unduly delay expenditure of amounts on charitable activities, the registered charity may be subject to revocation under paragraph 168(1)(b) as it has ceased to comply with the requirements of the Act for its registration.

Based on the documentation obtained during our audit, and our discussions as noted above, the inclusion of this sale in the calculation of the Foundation's disbursement quota, is a delay of expenditure as outlined in paragraphs 149.1(4.1)(a) & (b). The recording of this transaction as a gift has created a DQ excess for the Foundation that could be utilized for up to 5 years.

Per subsection 188.1(11)[5], the Foundation could be liable for a penalty equal to 110% of the amount of expenditure avoided or delayed. In the case of the Foundation, the amount of the expenditure would be the $4,712,500 agreed value of [redacted] shares[6].

However, since we are proposing to revoke the Foundation at this time, we are not proposing to assess this penalty.

Transfer to Chimp

Our audit has determined that the Foundation, Timothy Foundation (Timothy) and Association for the Advancement of Scholarship (AAS) are related through the application of subparagraphs 251(2)(c)(i) and 251(2)(c)(ii), and paragraphs 251(1)(a) and/or 251(1)(c). It is our position that the cash transfer to Chimp on July 30, 2015, of $4,000,000, is a non-arms length transfer.

Based on the information provided, it is our position that the Foundation's only involvement in these transactions was to assist in moving assets through its [redacted] account. The transaction does not appear to have any ordinary business reason.

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[5] The legislation reads: If, in a taxation year, a registered charity has entered into a transaction (including a gift to another registered charity) and it may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities, the registered charity is liable to a penalty under this Act for its taxation year equal to 110% of the amount of expenditure avoided or delayed, and in the case of a gift to another registered charity, both charities are jointly and severally, or solidarily, liable to the penalty.

[6] The penalty calculated would be $5,183,750 ($4,712,500 * 110%).

Our analysis of the transactions between the Foundation, Chimp and Paraklesis indicates that the Foundation was inserted into a series of transactions that was substantially created to take place between Chimp and Paraklesis.

We take the position that the lack of commercial purpose is indicative of a non-arm's length transaction. We add to this fact the family relationship between [redacted] and [redacted], and the employment relationship between [redacted], [redacted], and the directors of the Foundation, and we conclude that the relationship between Chimp and the Foundation is one that is not at arm's length.

In summary, we conclude that the Foundation received funds from entities that it did not deal with at arm's length when it received funds from AAS and Timothy. The Foundation did not disburse these funds to an arm's length entity as required by paragraph 149.1(4.1)(d) of the Act, but rather distributed them to the non-arm's length entity - Chimp. As required by paragraph 149.1(4.1)(d) this gift should not have been added to the calculation of the Foundation's DQ, but rather should have been an additional disbursement requirement.

Per paragraph 149.1(4.1)(d) of the Act, if a registered charity has in a taxation year received a gift of property (other than a designated gift) from another registered charity with which it does not deal at arm's length and it has expended, before the end of the next taxation year, in addition to its DQ for each of those taxation years, an amount that is less than the fair market value of the property, on charitable activities carried on by it or by way of gifts made to qualified donees with which it deals at arm's length, then it may be revoked.

Per subsection 188.1(12), the Foundation could also be liable for a penalty equal to 110% of the gift not made to an arm's length entity. In the case of the Foundation, the amount of the expenditure would be the $4,000,000[7] gifted to Chimp. However, since we are proposing to revoke the Foundation at this time, we are not proposing to assess this penalty.

Overall, we conclude that the Foundation made no gifts to qualified donees with which it deals at arm's length, as required to meet its obligations under paragraph 149.1(4.1)(d) of the Act. The transfer of shares to Paraklesis is properly characterized as a sale, rather than a gift. The transfer of $4 million to Chimp was a gift to a non-arm's length entity.

As a result, the Foundation has failed to comply with the DQ requirements contained in the Act. Pursuant to subsection 149.1(3) and paragraph 149.1(4.1)(d) of the Act, this is cause for the Foundation to be revoked in the manner described in paragraph 168(1)(b) of the Act.

[7] The penalty calculated would be $4,400,000 ($4,000,000 * 110%).

c) Failure to file an information return as and when required by the Act and/or its Regulations

Subsection 149.1(14) of the Act states that every registered charity shall, within six months from the end of each taxation year of the charity, file with the Minister both an information return and a public information return for the year, each in prescribed form and containing prescribed information, without notice or demand therefore.

It is the responsibility of the Foundation to ensure that the information provided in its T3010, schedules and statements is factual and complete in every respect. A charity is not meeting its requirements to file an information return in prescribed form if it fails to exercise due care with respect to ensuring the accuracy thereof.

A registered charity that fails to file an information return as and when required under the Act may be subject to revocation under paragraph 168(1)(c) of the Act.

The information reported on line 5050, total amount of gifts made to all qualified donees, did not reflect the findings of the audit. The $4,712,500 reported on that line is not a gift, as previously discussed. Based on the supporting documentation provided, this series of transactions should have been reported as follows:

i) July 15, 2015, acquisition of 1,250,000 shares of [redacted] as purchased assets/inventory on line 4891.

ii) July 30, 2015, receipt of $4,735,985 cash from Paraklesis as revenue from sale of goods and services on line 4640.

Ineligible Individuals

Subsection 149.1(1) of the Act reads, "Ineligible individual," at any time, means a person who has been

(a) convicted of a relevant criminal offence unless it is a conviction for which
   i. a pardon has been granted and the pardon has not been revoked or ceased to have effect, or
   ii. a record suspension has been ordered under the Criminal Records Act and the record suspension has not been revoked or ceased to have effect,

(b) convicted of a relevant offence in the five-year period preceding that time,

(c) a director, trustee, officer or like official of a registered charity or a registered Canadian amateur athletic association during a period in which the charity or association engaged in conduct that can reasonably be considered to have constituted a serious breach of the requirements for registration under this Act

and for which the registration of the charity or association was revoked in the five-year period preceding that time,

(d) an individual who controlled or managed, directly or indirectly, in any manner whatever, a registered charity or a registered Canadian amateur athletic association during a period in which the charity or association engaged in conduct that can reasonably be considered to have constituted a serious breach of the requirements for registration under this Act and for which its registration was revoked in the five-year period preceding that time, or

(e) a promoter in respect of a tax shelter that involved a registered charity or a registered Canadian amateur athletic association, the registration of which was revoked in the five-year period preceding that time for reasons that included or were related to participation in the tax shelter.

Under paragraph 149.1(4.1)(e) of the Act, the CRA may revoke the registration of a registered charity, if an ineligible individual is a director, trustee, officer or like official of the charity, or controls or manages the charity, directly or indirectly, in any manner whatever.

Relating to the preceding information to the Foundation, we have concerns with one of the Foundation's directors. Specifically, we are referring to Christopher Richardson, the director of the Foundation since November 19, 2010.

According to our records Mr. Richardson was previously listed among the directors and was a member of a charity named Theanon Charitable Foundation when its registration was revoked on February 10, 2018, for serious breaches of the requirements for registration under the Act.

At this time, we would like the Foundation to note that Mr. Richardson meets the definition of ineligible individual, as described in paragraph (c) above.

The Foundation's options:

a) Respond

If the Foundation chooses to respond, send written representations and any additional information regarding the findings outlined above **within 30 days** from the date of this letter to the address below. After considering the response, the Director General of the Charities Directorate will decide on the appropriate course of action. The possible actions include:

- no compliance action;
- issuing an educational letter;
- resolving the issues through a Compliance Agreement;
- applying penalties or suspensions or both, as described in sections 188.1 and 188.2 of the Act; or

- issuing a notice of intention to revoke the registration of the Foundation in the manner described in subsection 168(1) of the Act.

b) Do not respond

The Foundation 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 Foundation in the manner described in subsection 168(1) of the Act.

If the Foundation appoints a third party to represent it in this matter, send us a written request with the individual's name, the individual's contact information, and explicit authorization that the individual can discuss the file with us.

If you have any questions or require further information or clarification, do not hesitate to contact me at the numbers indicated below. My team leader, Sherri Davis, may also be reached at (250) 363-3128.

Yours sincerely,

[redacted]

Maria Popova, [redacted]
Audit Division – Charities Directorate
Vancouver Island and North Tax Services Office

Telephone: 250-363-8876
Toll Free: 1-855-522-7864
Facsimile: 250-363-3000
Address: c/o 9755 King George BLVD
Surrey, BC V3T 5E1

c.c.: Leslie Brandlmayr
[redacted]

Appendix A

The transactions as implemented and identified in the records of Headwaters Foundation (the Foundation) were as follows:

July 14, 2015	The Foundation accepted a gift of $2,500,000 from Timothy Foundation (Timothy). This was a wire transfer from Timothy's bank account into the Foundation's bank account.
July 14, 2015	The Foundation accepted a gift of $2,250,000 from Association for the Advancement of Scholarship (AAS). This was a wire transfer from AAS's bank account into the Foundation's bank account.
July 15, 2015	$4,736,062.50 cash is transferred to [redacted] for purchase of 1,250,000 [redacted] shares - $3.79/share. Per the Foundation, this was a purchase from CHIMP Charitable Impact Foundation (Chimp), but source documents only reference [redacted].
July 24, 2015	1,250,000 [redacted] shares are transferred to Paraklesis Foundation (Paraklesis) from the Foundation by deed of gift.
July 30, 2015	The Foundation receives $4,735,985 cash from Paraklesis ($4,736,000 less $15 fee) in the form of a wire transfer from one bank account to another.
July 30, 2015	The Foundation made a gift of $4,000,000 to Chimp. This was in the form of two cheques from the Foundation's bank account; ch[redacted] for $1,000,000 and ch[redacted] for $3,000,000.

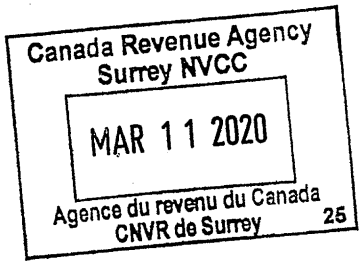
[redacted]

[redacted]

March 9, 2020

[redacted]

Canada Revenue Agency
Vancouver Island Tax Services
c/o 9755 King George Boulevard
Surrey, BC V3T 5E1



Attention: Maria Popova

Dear Madam

Re: HEADWATERS FOUNDATION BN 83102 4203 RR0001
(the "Foundation")
Your File#: 3045194

We write in response to the Administrative Fairness Letter dated January 8, 2020 ("AFL") wherein you invite the Foundation to respond with written representations and any additional information regarding the findings outlined in the AFL. We will begin with a discussion of legal and definitional issues because the AFL sets out some provisions as of the *Income Tax Act* ("the *Act*") as the basis for its determinations. The AFL also cites the Federal Court of Appeal decision in *Prescient Foundation and Minister of National Revenue*[1] ("*Prescient Decision*") so our response will also draw on that case in this response.

EXTRICABLE QUESTIONS OF LAW

To the extent that the AFL takes any position on the interpretation of a statutory provision, the Federal Court of Appeal expressly held that the interpretations of the *Act* are "extricable questions of law"[2]. It is important for CRA, when writing an AFL, to remember that the Court has unequivocally ruled that when it acts upon its administrative interpretation of the *Act* it is raising an "extricable question of law". Consequently, when it makes a determination that the Foundation was operated for a non-charitable purpose, CRA must have a correct interpretation of what is a "charitable purpose" because that is a defined statutory provision.

Identifying issues as extricable questions of law is important because the Federal Court of Appeal held that these issues must "be determined on a standard of correctness"[3].

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1 *2013 FCA 120*
2 *Prescient Decision para 12*
3 *Prescient Decision para 12*

The AFL raised the Minister's intention to revoke and it was in a revocation context that the Court made this determination[4].

It is important when considering the operations of the Foundation to remember that the Court went on to hold that "the reasonableness standard of review does not apply to the Minister's interpretation of section 149.1 and related statutory provisions because "Parliament has not provided for deference to the Minister on questions of law in the context of an appeal under paragraph 172(3)(*a.1*) of the Act".[5] The Court held in the Prescient Decision that the issue as to "whether a charitable gift to a non-qualified donee is a valid legal ground to revoke a registration" was an extricable question of law "which must be reviewed on a standard of correctness"[6]. The AFL raises extricable questions of law.

THE LEGISLATIVE PROVISIONS

The Foundation is a "charitable foundation" which is defined under subsection 149.1(1) of the Act "as a corporation or trust that is constituted and operated exclusively for charitable purposes"[7]. The *Prescient Decision* said that "subsection 149.1(1) of the Act provides that 'charitable purposes' 'includes the disbursement of funds to a qualified donee' (emphasis added). The use of the word 'includes' clearly indicates that charitable purposes recognized under the Act extend beyond disbursements to qualified donees"[8]. It is an extricable question of law as to what operations are included in the word "includes" as well as what is meant by "the disbursement of funds to a qualified donee..." rather than "gifts".

The citation from the *Prescient Decision* in the previous paragraph establishes that the Court has already held that "includes" extends beyond disbursements. The purposes of the Foundation quoted in the AFL include "to hold, invest, develop, manage, accumulate and administer funds and property for the purpose of distributing funds and property exclusively to registered charities". These purposes were approved by CRA at the time of registration. The AFL does not set out any argument or analysis as to why the transactions involved in acquiring the [redacted] shares do not fall squarely within the wording of the registered purposes as well as within the statutory definition of "charitable purposes" as an extricable question of law.

There is no time limit set out in the provisions of the *Act* as to how long an acquired asset must be held before being disbursed. The AFL impugns transfers which fail to meet CRA's arbitrary determination as to whether they were gifts as failing to meet the statutory definition of "charitable purpose" and in doing so completely disregards that the statute says "disbursement of funds" rather than "gifts". While we maintain that these transactions were intended between the parties to be gifts, even ifthe AFL's statement "this is properly classified as a sale of shares" is correct, a "sale" would still

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4 *Prescient Decision para 12*
5 *Prescient Decision para 13*
6 *Prescient Decision para 14*
7 *ITA subsection 149.1(1)*
8 *Prescient Decision para 25*

[redacted]

be a "disbursement" – which is the term used in the statutory definition of "charitable purpose".

PRIVATE TAX PLANNING REGARDING [redacted] SHARES

It is also not reasonable for the AFL to state: "It is our position that the Foundation was operated for the non-charitable purpose of facilitating a private tax planning arrangement...". Not a single transaction described in Appendix A resulted in one dollar of tax benefit going to either a donor or the recipient. The AFL does not identify a single "private benefit" which results from these transactions. It simply makes a bald allegation without any supporting evidence. Similarly, it identifies not a single "private person" who has allegedly benefited. The only parties are registered charities rather than "private persons".

It is unfortunate that Appendix A, when it sets out the chronology of transactions, did not include the fact that the Paraklesis Foundation ("Paraklesis") did not receive title to the 1,250,000 [redacted] shares ("[redacted] Shares") until September 16, 2015, as set out in the body of the AFL. This explains that any complexity to these transactions results from the fact that Paraklesis did not have a public securities account which enabled it to receive and hold marketable securities until September 2015. Consequently, the Foundation agreed to purchase the [redacted] Shares from Chimp and donate them to Paraklesis by way of deed of gift shortly thereafter. If Paraklesis had an account at [redacted] in July, the Foundation would not have been involved. The purchase of the shares required a registered charity with a public securities account such as the Foundation had at [redacted]. Further, the only way to transfer the [redacted] Shares to Paraklesis in July was to do it by deed of gift without a registered transfer taking place. The transfer which took place on September 16 after Paraklesis opened an account with a securities broker would have taken place at the outset without any involvement of the Foundation.

It is very clear that tax benefits had no role to play in the involvement of the Foundation. The Foundation became involved to enable [redacted] shares to become a charitable asset in July because the donations may not have been made if delayed until September. The donor was a corporation with a July 31 fiscal year end so timing was important in the same way that individuals seek to complete their charitable donations prior to December 31. The AFL is very wrong to state this is "a series of transactions best described as a tax plan". There is no private benefit to any taxpayer which has been identified in the AFL. There is no administrative fairness in the AFL brazenly stating "[o]perating for the benefit of a private person is not a charitable purpose" when all the transactions described served only to enable a charitable foundation to acquire the [redacted] Shares without any tax receipts or other benefit being provided to a private person. We have read the AFL repeatedly and cannot find a single reference to a private person who has allegedly benefited from these transactions.

[redacted]

PRIVATE BENEFIT IN CONSULTING FEES

The AFL is also unreasonable to hold that the consulting fees paid with regard to the Foundation's deliberations as to whether it should continue to hold its investments in shares in a public company and a private company fail the test of being an acceptable expenditure. The AFL puts forward no analysis as to why the decision to continue to hold these investments is a private benefit to the companies involved. It is very normal for charitable foundations to pay for advice on the buying, holding or selling investments.

Even if these two contracts were imprudent, they are not grounds for revocation. The reasonable response would be for CRA to issue an education letter or a compliance agreement.

ARM'S LENGTH RELATIONSHIP BETWEEN CHARITIES

It is an extricable question of law to be determined on the standard of correctness as to whether the charities mentioned in the AFL are arm's length or not. Subsection 251(2) sets out the statutory definition of "related persons" with specific stipulations in paragraph 251(2)(c) as to whether any two corporations are related. It is our position that the foundations named in the AFL do not meet the statutory test of being related persons.

The AFL addresses this extricable question of law by baldly stating:

> "Our audit has determined that the Foundation, Timothy Foundation (Timothy) and Association for the Advancement of Scholarship (AAS) are related through the application of subparagraphs 251(2)(c)(i) and 251(2)(c)(ii), and paragraphs 25l(l)(a) and/or 251(1)(c)".

The AFL does not set out any facts to support this determination. There is no way for the Foundation to ascertain how the Minister came to this determination so cannot address it in a meaningful way when framing this response. The arbitrariness of the Minister's decision making on questions which must be determined on the standard of correctness raises the doubt as to whether the Minister is extending the Foundation the fairness which is required of the regulator when auditing a charitable foundation.

The AFL very clearly states "We take the position that the lack of commercial purpose is indicative of a non-arm's length transaction". It is our position that CRA has clearly failed to meet the standard of correctness in determining the extricable question of law as to what is the proper interpretation of "arm's length". It is incomprehensible that CRA requires a "commercial purpose" in order to establish that a charitable gift is "arm's length". One would expect that if the standard of correctness is to be applied to the extricable question of law as to what transfers qualify as a "charitable gift" it would be completely wrong to require a "commercial purpose".

In the event that CRA is correct that a "commercial purpose" is required, it is our position that this requirement has been met. The Legal Dictionary defines "commercial" to mean

[redacted]

"of or relating to commerce". The "commerce" of acquiring or disposing of public securities requires a trading account such as the Foundation had at [redacted] and Paraklesis did not have. The transactions involved with the Foundation related to the commercial purpose of being able to acquire [redacted] Shares.

FAILURE TO MEET THE DISBURSEMENT QUOTA

One of the grounds for revocation proposed in the AFL is failure to meet the disbursement quota. The AFL states that the "Act requires public foundations to make a minimal disbursement each year equal to the disbursement quota (DQ)". The AFL cites subsection 149.1(3) which gives the Minister the discretion to revoke where the Foundation "fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the foundation's disbursement quota for that year"[9].

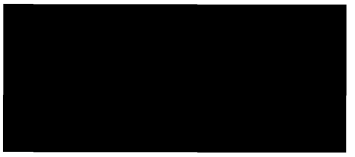
However, the AFL does not quantify or stipulate the amount of expenditures that CRA believes the Foundation must complete in order to meet its disbursement quota. Consequently, the Minister does not set out the case which the Foundation must meet in order to avoid the Minister's discretionary ability to revoke. Therefore there is a failure of administrative fairness.

INTENTION TO AVOID OR DELAY EXPENDITURES ON CHARITABLE ACTIVITIES

The AFL cites paragraph 149.1(4.l)(a) of the Act to propose revocation if a registered charity enters into a transaction (including a gift to another registered charity) and it may reasonably be considered that a purpose of that transaction was to avoid or unduly delay expenditure of amounts on charitable activities. It is a material component of this statutory provision that a purpose of the impugned transaction may reasonably be considered to avoid or unduly delay the expenditure of amounts on charitable activities. The AFL does not make any case as to why the Foundation had any disbursement quota problem and does not allege any other basis for reasonably considering a purpose of the transactions to be avoiding or delaying disbursements. Unless the Minister sets out some reasonable grounds for believing that the purpose of the transactions was to delay disbursements, the Minister has not met the statutory grounds for revocation set out in paragraph 149.1(4.l)(a) of the Act.

The Foundation had no disbursement shortfall and therefore it is not reasonable to consider that the reason for the transactions was to unduly delay expenditures. It is only the determination of the Minister, which is completely unsupported by the facts, that raises issue as to whether the Foundation had an obligation to increase its disbursement quota. The Foundation did not and does not believe that the Foundation, Timothy Foundation and Association for the Advancement of Scholarship are related. Consequently, it had no reason to make the purpose of the $4,000,000 cash transfer to Chimp on July 30, 2015 to avoid a disbursement expenditure. In any event, only one officer of Chimp is related to anyone at [redacted], and no directors of Chimp are related to

9 *ITA subsection 149.1(3)(b)*



anyone at [redacted]. As a result, this does not meet the statutory definition of being non-arm's length. The reason for the Foundation's involvement in the [redacted] Shares transfers has been clearly set out in this response and has nothing to do with tax planning, private benefit or the undue delay of disbursement quota requirements. This reason is uncontroversial and is acknowledged at p. 5 of the AFL: "Based on the information provided, it is our position that the Foundation's only involvement in these transactions was to assist in moving assets through its [redacted] account."

FAILURE TO FILE AN INFORMATION RETURN AS AND WHEN REQUIRED

The AFL cites subsection 149.1(14) of the Act which states that every registered charity shall, within six months from the end of each taxation year of the charity, file with the Minister both an information return and a public information return for the year, each in prescribed form and containing prescribed information, without notice or demand therefore. There is no doubt that the Foundation filed the prescribed form without notice or demand.

When the Foundation completed the public information return, it did so on the basis of professional advice. CRA's Guide on completing the T3010 says with regard to line 4891 says:
"Enter the cost of all supplies and assets bought in the fiscal period. Do not include assets that have been capitalized." The advice provided to the Foundation by its accountant was that the [redacted] Shares were a capital asset so did not report it in Line 4891. The AFL proposes to revoke the Foundation's registration because the Foundation should have reported its "July 15, 2015, acquisition of 1,250,000 shares of [redacted] as purchased assets/inventory on line 4891". It is extremely harsh for the Minister to propose revocation over a difference in professional advice as to whether the shares were "assets/inventory" rather than "capital assets".

It seems that the AFL lacks accuracy and consistency on how the [redacted] Shares should be categorized. The AFL goes on to propose revocation because it did not record what CRA alleges is proceeds of the sale of the [redacted] Shares "as revenue from sale of goods and services on line 4640". The professional advice that the Foundation received at the time of completing the T3010, and continues to receive today, does support categorizing the July 30, 2015, receipt of $4,735,985 cash from Paraklesis as revenue from the "sale of goods and services".

The Minister's basis for proposing revocation is that "the findings of the audit" determined this was a sale rather than a gift. The issue as to whether it was a "gift" is an extricable question of law. The AFL makes no reference to the intention of the parties and "the findings of the audit" do not reflect the intention of the parties. However, the law makes the intention of the parties central to making this determination. The Supreme Court of British Columbia made this very clear when it held:

> "The legal relationship between the parties, needless to say, arises out of their intentions and dealings as between themselves. The ***Income Tax Act*** does not define that relationship except for its own purposes. Its characterization of these

[redacted]

transactions as a net exchange of advantages does not mean that is what they were as between the parties."[10]

In the previous paragraph, the Court described and sanctioned the concept of mutual gift when it held:

> "There was, in essence, a perfected gift for $1,000 passing from the plaintiff to the defendant, and a gift back from the defendant in appreciation. While the transactions are related, on neither part are they a bargain or exchange of one thing of value for another."[11]

It would have been dishonest for the Foundation to have completed the T3010 on any other basis than it did given that the Court has held that the legal relationship between parties arises out of their intentions and dealings as between themselves and not out of definitions in the Act. It is not reasonable for the Minister to propose revocation when the Foundation exercised due care and completed the form accurately.

Even if the audit findings were correct, they were not known to the Foundation at the time when it was required to file the return without demand. At the most, the Minister should consider an education letter in these circumstances rather than revocation.

CONCLUSION

The reason for the Foundation's involvement in the [redacted] Shares transfers has been clearly set out in this response and has nothing to do with tax planning, private benefit or the undue delay of disbursement quota requirements. Paraklesis did not have a public securities account which enabled it to receive and hold marketable securities until September 2015. Consequently, the Foundation agreed to purchase the [redacted] Shares from Chimp and donate them to Paraklesis by way of deed of gift shortly thereafter. This reason is uncontroversial and is explicitly acknowledged and set out as an audit finding at p. 5 of the AFL: "Based on the information provided, it is our position that the Foundation's only involvement in these transactions was to assist in moving assets through its [redacted] account." We trust these submissions, and your own findings, alleviate your concerns regarding tax planning, private benefit, the undue delay of disbursement quota requirements and charities acting not at arms' length from each other.

The Foundation has a deep desire to comply with the law and work with CRA in doing so. Now that it understands that CRA finds it offensive to assist another foundation which does not have a public securities account, the Foundation will unilaterally agree not to do so in future and would welcome an education letter to help it understand

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[10] *Richert v. Stewards' Charitable Foundation, 2005 BCSC 211, para 17*

[11] *Richert v. Stewards' Charitable Foundation, 2005 BCSC 211, para 16*

[redacted]

why its actions were offensive. The clear findings of the AFL demonstrate that revocation is not the appropriate course of action.

Yours truly,

[redacted]

Per: [redacted]

March 2, 2021

Leslie Brandlmayr
Director
Headwaters Foundation
1250 – 1500 West Georgia St
Box 62
Vancouver, BC V6G 2Z6

BN: 83102 4203 RR0001
File: 3045194

Dear Leslie Brandlmayr,

Subject: Audit of Headwaters Foundation

This letter results from the audit of the Headwaters Foundation (the Foundation) conducted by the Canada Revenue Agency (CRA). The audit related to the operations of the Foundation for the period from September 1, 2015, to August 31, 2017.

We have received your letter dated March 9, 2020 (enclosed), responding to our letter of January 8, 2020 (enclosed), and have carefully considered your representations (Representations), which we have addressed below. We remain of the opinion that the Foundation has not complied with all the requirements of the Income Tax Act (the Act). We summarize the non-compliance in the table below, and explain it in detail in the body of this letter.

The Foundation has another opportunity to respond and present additional information. The Foundation must comply with the law; if it does not, its registered status may be revoked in the manner described in section 168 of the Act, or sanctioned in the manner described in section 188.1 of the Act.

AREAS OF NON-COMPLIANCE		
	Issue	**Reference**
1.	Failure to devote resources to a charitable purpose: - Private benefit - Conferring an undue benefit to a person	 149.1(3), 168(1)(b) 188.1(4), 188.1 (5)
2.	Failure to meet the disbursement quota: - Delay of expenditure on its own charitable activities - Assisting another registered charity to delay expenditures on its own charitable activities - Gifts not at arm's length	149.1(4.1)(d), 168(1)(b), 149.1(4.1)(a), 188.1(11), 149.1(4.1)(b), 188.1(12)

3.	Failure to file an information return as and when required by the Act and/or its Regulations	149.1(3), 149.1(14), 168(1)(c)

Applicable standard of review

In the Representations you state that extricable questions of law are to be reviewed based on the standard of correctness, and we agree. However, in our view the majority of the decisions outlined in our letter of January 8, 2020, are concerns involving a mix of fact and law. This is because addressing each of the concerns involves both interpreting the statutory provision and the law, and applying the law to the facts as found by the CRA. For that reason, we do not believe that we can use the standard of correctness during the analysis of our audit findings. Rather, as explained in paragraph 37 of Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65:

> …where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with Housen v Nikolaisen, 2002 SCC 33 at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see Housen, at paras. 10, 19 and 26-37. (emphasis added)

This means that when there is a statutory right to appeal an administrative decision, as in decisions to revoke charitable registration, the standard of review for questions of fact, and for questions of mixed fact and law (as is the case in the current audit of the Foundation) is "palpable and overriding error".

The Vavilov decision was considered by the Federal Court of Appeal recently in Ark Angel Fund v Canada (National Revenue), 2020 FCA 99. This was a decision regarding revocation of charitable registration, and the court described how "palpable and overriding error" should be applied. It stated:

> [4] As this is a statutory appeal, the appellant must persuade us that the Minister has made an error of law or a palpable and overriding error in applying the law to the facts: Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para. 37. The appellant has failed to do so.

[5] Palpable and overriding error is a high standard. In one case, this Court explained the standard as one where "[t]he entire tree must fall"; "it is not enough to pull at leaves and branches and leave the tree standing": South Yukon Forest Corp. v. Canada, 2012 FCA 165 at para. 46, approved in Benheim v. St. Germain, 2016 SCC 48 at para. 38. In another case, this Court explained the standard as follows:

> "Palpable" means an error that is obvious. Many things can qualify as "palpable". Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
>
> "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding". The judgment of the first-instance court remains in place.
>
> There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.
>
> (Mahjoub v. Canada (Citizenship and Immigration), 2017 FCA 157)

The Meaning of "Disbursements to Qualified Donees"

In your Representations, you referred to the definitions of "charitable foundation" and "charitable purpose" under subsection 149.1(1) of the Act and whether the permissible act of making "disbursements to qualified donees" includes making disbursements that are not gifts.

Specifically, you stated "the use of the word 'includes' [in the definition of charitable purposes] clearly indicates that charitable purposes recognized under the Act extend beyond disbursements to qualified donees." You concluded "the AFL does not set out any argument or analysis as to why the transactions involved in acquiring the [redacted] shares do not fall squarely within the wording of the registered purposes as well as within the statutory definition of 'charitable purposes' as an extricable question of law."

We understand you to conclude that even if the transactions involving the [redacted] shares were a sale, and not a gift, then that sale would be a charitable activity of the Foundation, since a disbursement includes a sale.

In response to your Representations we considered whether there were, as you suggested, extricable questions of law that need to be considered in this regard.

As cited in Sheldon Inwentash and Lynn Factor Charitable Foundation v Canada, 2012 FCA 136, the Supreme Court of Canada established the approach to the statutory interpretation of the provisions of the Act as follows:

> **27** The principles to be applied to the interpretation of the definition are well-established:
>
> > It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
> >
> > The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.
>
> See: Celgene Corp. v. Canada (Attorney General), 2011 SCC 1, at paragraph 21.

The term "charitable foundation" is defined in section 149.1(1) of the Act, which states it "means a corporation or trust that is constituted and operated exclusively for charitable purposes." Section 149.1(1) also states that "charitable purposes" include the disbursement of funds to a qualified donee."

Since the rules of statutory interpretation require these words to be read in their entire context and harmoniously with the scheme of the Act, it is necessary to

consider other related provisions of the Act. In particular, the provisions of section 149.1(1) which define "disbursement quota," and the provisions of section 149.1(3)(b) which permits revocation where a public foundation "fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the foundation's disbursement quota for that year."

Since the Act is clear that a foundation's own charitable activities, combined with its gifts to qualified donees, must at least equal its "disbursement quota" for the year, it can be inferred that "disbursements to qualified donees" in the definition of charitable purposes means "disbursements by way of gifts to qualified donees." Indeed, if this were not the case, and **any** transfer of funds by a registered charity—including a sale of property—could enable it to meet its disbursement quota (DQ), then the DQ provisions of the Act, which are clearly meant to ensure charities spend a minimum amount each year to further their charitable purposes, would have no real function.

This interpretation is consistent with the wording of paragraph 149.1(3)(b.1) of the Act which permits the revocation of a public foundation if it makes a "disbursement by way of gift" other than a gift in the course of its charitable activities or to a qualified donee.

According to the Canadian Oxford Dictionary, "disbursement" means "the act of paying out money especially from a fund." Given the other references in the Act, which imply an intention that a registered charity expend a minimum amount of resources annually on charitable activities or on gifts to qualified donees, it is difficult to see how the legislator could have intended the DQ could be met by the mere selling of property, let alone by taking part in transactions such as those that we have described as a tax planning arrangement, which provided a private benefit to a third party.

It is our view, therefore, that the correct interpretation of the Act is that "disbursements to qualified donees" means "disbursement by way of gifts to qualified donees."

Regarding our interpretation of the word "includes", while the court in the Prescient[1] case did indeed state that the word "includes" in the definition of charitable purposes indicates charitable purposes extend beyond disbursements to qualified donees, it is our view that the court was referring to the fact that while charitable purposes are defined in the common law, the term as used in the Act **also** includes disbursements to qualified donees. This is clear since the court proceeded to refer to the common law treatment of charitable purpose and referenced the Vancouver Society[2] decision.

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[1] Prescient Foundation, FCA 120

[2] Vancouver Society of Immigrant and Visible Minority Women v MNR [1999] 1 SCR 10

In conclusion, it is our view that the transactions involved in acquiring the [redacted] shares do not fall within the wording of the Foundation's registered purposes, nor within the statutory definition of "charitable purposes" as an extricable question of law. We are of the opinion that the sale of the [redacted] shares is not a charitable activity and as such, does not further the Foundation's stated charitable purposes.

Identified areas of non-compliance

1) Failure to devote resources to a charitable purpose

Transactions related to the [redacted] shares

Delivery of non-incidental private benefits

A registered charity must be established and operated for the purpose of delivering a charitable benefit to the public or a sufficient segment thereof. The public benefit requirement prevents a charity from conferring an unacceptable private benefit in the course of pursuing charitable purposes.

At common law, a private benefit[3] means a benefit provided to a person or organization that is not a charitable beneficiary, or a charitable beneficiary where a benefit goes beyond what is considered to be charitable. Private benefits can be conferred on a charity's staff, directors, trustees, members, and/or volunteers while they are carrying out activities that support the charity, or to third parties who provide the charity with goods or services. Where it can be fairly considered that the eligibility of a recipient relates solely to the relationship of the recipient to an organization, any resulting benefit will not be acceptable.

Providing a private benefit is unacceptable unless it is incidental to accomplishing a charitable purpose. A private benefit will usually be incidental where it is necessary, reasonable, and proportionate to the resulting public benefit.[4]

Necessary means legitimately and justifiably resulting from:

- an action taken to achieve a charitable purpose;
- a necessary step, a consequence, or a by-product of an action taken to achieve a charitable purpose; or
- the operation of a related business as defined in paragraph 149.1(1) of the Act.

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[3] For more information, see CRA Guidance product CG-019: How to draft purposes for charitable registration. Note that the terms "Personal benefit" and "Private benefit" are interchangeable.

[4] For more information, see CRA Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test.

Reasonable means related to the charitable need and no more than is needed to achieve the purpose, and fairly and rationally assessed and distributed.
and

Proportionate means the private benefit cannot be a substantial part of a purpose or activity, or be a non-charitable end in itself. The private benefit must be secondary and the public benefit must be predominant and more significant.

Additionally, the public benefit cannot be too speculative, indirect or remote, as compared to a more direct private benefit, particularly when a direct benefit is to private persons, entities, or businesses.

Examples of unacceptable (not incidental) private benefit might include:

- paying excessive salaries/remuneration;
- paying for expenses, or providing benefits that are not justified or needed to perform required duties;
- providing excessive per diems;
- unjustified/unnecessary or excessive payments for services, facilities, supplies, or equipment; or
- promoting the work, talent, services, or businesses of certain persons or entities, without justification.

You state in your Representations that our letter of January 8, 2020, did not disclose any private benefit and further state that no private persons who benefited have been identified. Accordingly, we are clarifying our position with respect to this private benefit concern.

It is our position that the Foundation provided an unacceptable private benefit to [redacted], a private, for-profit corporation, when it became involved in facilitating a private tax planning arrangement. In our view, the private benefit to [redacted] resulting from this tax planning arrangement is both unnecessary and not justified by a proportionate public benefit.

Below is the series of transactions that in our view demonstrates how the Foundation provided a private benefit to [redacted]:

1) [redacted] donated [redacted] shares to CHIMP Charitable Impact Foundation (Chimp).
2) [redacted] sold land to Paraklesis Foundation (Paraklesis), a qualified donee, and took back a mortgage from Paraklesis in payment.
3) [redacted] requested that the mortgage be "satisfied upon receipt of 1,123,362 shares of [redacted] which Paraklesis did not own at the time.

4) A series of transactions[5] occurred which resulted in the transferring of [redacted] shares from Chimp, via the Foundation, to Paraklesis.
5) Paraklesis satisfied the terms of the mortgage by transferring the [redacted] shares to [redacted] as requested by [redacted]

In the above series of transactions the [redacted] shares both started and ended in the hands of [redacted], a private, for-profit corporation. This is in contrast to what you indicated in your Representations that "the Foundation became involved to enable [redacted] shares to become a charitable asset." Our position is that one of the purposes for the transactions was to allow [redacted] to receive a tax credit for its donation to Chimp for assets which were ultimately returned to it as part of a pre-arranged series of transactions. As such, we maintain our position from our January 8, 2020, letter that the purposes of these transactions were not charitable, and that by partaking in the transactions the Foundation provided an unacceptable private benefit to [redacted].

It is our position that in providing a private benefit to [redacted] the Foundation has failed to meet the requirements of subsections 149.1(3) of the Act. For this reason, it appears there may be grounds for revocation of the charitable status of the Foundation under paragraph 168(1)(b) of the Act.

Conferring an undue benefit to a person

Pursuant to subjection 149.1(1) of the Act, as a public foundation no part of the Foundation's income can be payable to, or otherwise made available for, the personal benefit of any proprietor, member, shareholder, trustee or settler thereof." Any portion of a public foundation's income that is received by such a person would be an unacceptable private benefit.

Typically, private benefits that are unacceptable under the common law will also be "undue" under subsection 188.1(5) of the Act. An undue benefit[6] means a benefit provided by a registered charity, a registered Canadian amateur athletic association (RCAAA), or a third party at the direction, or with the consent, of a charity or RCAAA that would otherwise have had a right to that amount.

An undue benefit includes a disbursement by way of a gift or the amount of any part of the income, rights, property or resources of the charity or RCAAA that is paid, payable, assigned or otherwise made available for the personal benefit of any person who:

- is a proprietor, member, shareholder, trustee or settlor of the charity or RCAAA;
- has contributed or otherwise paid into the charity or RCAAA more than 50% of the capital of the charity or RCAAA; or

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[5] This series of transactions was outlined in Appendix A of our letter dated January 8, 2020, which is enclosed with this letter.
[6] Undue Benefit penalties are assessed under subsection 188.1(4) of the Act.

- does not deal at arm's length with a person in (a) or (b), or with the charity or RCAAA.

Conversely, an undue benefit does not include

a) reasonable consideration or remuneration for property acquired or services received by the charity or RCAAA;
b) a gift made, or a benefit conferred, in the course of a charitable act[7] in the ordinary course of the charitable activities carried on by the charity unless it can be reasonably considered that the beneficiary was eligible for the benefit solely due to the relationship of the beneficiary to the charity; or
c) a gift to a qualified donee;

2016

In our January 8, 2020 letter we advised you that we considered that in paying the consulting fees to [redacted] the Foundation had conferred an undue benefit to the recipients of the consulting fees. In your Representations you stated that we failed to properly explain why we took that position.

Below is a listing of facts that we collected during the audit which we considered in arriving at our position:

- Invoice [redacted] from [redacted] "for professional services related to all dealings with [redacted] and transfer of income producing assets into Archon and issues related to enhancing the value of the Foundation's Archon holdings."
- The Foundation explained that [redacted] was retained as a consultant to "propose a plan to have [redacted] sell his 11% interest in the "core zone" to Archon."
- The direct beneficiaries of this plan are [redacted] and Archon. Neither of these is a qualified donee.
- The Foundation benefits indirectly along with all other shareholders
- [redacted]

We fail to see the public benefit resulting from the payment of these consulting fees. Based on the information provided, these consulting fees are the responsibility of [redacted] and Archon as they are the only persons directly involved in this proposed plan. The Foundation only benefits indirectly [redacted] We have therefore considered the Foundation's act of paying for the consulting fee

[7] While the term "charitable act" is not defined in the Act, in our view it is considered to refer to an activity that itself provides a charitable benefit to an eligible beneficiary.

expenses incurred by [redacted] and Archon as gifting to non-qualified donees[8] and constitutes an undue benefit as a disbursement by way of a gift to a non-qualified donee.

Per subsection 188.1(4) the value of the undue benefit penalty is 105% of the undue benefit. Accordingly, and as outlined in our letter of January 8, 2020, the amount of the undue benefit penalty for the 2016 fiscal period is $34,125. Please see the table below for details regarding this calculation.

2017

- Invoice [redacted] from [redacted] states "for consulting services rendered in all conversations and meetings related to making water turbine operational and in seeking additional funding"
- The Foundation does not own any water turbines
- The direct beneficiary of these services is [redacted], who owns water turbines. [redacted] is not a qualified donee
- The Foundation benefits indirectly as [redacted] in [redacted] along with [redacted]

The services in question were provided to [redacted] and not to the Foundation. It is not clear why the Foundation [redacted] would be paying for fundraising services provided to [redacted] When asked about these expenditures, the Foundation only clarified that the funding was necessary for repairs to the prototype turbine created by [redacted] Based on the information provided, it is the responsibility of [redacted] to acquire this funding. We have therefore considered the Foundation's act of paying [redacted] fundraising expenses to be a gift to a non-qualified donee and constitutes an undue benefit as a disbursement by way of a gift to a non-qualified donee.

Per subsection 188.1(4) the value of the undue benefit penalty is 105% of the undue benefit. Accordingly, and as outlined in our letter of January 8, 2020, the amount of the undue benefit penalty for the 2017 fiscal period is $8,143. Please see the table below for details regarding this calculation.

In conclusion, as we have not been provided with any new information in regards to the Foundation's devotion of resources it remains our position that the Foundation engaged in a private tax planning arrangement, and that the Foundation has conferred an undue benefit in both years of the audit period by using its resources to pay for non-charitable expenditures incurred by non-qualified donees that were not in furtherance of the Foundation's own charitable purposes.

The undue benefits conferred to [redacted] Archon, and [redacted] are subject to sanctions under subsection 188.1(4) of the Act as follows:

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[8] The non-qualified donees in this case are [redacted] and Archon.

Headwaters Foundation

Year	Type of Sanction	Sanction %	Sanctioned Amount	Sanction
2016	Undue benefits	105%	$ 32,500	$ 34,125
2017	Undue benefits	105%	$ 7,755	$ 8,143
		Total	$ 40,255	$ 42,268

For the reasons stated above, it appears there may be grounds for revocation of the Foundation's charitable status under paragraph 168(1)(b) of the Act for providing private benefits, and there may also be grounds to sanction the Foundation under subsection 188.1(4) of the Act for conferring undue benefits.

2) Failure to meet the disbursement quota

The Act requires public foundations to make disbursements on charitable activities each year equal to at minimum the disbursement quota (DQ). Per the definition provided in subsection 149.1(1) of the Act, a public foundation with assets not used in charitable activities (for example, investments) over $25,000 calculates its DQ as 3.5% of those assets.

Failure to make disbursements at least equal to the DQ can result in the revocation of a public foundation per paragraph 149.1(3)(b) of the Act.

You stated in your Representations that in our January 8, 2020 letter we failed to either quantify or stipulate the amount of expenditures that we believe the Foundation must complete in order to meet its DQ. We have enclosed a working paper which outlines how we have calculated a DQ shortfall of $5.6 million.

Delay of expenditure on its own charitable activities

Under paragraph 149.1(4.1)(a) of the Act, if a registered charity enters into a transaction (including a gift to another registered charity) and it may be reasonably considered that a purpose of the transaction was to avoid or unduly delay expenditure of amounts on charitable activities, the registered charity may be subject to revocation under paragraph 168(1)(b) of the Act. Similarly, a registered charity may also be financially penalized for partaking in such a transaction under subsection 188.1(11) of the Act.

As we explained in our January 8, 2020 letter, we are of the opinion that there is considerable evidence to conclude that a purpose of the Foundation's involvement in the transactions with Paraklesis was to delay expenditures on charitable activities.

As discussed in the preceding section of this letter, during our audit we determined that the series of transactions involving the [redacted] shares were pre-arranged and not undertaken for charitable purposes.

In our view, the Foundation benefited from the transactions as they made it appear as though a charitable gift was made to Paraklesis, which was used by the Foundation to meet its DQ. As indicated above, it is our view that the individual transactions in the series of transactions, including the Foundation's artificial gift to Paraklesis[9], were not charitable in nature as they did not fulfill a charitable purpose. Rather, it is our view that the Foundation partook in the series of transactions as it enabled the Foundation to meet its DQ which it would not have met otherwise. Apart from this DQ benefit, we see no other explanation for why the Foundation would become a part of these transactions.

To demonstrate this point, as of August 31, 2017, the Foundation owned the following assets:

- 3,250,000 of [redacted] shares. These are shares that do not have significant trading activity and the Foundation did not make any effort in the audit period to sell these shares. There have not been any dividends received on these shares;
- A note receivable on which interest has been accrued, but not paid; and
- Investment in [redacted] for which the Foundation has not received any return up to the end of the audit period.

Given the nature of the Foundation's assets, and the lack of any significant revenue during the audit period[10], we conclude that the Foundation would have not met its DQ requirements without including the artificial gift to Paraklesis.

Moreover, given the circuitous nature of the series of transactions involving the [redacted] shares, we do not believe that there is any evidence that the transfer of the shares can be considered a gift to another qualified donee as reported by the Foundation.

A transfer of resources cannot be considered a gift if the supposed gifting entity receives valuable consideration in return (for the gift). In this case, as part of a series of transactions the Foundation transferred [redacted] shares worth $4,712,500 to Paraklesis and in return received a cash transfer of $4,736,000 from Paraklesis. In our view, the cash transfer is clearly material enough to consider it to be valuable consideration (that is, the Foundation's transfer of the [redacted] shares cannot therefore be considered a gift).

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[9] The artificial gift in question is the transaction from the Foundation to Paraklesis which was part of the series of transactions that resulted in [redacted] being transferred from Chimp to Paraklesis.
[10] Other than the artificial gifts from other charities in the pre-arranged plan we discuss elsewhere in this letter.

This is relevant as the Foundation reported on its T3010 information return that the above transfer was a gift to a qualified donee and included it in its calculation of the DQ. In our view, as it is not a gift to a qualified donee, and as there is no evidence that the Foundation ever utilized these resources (that is, the [redacted] shares) on charitable activities, this transfer cannot be included as a charitable expense in the calculation of the Foundation's DQ. As a result, in our calculation of the DQ we have re-characterized $4,712,500 of the Foundation's $8,712,500 total reported gifts to qualified donees as a sale (which is not a charitable activity).

Under paragraph 149.1(4.1)(a) a registered charity may be revoked for intentionally delaying the expenditure of resources on charitable activities. Also, under subsection 188.1(11), a charity may be assessed a sanction equal to 110% of the amount of the expenditure avoided or delayed. In this regard, the Foundation's potential sanction is calculated as follows:

Headwaters Foundation

Year	Type of Sanction	Sanction %	Sanctioned Amount	Sanction
2016	Delay of expenditures	110%	$ 4,712,500	$ 5,183,750

For the reasons stated above, it appears there may be grounds for revocation of the Foundation's charitable status under paragraph 149.1(1)(a) of the Act, and there may also be grounds to sanction the Foundation under subsection 188.1(11) of the Act for delaying expenditures.

Assisting another registered charity to delay expenditures on its own charitable activities

Under paragraph 149.1(4.1)(b) of the Act, if a registered charity enters into a transaction with another registered charity and it may be reasonably considered that a purpose of the transaction was to assist the other registered charity in avoiding or unduly delaying the expenditure of amounts on charitable activities, the registered charity may be subject to revocation under paragraph 168(1)(b).

It is our view that by partaking in the series of transactions involving the [redacted] shares, the Foundation assisted Paraklesis to delay expenditures on charitable activities. The $4.7 million of assets going back and forth between the Foundation and Paraklesis provides the same benefit to both the Foundation and Paraklesis; it allows both charities to meet several years of the minimum DQ. This activity does not further a charitable purpose.

Our view is supported by several factors. Firstly, there is no commercial purpose to these transactions. The Foundation itself acknowledged that "if Paraklesis had an account at [redacted] in July, the Foundation would not have been

involved." This indicates to us that the Foundation did not involve itself in this series of transaction for its own benefit. Secondly, there was no benefit to the Foundation, other than being able to meet its DQ with an artificial gift to Paraklesis as previously discussed. This is important to note as meeting the DQ is not in and of itself a charitable purpose. Rather, a charity meets its DQ by devoting resources to a charitable purpose. Lastly, the Organization only held the shares for 9 days. This demonstrates that the Foundation was not investing in the shares as an investment opportunity. It is evidence that the Foundation only purchased the shares as part of the aforementioned pre-planned series of transactions.

It is also relevant that during the audit interview when we asked director Leslie Brandlmayr the reason for these circular transactions, she did not provide any explanations relating to the Foundation's own stated charitable purposes. Rather, she explained that the Foundation was aiding Paraklesis to obtain these shares, which the Foundation never intended to hold on to. Our position is that the Foundation was accommodating Paraklesis by allowing it to make use of the Foundation's [redacted] account. This activity does not further a charitable purpose, and as we have previously discussed Paraklesis did not maintain ownership of the [redacted] shares for very long. Instead, the shares ended up in the hand of the for-profit entity [redacted] thereby providing an unacceptable private benefit to [redacted]

Our view is further supported by an email dated February 23, 2018, from David Harrop of Paraklesis in which he states "[redacted][11] on his own added a series of transactions intended to include a parallel donation of $4.7M with Headwaters Foundation to cover several years of the minimum required donation." Since Mr. Harrop is the representative of Paraklesis, it is presumed that he is referring to Paraklesis' "minimum required donation," or DQ.

This email, in conjunction with other evidence, provides us with a clear indication that the Foundation entered this series of transactions, at least in part, to assist Paraklesis to delay the expenditure of its resources on charitable activities by artificially meeting Paraklesis' DQ requirement. Entering into transactions to assist other charities, such as Paraklesis, to artificially meet their DQ requirements does not further a charitable purpose.

As per paragraph 149.1(4.1)(b) of the Act, we have grounds to revoke the registration of the Foundation in the manner described in paragraph 168(1)(b) of the Act.

Gifts not at arm's length

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[11] The "[redacted]" referenced here is [redacted] is the architect of the plan to get the [redacted] shares from Chimp to Paraklesis and the employer of the majority of the board of directors of the Foundation.

As we have outlined in previous sections, it is our view that the funds the Foundation received from Paraklesis were not received as gifts because they were received in exchange for valuable consideration[12]. As such, neither of the provisions listed in the following paragraphs are applicable to the series of transactions in question. Nevertheless, we are including this discussion within this letter so that you will also have to ability to provide representations in this regard during the current audit.

This means that if you successfully demonstrate to us that the resources exchanged between the Foundation and Paraklesis were in fact legitimate gifts, you will be required to also demonstrate that the resources the Foundation received from Paraklesis were expended as and when required. Accordingly, the explanations below are provided to address our non-compliance concerns in the event that you can successfully demonstrate to us that the resources exchanged to and from Paraklesis can be considered gifts in the charitable sense.

Legislation

Under paragraph 149.1(4.1(d) of the Act, the Minister may revoke the registration of a registered charity in the manner described in section 168 of the Act if:

> it has in a taxation year received a gift of property (other than a designated gift) from another registered charity with which it does not deal at arm's length and it has expended, before the end of the next taxation year, in addition to its disbursement quota for each of those taxation years, an amount that is less than the fair market value of the property, on charitable activities carried on by it or by way of gifts made to qualified donees with which it deals at arm's length;

This means that if a registered charity receives a gift from another registered charity with which it does not act at arm's length, it must expend—in addition to its DQ—the fair market value of that gift prior to the end of the follow taxation year. An additional requirement is that the expended amounts cannot be gifted to registered charities with which it does not act at arm's length.

If a registered charity does not fulfill these requirements, it may either have its registration revoked under paragraph 149.1(4.1)(d) of the Act, or be financially penalized under subsection 188.1(12) of the Act.

Subsection 188.1(12) states that:

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[12] In this case, as part of a series of transactions the Foundation transferred [redacted] shares worth $4,712,500 to Paraklesis and in return received a cash transfer of $4,736,000 from Paraklesis. In our view, the cash transfer is clearly material enough to consider it to be valuable consideration.

> If a registered charity has in a taxation year received a gift of property (other than a designated gift) from another registered charity with which it does not deal at arm's length and it has expended, before the end of the next taxation year, in addition to its disbursement quota for each of those taxation years, an amount that is less than the fair market value of the property, on charitable activities carried on by it or by way of gifts made to qualified donees with which it deals at arm's length, the registered charity is liable to a penalty under this Act for that subsequent taxation year equal to 110% of the difference between the fair market value of the property and the additional amount expended.

Audit Findings

On July 30, 2015, the Foundation received $4,736,062.50 in cash from Paraklesis in a non-arm's length transaction. If, as the Foundation has suggested, we consider this amount to be a gift, then the Foundation would be required to expend this amount on its own charitable activities or as a gift to a registered charity acting at arm's length by the end of its following fiscal period (that is, August 31, 2016)[13].

Also, on July 30, 2015, after receiving the above funds the Foundation made a $4,000,000 gift to CHIMP Charitable Impact Foundation (CHIMP). This gift is less than the $4,736,062.50—received from Paraklesis—that the Foundation was required to expend[14]. Additionally, as we stated in our January 8, 2020 letter, the gift to CHIMP in our view was not made at arm's length, and so the $4,000,000 cannot be included as a contribution towards the Foundation's expenditure requirement.

We have also found that the Foundation was similarly non-compliant with the Act when it received, on July 14, 2015, a total of $4,750,000 from Timothy Foundation (Timothy) and Association for the Advancement of Scholarship (AAS). As with the amounts received from Paraklesis, these transactions were not made at arm's length.

Per paragraph 149.1(4.1)(d) of the Act, the Foundation was required to expend this amount on its own charitable activities or as a gift to a registered charity acting at arm's length by the end of its following fiscal period (that is, August 31, 2016). As we have previously explained, the Foundation did not make the required amount of acceptable expenditures in this regard.

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[13] Meaning, funds a charity receives as gifts from person(s) not at arm's length and gifted to person(s) not at arm's length are not to be included in a charity's DQ calculation.

[14] No evidence was provided to support that the Foundation incurred any acceptable charitable expenses prior to August 31, 2016 (that is, the following year's fiscal period end) to contribute towards its DQ.

We note from the Representations that the Foundation "maintain[s] that these transactions were intended between the parties to be gifts. However, as previously explained, the $4,712,500 reported as a gift to Paraklesis was not in fact a gift due to valuable consideration being exchanged. Furthermore, we maintain that the Foundation is not at arm's length with Timothy and AAS and hence there is the further requirement that the $4,750,000 received by the Foundation from these two entities be disbursed to an arm's length entity. This requirement was not met for the $4,000,000 transferred to CHIMP.

You stated in your Representations that we failed to provide a fact-based explanation in our January 8, 2020, letter to demonstrate how we made the determination that by participating in this series of transactions the Foundation was acting in a non-arm's length manner with Timothy, AAS, and CHIMP.

As requested, below we provide factual details demonstrating how we have concluded that when the Foundation received gifts from Timothy and AAS, those gifts were not made at arm's length, and how we have concluded that the Foundation's gift to CHIMP was not made at arm's length.

1) **The following series of transactions were pre-arranged:**

- The set of transactions relating to the [redacted] shares were planned as early as November 11, 2014, when Blake Bromley proposed to [redacted] to donate these shares.
- At November 11, 2014 the plan was for Paraklesis to obtain the [redacted] shares directly from Chimp as a donation.
- On July 13, 2015 Blake Bromley explained in an email that there was a problem with implementing the November 11, 2014, plan. Chimp did not have the technological capacity to do the transfer of the [redacted] shares.
- In the same email, Blake Bromley proposed a solution, stating that the difficulty can be overcome by having an indirect transfer using an intermediary charity. The intermediary charity would buy the [redacted] shares from Chimp and then donate the shares to Paraklesis. He further states "I have foundations which are willing to front the cash" to allow Paraklesis to buy the [redacted] shares from Chimp.
- The Foundation did acquire the [redacted] shares for the benefit of Paraklesis, following the plan of Blake Bromley.
- In its Representations, the Foundation itself states "if Paraklesis had an account at [redacted] in July, the Foundation would not have been involved," and "the purchase of the shares required a registered charity with a public securities account such as the Foundation." These requirements were identified by Blake Bromley in the July 13, 2015 email.

2) **The corporate structure of the parties involved in the series of transactions.**

The Foundation:

- Per the bylaws of the Foundation, the members have the power to appoint, remove and extend the board of directors..
- The same three individuals are both members and directors of the Foundation
- Blake Bromley is [redacted] of two out of the three members/directors of the Foundation.
- Although he is neither a member nor a director of the Foundation, Blake Bromley signed the two cheques to CHIMP totalling $4,000,000 which was reported as a gift.
- Blake Bromley is the [redacted] and [redacted] he was remunerated to create the plan relating to the [redacted] shares. This plan resulted in the transfers of funds which are reported as gifts to qualified donees by the Foundation. No other gifts were reported by the Foundation.
- [redacted] is the consultant that provided the services which make up the main operating expenditures of the Foundation.

Timothy Foundation (Timothy):

- Per the bylaws of Timothy, the members have the power to appoint, remove and extend the board of directors.
- Blake Bromley is a member and the other two members are [redacted] of Blake Bromley.
- Blake Bromley signed the $2.5 million cheque from Timothy to the Foundation on July 14, 2015.
- The next day, July 15, 2015, the $2.5 million was used by the Foundation to purchase the [redacted] shares from Chimp.
- Blake Bromley attended all three annual general meetings of Timothy surrounding July 14 and July 15, 2015.

Association for the Advancement of Scholarship (AAS)

- Per the bylaws of AAS, the members have the power to appoint, remove and extend the board of directors. The only member of AAS is John Bromley.
- John Bromley [redacted] Blake Bromley.

CHIMP

- Per the bylaws of CHIMP, the members have the power to appoint, remove and extend the board of directors. The only member of CHIMP is Chimp Fund

- [redacted] John Bromley are two out of the three members of Chimp Fund
- John Bromley [redacted] Blake Bromley

Based on these facts, we have enough information to conclude that in becoming involved in the series of transactions, the Foundation was not acting at arm's length with either Timothy, AAS, or CHIMP both due to fact that the series of transactions was pre-arranged and due to the relationships that Blake Bromley has with all the entities involved. As such, the Foundation's gift to CHIMP cannot be considered as a contribution to the Foundation's DQ, and under paragraph 149.1(4.1)(d) of the Act the Foundation may be revoked.

Furthermore, and as mentioned in our letter of January 8, 2020, the Foundation may also be liable to a penalty equal to 110% of the gift not made to an arm's length entity per subsection 188.1(12) of the Act. The Foundation's potential penalty is as follows:

Headwaters Foundation

Year	Type of Sanction	Sanction %	Sanctioned Amount	Sanction
2016	Gift not at arm's length (Timothy)	110%	$2,500,000	$ 2,750,000
2016	Gift not at arm's length (AAS)	110%	$2,250,000	$ 2,475,000
		Total	$4,750,000	$ 5,225,000

Please also note that we have corrected the amount of the non-arm's length gift that we are potentially sanctioning from the amount in our January 8, 2020 letter. There was an error in the calculation and the amount should be $4,750,000 not $4,000,000.

For the reasons stated above, it appears there may be grounds for revocation of the Foundation's charitable status under paragraph 168(1)(b) of the Act, and there may also be grounds to sanction the Foundation under subsection 188.1(12) of the Act for misusing gifts not at arm's length.

In conclusion, we maintain our position that the Foundation failed to comply with the DQ requirements contained in the Act, and pursuant to subsection 149.1(3) and paragraphs 149.1(4.1)(a), (b) and (d) of the Act, the Foundation's registration may be revoked.

3) Failure to file an information return as and when required by the Act and/or its Regulations

Regarding our concerns that the Foundation did not accurately complete its T3010 information return, you state in your Representations that the Foundation received professional advice that the [redacted] shares were a capital asset and consequently reported them as such. While shares can sometimes be considered capital assets, in this particular case the Foundation knew that it only owned the shares for nine days and received no long-term benefit from them. It is therefore not reasonable to argue that the [redacted] shares in question could be classified as capital assets of the Foundation at any point in time.

As regards the $4,735,985 cash received from Paraklesis, you state in your Representations that you agree that this is revenue from sales of goods and services; however, you have not demonstrated what goods and services were sold by the Foundation, if not the [redacted] shares. To be consistent, the transfer of the [redacted] shares to Paraklesis should not have been reported as a gift and as a sale (the proceeds are reported on the information return as revenue). As such, the reporting of the $4,712,500 million gift to Paraklesis was both unnecessary and inaccurate.

In conclusion, we maintain our position that the Foundation failed to accurately complete its T3010 information return. Per paragraph 168(1)(c) a registered charity that fails to file an information return as and when required by the Act may be subject to revocation. Therefore, there may be grounds to revoke the Foundation for failing to accurately file its T3010.

Ineligible Individuals

In our January 8, 2020 letter we inform the Foundation that one of its directors, Christopher Richardson, became an ineligible individual on February 10, 2018.

While this is outside the audit period, it is important to note that should the Foundation not remove Mr. Richardson as a director, it could result in the Foundation's registration being revoked under paragraph 149.1(4.1)(e) of the Act.

The Foundation's options:

a) Respond

If the Foundation chooses to respond, send written representations and any additional information regarding the findings outlined above **within 30 days** from the date of this letter to the address below. After considering the response, the Director General of the Charities Directorate will decide on the appropriate course of action. The possible actions include:

- no compliance action;

- issuing an educational letter;
- resolving the issues through a Compliance Agreement;
- applying penalties or suspensions or both, as described in sections 188.1 and 188.2 of the Act; or
- issuing a notice of intention to revoke the registration of the Foundation in the manner described in subsection 168(1) of the Act.

b) Do not respond

The Foundation 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 Foundation in the manner described in subsection 168(1) of the Act.

If the Foundation appoints a third party to represent it in this matter, send us a written request with the individual's name, the individual's contact information, and explicit authorization that the individual can discuss the file with us.

If you have any questions or require further information or clarification, do not hesitate to contact me at the numbers indicated below. My team leader, Crystal Scott, may also be reached at 250-857-2222.

Yours sincerely,

Maria Popova, [redacted]
Audit Division – Charities Directorate
Vancouver Island and North Tax Services Office

Telephone: 778-835-3255
Toll Free: 1-855-522-7864
Facsimile: 250-363-3000
Address: c/o 9755 King George BLVD
Surrey, BC V3T 5E1

c.c.: Leslie Brandlmayr

Enclosures: Letter dated January 8, 2020
Letter dated March 9, 2020
Disbursement Quota Calculation

Headwaters Foundation
c/o 1250 1500 West Georgia Street
Vancouver, BC V6G 2Z6

May 3, 2021

Canada Revenue Agency
Surrey NVCC
MAY 06 2021
Agence du revenu du Canada
CNVR de Surrey 02

Canada Revenue Agency
Vancouver Island Tax Services
c/o 9755 King George Boulevard
Surrey, BC V3T 5E1

Attention: Maria Popova

Dear Ms. Popova:

Re: Headwaters Foundation (the "Foundation")

Subject: Audit of Headwaters Foundation BN: 83102 4203 RR0001
File: 3045194

We are in receipt of your letter of March 2, 2021 and are grateful for the opportunity to respond. We set out our further representations below.

APPLICABLE STANDARD OF REVIEW

We agree with you that standard of review set out in paragraph 37 of Canada (Minister of Citizenshipand Immigration) v Vavilov, 2019 SCC 65 ("Vavilov") is "palpable and overriding error". However, that standard of review applies only to appeals from an administrative decision to a court applying appellate standards of review to the decision. Consequently, this standard of review applies only to the Minister's administrative decision to revoke charitable registration, such as when she relies upon provisions in sections 149.1 and 168.

Many of the areas of alleged non-compliance deal with Part V of the Income Tax Act. All of the taxes and penalties coming under section 188.1 result in an appeal to the Tax Court of Canada rather than a judicial review. We are quite certain that you would agree that the standard of review in the Tax Court of Canada is not "palpable and overriding error" and we are perplexed as to why your Administrative Fairness Letter is misleading in this regard.

MEANING of "DISBURSEMENTS to QUALIFIED DONEES"

The very fact that your letter articulates the next section under the heading above demonstrates that you have completely misunderstood our representations on this issue. Our letter was dealing with the meaning of the statutory term "charitable purposes". We completely agree with you that a sale of property does not qualify as a transaction enabling a charitable foundation to meet its disbursement quota (DQ). We agree with your interpretation that only "disbursements by way of gift to qualified donees" qualifies to meet its disbursement quota.

However, that is irrelevant to the issue of determining as an extricable question of law what is a "charitable purpose". We did not take the position that the sale of the [redacted] shares is a "charitable activity". We continue to hold the view that the transactions involved in acquiring

and selling the [redacted] shares DO fall within the wording of the Foundation' s registered purposes. The wording in clauses a) and b) of the Foundation's constitution which were registered by CRA have purposes which authorize these transactions:

a) to solicit and receive gifts, bequests, trusts, funds and property and beneficially, or as a trustee or agent, to hold, invest, develop, manage, accumulate and administer funds and property for the purpose of disbursing funds and property exclusively to registered charities and "qualified donees" under the provisions of the Income Tax Act; and
b) to undertake activities ancillary and incidental to the attainment of the aforementioned charitable purposes.

If the position taken in your letter was correct, it would not be possible for any charitable foundation to purchase and sell shares in [redacted] or any other publicly traded securities such as [redacted] shares. It is not reasonable for CRA to take this position because it is contrary to the *modus operandi* of charitable foundations since time immemorial. There is likely no single activity of a charitable foundation which is more frequent and legitimate than purchasing and selling shares in public companies.

CRA completes this section of its letter by stating the following:

> "In conclusion, it is our view that the transactions involved in acquiring the [redacted] shares do not fall within the wording of the Foundation' s registered purposes, nor within the statutory definition of "charitable purposes" as an extricable question of law. We are of the opinion that the sale of the [redacted] shares is not a charitable activity and as such, does not further the Foundation's stated charitable purposes."

CRA's error in holding that the Foundation purchasing and selling [redacted] shares does not, as an extricable question of law fall within the statutory definition of "charitable purposes" is a "palpable and overriding error".

TRANSACTIONS RELATED TO [redacted] SHARES

The reality that CRA's "palpable error" is also "overriding" becomes clear when the letter sets out CRA's interpretation of the word "necessary". CRA's position is that "necessary" means legitimately and justifiably resulting from an action taken to achieve a charitable purpose [or] and a necessary step, a consequence, or a by-product of an action taken to achieve a charitable purpose. The statutory definition of a "charitable foundation" is that it is "constituted and operated exclusively for charitable purposes". Given that the predominant activity of almost every charitable foundation is to deal in commercial transactions related to the purchase and sale of public shares, the transactions related to [redacted] shares were legitimately and justifiably taken to achieve a charitable purpose. Consequently, any private benefit was incidental because it was necessary, reasonable, and proportionate to the resulting public benefit.

Your letter sets out 5 examples of unacceptable private benefit without alleging that any of the examples are relevant to conduct discovered in this audit. They are not in any way described in the series of transactions that in CRA's view demonstrates how the Foundation provided a private benefit to [redacted] If the fact that the [redacted] shares both started and ended in the hands of [redacted] a private, for-profit corporation, does constitute a private benefit, surely it is incidental because it is reasonable and proportionate to the resulting public benefit. There is no suggestion in the audit that [redacted] paid less than fair market value for the [redacted] shares. Consequently, the charitable purpose of acquiring assets which will fund disbursement quota payouts to other charities was accomplished by this series of transactions. Any suggestion that these transactions provided an unacceptable private benefit to [redacted] is rooted in CRA's "palpable and overriding error" as to the meaning of "charitable purposes". No statutory basis has been provided as to why transactions that allowed [redacted] to receive a tax credit for its donation to Chimp and then subsequently repurchase the [redacted] shares for fair market value run afoul of the rules governing the operations of a charitable foundation.

CRA's letter states:

> "It is our position that in providing a private benefit to [redacted] the Foundation has failed to meet the requirements of subsections 149.1(3) of the Act. For this reason, it appears there may be grounds for revocation of the charitable status of the Foundation under paragraph 168(1)(b) of the Act."

Subsection 149.1(3) reads as follows:

Revocation of registration of public foundation

(3) The Minister may, in the manner described in section 168, revoke the registration of a public foundation for any reason described in subsection 168(1) or where the foundation

- **(a)** carries on a business that is not a related business of that charity;
- **(b)** fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the foundation's disbursement quota for that year;
- **(b.1)** makes a disbursement by way of a gift, other than a gift made
  - **(i)** in the course of charitable activities carried on by it, or
  - **(ii)** to a donee that is a qualified donee at the time of the gift;
- **(c)** since June 1, 1950, acquired control of any corporation;
- **(d)** since June 1, 1950, incurred debts, other than debts for current operating expenses, debts incurred in connection with the purchase and sale of investments and debts incurred in the course of administering charitable activities; or
- **(e)** at any time within the 24 month period preceding the day on which notice is given to the foundation by the Minister pursuant to subsection 168(1) and at a time when the foundation was a private foundation, took any action or failed to expend amounts such that the Minister was entitled, pursuant to subsection 149.1(4), to revoke its registration as a private foundation.

There is not a single reference to "private benefit" in this subsection. Further, not a single transaction set out in CRA's letter runs afoul of any of the provisions in subsection 149.1(3). Consequently, CRA has made another "palpable and overriding error" on an extricable question of law when it says that the Foundation has failed to meet the requirements of subsections 149.1(3) of the Act and therefore there may be grounds for revocation of the charitable status of the Foundation under paragraph 168(1)(b) of the Act.

CONFERRING AN UNDUE BENEFIT TO A PERSON

Your letter states that the undue benefits are conferred to [redacted] Archon, and WWT. However, the statutory definition of undue benefits is set out in subsection 188.1(5) and is restricted to payment "for the personal benefit of any person who is a proprietor, member, shareholder, trustee or settlor of the charity or association". The letter does not allege that [redacted] Archon and WWT fall within these designations and, of course, they do not. Consequently, as an extricable question of law, the payments made do not meet the test of being an "undue benefit".

In any event, the appropriate penalty for an undue benefit is, as set out in your letter, the sanctions under subsection 188.1(4). This requires CRA to issue an assessment with the appeal being to the Tax Court of Canada. The Foundation will deal more fulsomely with these facts and issues when CRA decides to issue an assessment pursuant to Part V.

DELAY OF EXPENDITURES ON ITS OWN CHARITABLE ACTIVITIES

Your letter invokes paragraph 149.1(4. I)(a) of the Act and alleges "it may be reasonably considered that a purpose of the transaction was to avoid or unduly delay expenditure of amounts on charitable activities". In coming to this determination your letter expressly relies

upon your audit's earlier determination that the series of transactions involving the [redacted] shares were not undertaken for charitable purposes.

Earlier in this response, we argued that CRA has made a "palpable and overriding error" on an extricable question of law, being the statutory definition of "charitable purposes". Because, in proposing revocation pursuant to paragraph 149.1(4. l)(a), CRA is explicitly relying upon this error, this determination is fatally flawed.

Your letter goes on to state that the Foundation's gift to Paraklesis was artificial and not charitable in nature because it did not fulfill a charitable purpose. It is difficult to not believe that this is a "palpable and overriding error" because the statute specifically describes a disbursement to a qualified donee as being including in the definition of a charitable purpose. It is unclear how a taxpayer can defend itself when CRA simply recharacterizes a transfer which all the documentation says is a "gift" to not be a gift. The British Columbia Supreme Court in *Richert v. Stewards Charitable Fdn.*, [2005] B.C.T.C. 211 (SC) clearly accepted the legitimacy of reciprocal gifts and distinguished it from consideration and transfer by way of contract. The Foundation intended the transfer to be a gift and executed all the appropriate documentation to accomplish this at law. Consequently, it was correct to file its T3010 in accordance with its intention to transfer by way of gift.

ASSISTING ANOTHER CHARITY TO DELAY EXPENDITURES

Paragraph 149.1(4.l)(b) of the Act states that if a registered charity enters into a transaction with another registered charity **and it may be reasonably considered that a purpose of the transaction** was to assist the other registered charity in avoiding or unduly delaying the expenditure of amounts on charitable activities, then CRA can revoke. The Foundation is adamant that unduly delaying an expenditure on charitable activities was not a purpose of any of its transactions.

It seems intellectually impossible to convince the Federal Court of Appeal that the Minister has made a "palpable and overriding error" when the test is merely "may be reasonably considered". It is clear that the rule of law is tilted overwhelming in favour of the Minister and even making representations seems like a waste of the Foundation's money.

Nevertheless, your letter acknowledges that Paraklesis did not have an account at [redacted] or any other brokerage house at the time of the gift of the [redacted] shares so could not deal with publicly traded securities. The "commercial purpose" of the Foundation's participation was to facilitate the transfer of publicly traded securities. It is true that, as your letter states, "that the Foundation did not involve itself in this series of transaction for its own benefit". However, that does not preclude the charitable sector as a whole receiving a multi-million dollar benefit as a consequence of the Foundation facilitating a transaction that Paraklesis could not complete on its own. We agree that the Foundation "was not investing in the shares as an investment opportunity". The Foundation only purchased the shares as part of the aforementioned pre-planned series of transactions which had the result of adding more than $4 million of equity into the charitable sector.

Your letter states, "the Foundation was accommodating Paraklesis by allowing it to make use of the Foundation's [redacted] account". We disagree with your determination that "this activity does not further a charitable purpose". The statutory definition of ***charitable purposes*** includes the disbursement of funds to a qualified donee. Because of this participation Paraklesis had more than $4 million of funds which will generate additional funds to disburse to qualified donees. Your letter sets out facts which are entirely consistent with the narrative we have set out in these representations. There is no material discrepancy on the facts. The only difference is that CRA is taking the position that the purpose of the transaction was to unduly delay expenditures and the Foundation engaged in it to help more funds come into the charitable