



July 21, 2022

REGISTERED MAIL

Scott Cousens
Director
Fortius Foundation

BN: 835780958 RR0001
File number: 3037178

Dear Scott Cousens:

Subject: Notice of intention to revoke

We are writing with respect to our letter dated September 7, 2021 (copy enclosed), in which Fortius Foundation (the Organization) was invited to respond to the findings of the audit conducted by the Canada Revenue Agency (CRA) for the period from October 1, 2014 to September 30, 2016. Specifically, the Organization was asked to explain why its registration should not be revoked in accordance with subsection 168(1) of the Income Tax Act.

We have reviewed and considered your written responses dated November 15, 2021 and November 17, 2021. Your reply has not alleviated our concerns with respect to the Organization'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 Organization is not complying with the requirements set out in the Act. Although the Organization corrected its previous non-compliance, it committed multiple new serious breaches of the Act which demonstrates a continuous pattern of non-compliance. In particular, the current follow-up audit found that the Organization is not constituted and operated exclusively for charitable purposes, failed to devote resources to charitable activities carried on by the Organization itself, failed to maintain adequate books and records, failed to issue donation receipts in the accordance with the Act and/or its Regulations, and failed to file an information return as and when required by the Act and/or its Regulations. For these reasons, it is our position that the Organization no longer meets the requirements for charitable registration.

Consequently, for the reasons mentioned in our letter dated September 7, 2021, and pursuant to subsections 168(1) and 149.1(3) of the Act, we hereby notify you of our intention to revoke the registration of the Organization. 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), 168(1)(c), 168(1)(d), 168(1)(e), and paragraph 149.1(3)(b.1) 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
835780958RR0001	Fortius Foundation Vancouver BC

In addition, due to the egregious and continuous 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 Organization will no longer be exempt from Part I tax as a registered charity and **will no longer be permitted to issue official donation receipts**. This means that gifts made to the Organization would not be allowable as tax credits to individual donors or as allowable deductions to corporate donors under subsection 118.1(3) and paragraph 110.1(1)(a) of the Act respectively;
- b) by virtue of section 188 of the Act, the Organization will be required to pay a tax within one year from the date of the notice of intention to revoke. This revocation tax is calculated on 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 Organization will no longer qualify as a charity for purposes of subsection 123(1) of the Excise Tax Act. As a result, the Organization 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,

Sharmila P. Khare

Sharmila Khare
Director General
Charities Directorate

Enclosures

- Appendix A, Comments on representations
- Appendix B, Relevant provisions of the Act
- CRA letter dated September 7, 2021
- Organization's representations dated November 15, 2021 and November 17, 2021

APPENDIX A**Fortius Foundation
Comments on Representations**

In the administrative fairness letter (AFL) dated September 7, 2021, we explained that the audit conducted by the Canada Revenue Agency (CRA) for the period from October 1, 2014 to September 30, 2016, identified that Fortius Foundation (the Organization) is not operating in compliance with the provisions of the Income Tax Act (the Act) in the following areas:

1. It is not constituted and operated exclusively for charitable purposes
2. Failed to devote resources to charitable activities carried on by the Organization itself
3. Failed to meet disbursement quota
4. Failed to maintain adequate books and records
5. Failed to issue donation receipts in accordance with the Act and/or its Regulations
6. Failed to file an information return as and when required by the Act and/or its Regulations

We have reviewed and considered the representations of both November 15, 2021, and November 17, 2021, and we maintain our position that the non-compliance issues identified during our audit, with the exception of our position on the Organization's failure to meet the disbursement quota, represent a serious breach of the requirements of the Act. As a result of this non-compliance, the Organization's registration as a charity should be revoked.

Although we maintain our position that each of the section 188.1 penalties we discussed in our previous letter are applicable and could be assessed from a technical perspective,¹ we will not be assessing any of the penalties as a result of the current audit given that we are now informing the Organization of our intention to revoke its status as a registered charity.

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

- A summary of the issues raised in our AFL dated September 7, 2021;
- A summary of the representations provided by the Organization dated November 15, 2021, and November 17, 2021; and
- The CRA's response to the representations.

1. It is not constituted and operated exclusively for charitable purposes

As outlined in the AFL, the CRA is of the view that the Organization is not constituted and operated exclusively for charitable purposes, rather it is operating for an unstated, non-charitable purpose, namely enabling a non-qualified donee to use charitable assets. For this reason, it is the CRA's view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(b) of the Act.

¹ 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.

The Organization's representations:

The Organization stated in its letter of November 15, 2021 (the Representations) that it did not have any unstated purposes. It did report revenues of \$22,978,361, and it owned the building with the intention of earning income from the property. It had every intention of collecting lease payments set at fair market value (FMV) rather than enabling a non-qualified donee to use charitable assets without providing consideration set at FMV in return.

CRA's findings:

While it is true that revenue was reported, as outlined in the AFL, the Organization did not in fact collect the lease payments. The revenue reported was accrued rent receivable that was never collected. While we agree that the Organization was constituted for a charitable purpose,² it was not operated for charitable purposes. The intention to collect lease payments is not enough when the activity did not in fact generate any appreciable public benefit.

As we stated in the AFL, the Organization's revenues (and ability to fund qualified donees in the future) is dependent upon the non-qualified donee Fortius Athlete Development Association (FADA) and the rent receivable. Absent another revenue source, or demonstration that the expenses have been reduced so much that they can be covered by revenues other than rent, we cannot conclude that the Organization is in a position to fund other qualified donees. We have not been provided with either another revenue source, or an analysis of expenses, and accordingly we maintain our position that the Organization operated to benefit FADA at the expense of the Organization's charitable mandate of gifting to qualified donees.

2. Failed to devote resources to charitable activities carried on by the Organization itself

As outlined in the AFL, the CRA is of the view that by gifting funds to non-qualified donees and loaning funds to a non-qualified donee at below fair-market terms, the Organization provided unacceptable private benefits. As a result, the Organization failed to meet the requirement of section 149.1 of the Act that it devote its resources to charitable activities carried on by the Organization itself. As such, there are grounds for the Minister to revoke the charitable status of the Organization in the manner as described under section 168 of the Act.

Additionally, it is the CRA's view that the above mentioned unacceptable private benefits are also considered to be undue benefits as described in subsection 188.1(5) of the Act. As such, there may also be grounds for the Minister to sanction the Organization under subsection 188.1(4) of the Act.

The Organization's representations:

The Organization stated in the Representations that it did not intend to make a gift to FADA. It was unaware that letting the limitation period expire would impair its ability to collect rent from

² "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."

FADA, and that it is not in agreement with the CRA's interpretation of the Limitations Act that the expiry of the limitation period means that it cannot collect.

The Organization further stated that the limitation period had not expired during the audit period and therefore it would not be fair to raise issues of expiry of the limitation period when it happened outside the audit period.

Finally, the Organization stated that it does not agree that a failed commercial arrangement should be considered a private benefit for purposes of revocation; however, it did not provide the reasons for its position. The Organization only alleges that for decades to come the land acquired by the Organization and the facilities it built will achieve a public benefit for the people of Burnaby.

The Organization stated that it does not agree that a penalty for undue benefits is warranted, but did not provide any arguments in support of this position.

The Organization further stated that in hindsight it understands why the CRA found the loans to Fortius Institute (the Institute) unacceptable. It is willing to enter into a compliance agreement to cease such activities in the future.

CRA's findings:

We maintain our interpretation of the Limitations Act. Although there is nothing preventing FADA from repaying the Organization should it voluntarily decide to, the Organization has no legal recourse to insist on payment. In our view, the Organization willingly ceased to have legal control over its own financial resources in this regard.

Furthermore, as a result of this, we have concluded that the outstanding rental amounts were effectively given to FADA as a gift, since FADA can no longer be required to pay. This is independent of any intentions of the Organization, or FADA, and arises from the expiry of the limitation period. Given the large dollar values involved (\$11,900,003) this is a significant private benefit provided to FADA.

As explained in the AFL, at common law a private benefit 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. FADA is not a charitable beneficiary and hence, in our view, the benefit discussed above is a private benefit.

The separate concept of an undue benefit is defined under subsection 188.1(5) of the Act. An undue benefit means a benefit provided by a charity to a person who does not deal at arm's length with the charity. Hence, in addition to being a private benefit, the outstanding rental amounts are also an undue benefit given that the Organization and FADA are not at arm's length with one another.

While we have considered circumstances outside the audit period, this is circumstantial evidence of the Organization's intentions during the audit period. In our view, the Organization was not

concerned with collecting its debt from FADA and did not take any steps, in the audit period or subsequently, to ensure that it would have an adequate source of income to gift to qualified donees. There was no audit evidence or documentation to demonstrate efforts were made to collect the outstanding amounts. This further supports the position that the Organization made a material gift to FADA. Although a gift to FADA may not have been intended, that was the effect of the Organization's actions.

We maintain our position in regards to the existence of unacceptable private benefits and that this is a reason for the Organization's status as a registered charity to be revoked. As stated in the AFL, we are particularly concerned that no collection action was taken by the Organization and no record exists of how the Organization came to the conclusion that no collection action was warranted or how the Organization made a logical and reasoned conclusion that FADA will pay the rent owed without the need for collection action. We still have not been provided with any explanations for why the Organization made these decisions.

Accordingly, we maintain our position that an inappropriate private benefit was provided to FADA when the Organization failed to collect any rent owed. This outstanding rent is also an undue benefit, but as mentioned previously, while we are moving forward with revocation, we are not pursuing the penalty for undue benefits.

While the land and facilities may generate a public benefit now, depending on how the City of Burnaby uses them, that is not the proper test for whether the Organization has charitable purposes. The public benefit must have been generated by the Organization itself, while the Organization owned the land and facilities, for it to qualify as a charitable purpose.

3. Failed to meet disbursement quota

As outlined in the AFL, the CRA is of the view that the Organization has not met its minimum disbursement requirements as contained in the definition of disbursement quota (DQ) in subsection 149.1(1) of the Act. For this reason, it is the CRA's view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraphs 149.1(3)(b) and 168(1)(b) of the Act.

The Organization's representations:

The Organization stated that in its view it is not fair for the CRA to propose revocation for a cumulative shortfall that is relatively small at \$39,998. In addition, the Organization stated that if the unpaid debts from FADA and the Institute have no value, the Organization's assets for purposes of calculating the DQ should be adjusted.

CRA's findings:

Although the cumulative DQ short-fall in the audit period is relatively small it exists along with other areas of non-compliance identified in the Organization. Altogether, there is sufficient non-compliance to warrant revocation.

4. Failed to maintain adequate books and records

As outlined in the AFL, there were inconsistencies between the Organization's books and records, including its audited financial statements, and the 2015 and 2016 T3010s, Registered Charity Information Returns, filed. For this reason, it is the CRA's view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(e) of the Act. In addition, the Minister may suspend the Organization's authority to issue official donation receipts for one year for having inadequate books and records under subsection 188.2(2)(a) of the Act.

The Organization's representations:

The Organization stated that the AFL did not specify what deficiencies were in its books and records, and even concedes that its audited financial statements were correct. In addition, the Organization stated that there is no reference for mistakes in filing T3010s as being grounds for revocation.

CRA's findings:

While we acknowledge the Organization's intention with filing its T3010 based on the trial balances was to ensure that the information return was filed on time, there is a requirement, separate from the deadline for filing, that the information in the T3010 be supported by the books and records of the Organization. Far from supporting the T3010s filed, the Organization's books and records, in the form of the audited financial statements, support different figures.

The discrepancies between the Organization's trial balance and final audited financial statements were significant, affected numerous line items, and in our view cannot be reasonably viewed as minor. The Federal Court of Appeal has confirmed that a significant number of inaccuracies, or beyond what might reasonably be viewed as minor, in a T3010 are a sufficient basis for revocation.³

5. Failed to issue donation receipts in accordance with the Act and/or its Regulations

As outlined in the AFL, there were various errors and omissions noted in the Organization's official donation receipts (ODRs). For this reason, it is the CRA's view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(d) of the Act.

The Organization's representations:

The Organization accepted responsibility for the errors identified in its ODRs, but indicated that it does not think the appropriate response is revocation.

³ Opportunities for the Disabled Foundation v MNR, 2016 FCA 94 at paras 50-51.

CRA's findings:

We understand that the ODR errors could be remedied as the Organization now acknowledges the errors made; however, they exist along with other areas of non-compliance identified in the Organization. Altogether, there is sufficient non-compliance to warrant revocation.

6. Failed to file an information return as and when required by the Act and/or its Regulations

As outlined in the AFL, the Organization's T3010s for its 2015 and 2016 fiscal year ends contained significant and material errors, and the Organization failed to file a Form T1240, Registered Charity Adjustment Request to account for the material differences. As such, the Organization was not compliant with its obligation to file an accurate information return as prescribed at subsection 149.1(14) of the Act. For this reason, it is the CRA's view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(c) of the Act.

The Organization's representations:

In the Organization's view, the discrepancies between its T3010 and its audited financial statements occurred because it was extremely concerned to file the T3010 within 6 months of its fiscal year end. As a result, the Organization argued that it should not be penalized. The Organization also argued that the AFL did not cite the authority for revocation for failure to file a Form T1240.

CRA's findings:

While we acknowledge that the Organization's intention with filing its T3010 based on the trial balances was to ensure that the information return was filed on time, there is a requirement, separate from the deadline for filing, that the information in the T3010 be accurate.

The discrepancies between the trial balance and the final audited financial statements were significant, affected numerous line items, and in our view cannot be reasonably viewed as minor. The Federal Court of Appeal has confirmed that a significant number of inaccuracies, or beyond what might reasonably be viewed as minor, in a T3010 are a sufficient basis for revocation.⁴

Conclusion

For the reasons explained above, and the reasons outlined in our letter of September 7, 2021, it is the CRA's position that the Organization 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.

⁴ Opportunities for the Disabled Foundation v MNR, 2016 FCA 94 at paras 50-51

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

$$\mathbf{A} - \mathbf{B}$$

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

$$\mathbf{A} - \mathbf{B}$$

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.



September 7, 2021

Scott Cousens
Director
Fortius Foundation
[REDACTED]

BN: 83578 0958 RR0001
File #: 3037178

Dear Scott Cousens:

Subject: Audit of Fortius Foundation

This letter results from the audit of Fortius Foundation (the Organization) conducted by the Canada Revenue Agency (CRA). The audit related to the operations of the Organization for the period from October 1, 2014 to September 30, 2016.

Background

The Organization, formerly incorporated as Multisport Centre of Excellence Foundation, was registered as a public foundation on October 30, 2007. On September 28, 2012, the Organization changed its name to Fortius Foundation, via Supplementary Letters Patent.

The Organization is part of a conglomerate known as Fortius Sport & Health, which operated in a 148,000 square-foot sport medicine, training and rehabilitation centre in Burnaby, British Columbia. We note that as of December 2020, the sports complex is no longer being operated by the Organization. Fortius Sport & Health was comprised of three entities:

1. **Fortius Foundation**, the Organization, owned the land and buildings as well as capital assets inside the building known as the Fortius Athlete Development Centre (the Centre). The Organization leased the building and equipment to Fortius Athlete Development Association (FADA). The Organization is not involved in the operations of the Centre.
2. **Fortius Athlete Development Association (FADA)**, a not-for-profit management entity that operated the Centre and delivered community-based programs.

FADA leased the Centre from the Organization and then subleased the Centre to Fortius Institute (the Institute) and other commercial tenants. FADA's lease agreement with the Organization stipulated that it was to pay \$183,333 per month until April 2015, and \$216,667 per month thereafter, to the Organization. Payment has not been received by the Organization, rather it has been accruing as a receivable.

3. **Fortius Institute (the Institute)**, a for-profit Canadian Controlled Private Corporation.

Scott Cousens, the Organization's sole member and one of its directors, owns [REDACTED] of the share capital of the Institute, while FADA owns the remaining [REDACTED] of the Institute's share capital.

Prior audit

An audit of the Organization's 2008 and 2009 fiscal years concluded in 2012 with a Compliance Agreement signed by [REDACTED] the president and CEO at that time, and [REDACTED] the accountant at that time. The corrective measures agreed to in the signed Compliance Agreement include:

1. Ensuring that future loan agreements maintain an interest rate based on current market rates;
2. The Organization will amend its objects to reflect current activities and submit a draft copy to the Charities Directorate for approval by February 1, 2012. Once reviewed and approved by the Charities Directorate, a final copy of the revised objects will be submitted; and,
3. The Organization will ensure its expenses are allocated to the appropriate expense lines of the T3010 charity return.

The Organization submitted its proposed object change on February 1, 2012, and the CRA requested more detail about the implementation of the proposed object. The Organization provided the requested information; however, a current review of the Organization's documentation demonstrates that while its original object is potentially charitable, we require clarification of the Organization's activities, which is discussed in further detail below.

Current audit

On September 7, 2021, the Organization 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.	It is not constituted and operated exclusively for charitable purposes	149.1(1), 168(1)(b)
2.	Failed to devote resources to charitable activities carried on by the Organization itself <ul style="list-style-type: none"> I. Fiduciary duty II. Gifted to non-qualified donees III. Delivered non- incidental private benefits IV. Conferred an undue benefit to a person 	149.1(1), 168(1)(b) 149.1(3)(b.1) 188.1(4), 188.1(5)
3.	Failed to meet the disbursement quota	149.1(1), 149.1(3)(b)

4.	Failed to maintain adequate books and records	168(1)(e), 188.2(2)(a), 230(2), 230(4), 230(4.1)
5.	Failed to issue donation receipts in accordance with the Act and/or its Regulations	168(1)(d), Regulations 3500 and 3501
6.	Failed to file an information return as and when required by the Act and/or its Regulations	149.1(14), 168(1)(c), 188.1(6), 188.2(2.1)

As a registered charity, the Organization must comply with the law. If it fails to comply with the law, it may either be subject to sanctions under sections 188.1¹ and/or 188.2² of the Act, and/or have its registered charity status revoked in the manner described in section 168 of the Act.

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 Organization an opportunity to provide representations to our findings to support why it believes that sanctions should not be assessed and/or why its registered status should not be revoked.

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

General legal principles

In order to maintain charitable registration under the Act, Canadian law requires that an organization demonstrate that it is constituted and operated exclusively for charitable purposes (or objects) and that it devotes its resources to charitable activities carried on by the organization itself in furtherance thereof.³ To be exclusively charitable, a purpose must fall within one or more of the following four categories (also known as “heads”) of charity⁴ and deliver a public benefit:

¹ Financial sanctions are assessed under Section 188.1 of the Act.

² Suspensions of a registered charity's authority to issue official donation receipt, and qualified donee status, are assessed under section 188.2 of the Act.

³ See subsection 149.1(1) of the Act, which requires that a charitable organization devote all of its resources to “charitable activities carried on by the organization itself” and *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at paras 156-159. A registered charity may also devote resources to activities that, while not charitable in and of themselves, are necessary to accomplish their charitable purposes (such as expenditures on fundraising and administration). However, any resources so devoted must be within acceptable legal parameters and the associated activities must not become ends in and of themselves.

⁴ The Act does not define charity or what is charitable. The exception is subsection 149.1(1) which defines charitable purposes as including “the disbursement of funds to qualified donees.” The CRA must therefore rely on the common law definition, which sets out four broad categories of charity. The four broad charitable purpose categories, also known as the four heads of charity, were outlined by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 (PC). The classification approach was explicitly approved of by the Supreme Court of Canada in *Guaranty Trust Co*

- (1) the relief of poverty;
- (2) the advancement of religion;
- (3) the advancement of education; and
- (4) other purposes beneficial to the community as a whole in a way which the law regards as charitable.

An organization's purposes must fall within one or more of these categories to be considered for registration as a charity. The formal purposes as set out in an organization's governing document must be clear and precise so as to reflect exclusively charitable purposes.

The public benefit requirement involves a two-part test:

- The first part of the test requires the delivery of a benefit that is recognizable and capable of being proved, and socially useful. To be recognizable and capable of being proved, a benefit must generally be tangible or objectively measurable.
 - Benefits may be measurable or intangible. Benefits that are not tangible or objectively measurable should be shown to be valuable or approved by the common understanding of enlightened opinion for the time being.⁵ In most cases, the benefit should be a necessary and reasonably direct result of how the purpose will be achieved.⁶ An assumed prospect or possibility of gain that is vague, indescribable or uncertain, or incapable of proof, cannot be said to provide a charitable benefit.⁷
- The second part of the test requires the benefit be directed to the public or a sufficient section of the public. This means a registered charity cannot:
 - have an eligible beneficiary group that is negligible in size, or restricted based on criteria that are not justified based on the charitable purpose(s);
or
 - provide an unacceptable private benefit. Typically, a private benefit is a benefit provided to a person or organization that is not a charitable

of Canada v Minister of National Revenue, [1967] SCR 133, and confirmed in Vancouver Society of Immigrant and Visible Minority Women v MNR, [1999] 1 SCR 10, 1999 CanLII 704 (SCC).

⁵ For more information about public benefit, see CRA Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test. See also generally British Columbia (Assessor of Area #09 - Vancouver) v Arts Umbrella, 2008 BCCA-103; and Vancouver Society of Immigrant and Visible Minority Women v MNR, [1999] 1 SCR 10, 1999 CanLII 704 (SCC).

⁶ For more information about public benefit, see CRA Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test, and CRA Guidance CG-019, How to draft purposes for charitable registration. See also; Commissioners for Special Purposes of the Income Tax v Pemsel, [1891] AC 531 (PC) at 583.

⁷ Co-operative College of Canada v. Saskatchewan (Human Rights Commission), 1975 CanLII 808 (SKCA) at para 19; Vancouver Society of Immigrant and Visible Minority Women v MNR, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at para 202; For more information about charitable purposes see CRA Guidance CG-019, How to draft purposes for charitable registration at para 19.

beneficiary, or to a charitable beneficiary that exceeds the bounds of charity.

A private benefit will usually be acceptable if it is incidental, meaning it is necessary, reasonable, and not disproportionate to the resulting public benefit.⁸

The CRA must be satisfied that an organization's activities directly further charitable purposes in a manner permitted under the Act. In making a determination, we are obliged to take into account all relevant information. Accordingly, the current audit encompassed an enquiry into all aspects of the Organization's operations. The fact that some of the areas of non-compliance identified in this letter may, or may not, have been evaluated in the preceding audit does not preclude the need for compliance with existing legal requirements. Furthermore, the CRA may take a position that differs from that reached previously based on reconsideration of the pertinent facts and law.⁹

Identified areas of non-compliance

1. It is not constituted and operated exclusively for charitable purposes

Legislation and jurisprudence

As indicated under General legal principles, to be registered as a charity under the Act, Canadian law requires that an organization's purposes be exclusively charitable, and define the scope of the activities that can be engaged in by the organization.¹⁰ Further, a purpose must fall within one or more of the four categories of charity and deliver a charitable public benefit.

The question of whether an organization is constituted exclusively for charitable purposes cannot be determined solely by reference to its stated purposes, but must take into account the activities in which an organization currently engages. In *Vancouver Society of Immigrant and Visible Minority Women v MNR*, the Supreme Court of Canada stated as follows:

In *Guaranty Trust*, *supra* at p.144, this Court expressed the view that the question of whether an organization was constituted exclusively for charitable purposes cannot be determined solely by reference to the objects and purposes for which it was originally established. It is also necessary to consider the nature of the activities presently carried on by the organization as a potential indicator of whether it has since adopted other purposes. In other words, as Lord Denning put it in *Institution of Mechanical Engineers v Cane*, [1961] A.C. 696 (H.L.), at p. 723, the real

⁸ For more information about public benefit, see CRA Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test.

⁹ See for example *Canadian Magen David Adom for Israel v MNR*, 2002 FCA 323 at para 69.

¹⁰ *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at para 159; *Travel Just v Canada Revenue Agency*, 2006 FCA 343 at para 2.

question is, "for what purpose is the Society at present instituted? (emphasis in original)."¹¹

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. If an activity is, or becomes, a substantial focus of an organization, it may no longer be in furtherance of a stated purpose. Instead, the activity may further, or even form, a separate or collateral purpose. An organization with a collateral non-charitable purpose is ineligible for registration under the Act.

Unstated collateral non-charitable purpose

Although the formal purposes of a registered charity are the apparent source of reference of whether or not the charity is constituted exclusively for charitable purposes, it is not the sole indicator. The CRA also examines an organization's activities to determine whether it may be pursuing an unstated collateral non-charitable purpose.

Audit Findings

We reviewed the Organization's formal purposes found in its Letters Patent, issued October 17, 2007. They are as follows:

- 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.

While we consider the Organization's purposes to be potentially charitable, it is not the sole indicator of whether or not the Organization is constituted and operated exclusively for charitable purposes; the CRA also examines an organization's activities to determine whether it may be pursuing an unstated non-charitable purpose.

From 2008 to 2016, the Organization reported total revenue of \$22,978,361.¹² During the same period, it gifted only \$150,540, less than 1% of its revenue, to qualified donees. Our audit found that the majority of the Organization's resources were devoted to an unstated, non-charitable purpose; namely the provision of real property to FADA, a non-qualified donee.

¹¹ Vancouver Society of Immigrant and Visible Minority Women v MNR, [1999] 1 SCR 10, 1999 CanLII 704 (SCC) at para 194, Iacobucci J. See also AYSA Amateur Youth Soccer Association v Canada (Revenue Agency), 2007 SCC 42 at para 42.

¹² Form T3010s.

While a registered charity can lease property to a non-charity tenant, it must lease the property at fair market value (FMV)¹³. As outlined above, FADA's lease agreement with the Organization stipulates that it was to pay \$183,333 per month until April 2015, and \$216,667 per month thereafter, to the Organization; this would appear to be FMV. However, payment has not been received by the Organization, rather it has been accruing as a receivable without the Organization taking any collection action. Per the Limitations Act of British Columbia, there is a two year limitations period after which the Organization cannot collect an amount owing under an agreement. By failing to take any collection action for more than two years, the Organization has given up its ability to legally collect on the rent. While under the terms of the original rental agreement, the Organization was making its property available for consideration, when it allowed the limitations period to elapse, it essentially waived a right to repayment and allowed FADA to lease its property without consideration.

By permitting FADA to use its property without consideration, the Organization is failing to use its resources in furtherance of exclusively charitable purposes. Moreover, permitting FADA to occupy the Organization's property without appropriate compensation constitutes the delivery of both an unacceptable private benefit and an undue benefit (further details provided below).

In summary

It is our view that the Organization is not constituted and operated exclusively for charitable purposes, rather it is operating for an unstated, non-charitable purpose, namely enabling a non-qualified donee to use charitable assets. For this reason, it is our view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(b) of the Act.

2. Failed to devote resources to charitable activities carried on by the Organization itself

Legislation and jurisprudence

I. Fiduciary duty

A charity registered under the Act is required to be *bona fide* - meaning that it must be made by an organization that is established and operated to confer a tangible or objectively measurable benefit upon the public, without personal or private gain¹⁴.

¹³ <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/summary-policy-105-leasing-property.html>

¹⁴ M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) at para 136; and see *Gilmour v. Coats et al.*, [1949] 1 All E.R. 848

Further, the courts have placed extensive responsibilities, known as fiduciary duties, on the directors of charities¹⁵, which include:

- the duty to act honestly and in good faith, in the best interests of the charity and not in a manner that is self-serving,
- the duty to follow the laws and rules that apply to charities,
- the duty to use all charitable property and funds for only charitable purposes, and
- the duty to be accountable for the charity's property and funds.

II. Gifted to non-qualified donees

To comply with the requirement that a registered charity devote all of its resources to charitable activities carried on by the organization itself, the Act allows a registered charity to use its resources (funds, personnel, and property) inside or outside Canada in only two ways:

- for its own charitable activities – undertaken by the charity itself under its continued supervision, direction and control;¹⁶ and
- for gifting to qualified donees as defined in the Act

A **qualified donee** means a donee defined in subsection 149.1(1) of the Act, as follows:

- a registered charity (including a registered national arts service organization);
- a registered Canadian amateur athletic association;
- a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged;
- a registered Canadian municipality;
- a registered municipal or public body performing a function of government in Canada;
- a registered university outside Canada, the student body of which ordinarily includes students from Canada;
- a registered charitable organization outside Canada to which Her Majesty in right of Canada has made a gift;
- Her Majesty in right of Canada or a province, or a territory; and
- the United Nations and its agencies.

III. Delivered non- incidental private benefits

¹⁵ See for example, Ontario (Public Guardian and Trustee) v. Aids Society for Children (Ontario), [2001] OJ No.2170 (QL) (O.S.C.J.); Ontario (Public Guardian and Trustee) v. National Society for Abused Women, [2002] O.J. No. 607 (O.S.C.J.); Pathak v. Sabha, (2004) CanLII 10850 (O.S.C.). See also Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 (S.C.C.); Hodgkinson v. Simms, [1994] 3 S.C.R. 377, 1994 CanLII 70 (S.C.C.); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 1992 CanLII 31 at pg. 31 (S.C.C.)

¹⁶ Canadian Committee for the Tel-Aviv Foundation v. Canada, 2002 FCA 72 (CanLII) at para 31.

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 benefit¹⁷ 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.¹⁸

(i) **Necessary** – Necessary means legitimately and justifiably resulting from:

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

and

(ii) **Reasonable** – 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

(iii) **Proportionate** – 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.

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.

¹⁷ Personal benefit is also sometimes used instead of benefit in the common law private benefit context; See CRA Guidance CG-019, How to draft purposes for charitable registration.

¹⁸ For more information, see CRA Policy statement CPS-024, Guidelines for registering a charity: Meeting the public benefit test.

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
- promoting the work, talent, services, or businesses of certain persons or entities, without justification.

IV. Conferred an undue benefit to a person

As stated above, pursuant to subsection 149.1(1) of the Act, as a charitable organization, no part of the Organization'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 charitable organization'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** 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:

- (a) is a proprietor, member, shareholder, trustee or settlor of the charity or RCAAA;
- (b) has contributed or otherwise paid into the charity or RCAAA more than 50% of the capital of the charity or RCAAA; or
- (c) does not deal at arm's length with a person in (a) or (b), or with the charity or RCAAA.

Undue benefit does not include:

- (a) a gift to a qualified donee;
- (b) reasonable consideration or remuneration for property acquired or services received by the charity or RCAAA;
- (c) a gift made, or a benefit provided, in the course of a charitable act¹⁹ in the ordinary course of the charitable activities carried on by the charity or RCAAA, unless it can be reasonably considered that the beneficiary was eligible for the

¹⁹ While charitable act is not defined in the Act, it is considered to refer to an activity that itself provides a charitable benefit to an eligible beneficiary.

benefit solely due to the relationship of the beneficiary to the charity or RCAA.

Audit findings

I. Fiduciary duty

According to the Organization's financial statements, its real property is held as an investment to generate passive rental income. At paragraph 14 of our policy statement, CPS-019, What is a related business?²⁰ we note that investment income is derived from the mere ownership of an asset, the risk to the charity is limited, and investment income is acquired passively, not requiring the charity to take any active role in the underlying business. Since the Organization is minimally involved in its rental activity, accruing rent receivable merely due to the passage of time and not actively involved in the activities of FADA, we consider the Organization's rental activity to be an investment activity, as opposed to a business activity. That said, this investment activity has generated persistent losses for the Organization, as the rental income remains uncollected.

Paragraph 15 of the above-noted policy statement also states that a charity's assets must be managed so as to obtain the best return within the bounds of prudent investment principles. We have concerns whether it is prudent for the Organization to continue to engage in this rental activity, which has generated persistent losses and put the Organization's continued existence into jeopardy. Our concerns are exacerbated by the fact that the beneficiary of the Organization's assets, FADA, is not a qualified donee.

Continuing to engage in a rental activity when the tenant failed to pay rent on time for six consecutive fiscal periods is not, in our view, acting in the best interests of the Organization. We are particularly concerned that no collection action was taken by the Organization and no record exists of how the Organization came to the conclusion that no collection action was warranted, or how the Organization made a logical and reasoned conclusion that FADA will pay the rent owed without the need for collection action.

Per the Limitations Act of British Columbia,²¹ there is a two year limitations period after which the Organization cannot collect an amount owing under an agreement. By failing to take any collection action for more than two years, the Organization has given up its ability to legally collect on the rent. In effect, it has allowed FADA to use its property without consideration. In our view, this is contrary to the fiduciary duty to use all charitable property for only charitable purposes.

The failure of the Organization's board of directors to fulfill their fiduciary duties could put the corporate status of the Organization in jeopardy. Although we come to no conclusions on this, we wish to highlight for the Organization that if it loses its corporate status, then it would no longer qualify for registration as a charity under the Act. Hence,

²⁰ <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-019-what-a-related-business.html>.

²¹ Limitation Act, SBC 2012, c 13 at s.6(1).

it is vitally important that the board of directors is aware of all of its responsibilities under all applicable legislation.

II. Gifted to non-qualified donees

We considered whether the Organization's stated charitable activity of gifting funds to qualified donees is sustainable and whether it is reasonable to conclude that the Organization will be able to gift funds to other qualified donees in the future.

In its 2017 financial statements, the Organization acknowledged that it had a net assets deficiency of \$46,985,468 and a deficiency of revenue over expenses of \$10,061,394. Although the net assets position of the Organization improved subsequent to its 2017 fiscal period, this can be attributed to one-time donations that were used to pay down existing debts.²² With this non-recurring revenue source removed, the Organization recorded a net loss during its 2018 fiscal period.

The Organization has stated that it is the intention of both FADA and the Institute to pay their debts to the Organization when they are in a financial position to do so. Moreover, the Organization stated that from October 2018 to September 2019, the Institute repaid \$1,100,000. However, it is not apparent that FADA has made any rental payments, either current or owed, subsequent to the 2017 fiscal period.

As FADA is the Organization's most significant source of income, we note that the Organization would not have any material source of income to fund its stated charitable purpose in future years if FADA is not making any payments to the Organization.

FADA's financial statements acknowledge that it is financially dependent on the Organization. Specifically, it states, "the ability of [FADA] to continue...is dependent on, among other things, the continued support of...[the Organization]."²³ Moreover, as of September 30, 2017, the Organization reported total accrued rent receivable due from FADA of \$13,055,456, with an allowance for doubtful accounts of \$13,055,456.

Similar to FADA, the Institute's financial statements state that "there exists a material uncertainty that casts significant doubt about the Institute's ability to continue as going concern."²⁴

While the Organization has made efforts subsequent to its 2017 fiscal period to reduce debt payments, and hence expenses, its revenues continue to be dependent upon FADA and the rent receivable. Absent another revenue source, or demonstration that the expenses have been reduced so much that they can be covered by revenues other than rent, we cannot conclude that the Organization is in a position to fund other qualified donees.

²² That is, these funds were not used to gift to qualified donees.

²³ 2017 fiscal financial statements for FADA, note 1.

²⁴ 2017 fiscal financial statements for the Institute, note 1.

III. Delivered non- incidental private benefits

The audit revealed that during the audit period the Organization provided two separate private benefits to persons of which the Organization was acting at non-arm's length:

- 1) Not collecting rental payments from FADA as per an existing rental agreement (see Rental agreement with FADA); and
- 2) Loaning funds without charging interest to the Institute (see Amounts loaned by the Organization to the Institute).

Each of the above two benefits are discussed below.

1) Rental agreement with FADA

On April 30, 2013, the Organization entered a rental agreement with FADA, an entity that is not at arm's length with the Organization, for FADA to rent land and building that is owned by the Organization. Per the terms of the agreement, FADA was to pay rents to the Organization in equal monthly instalments commencing May 1, 2013. From May 1, 2013 to April 30, 2014, the instalment payments were \$175,000 monthly, increasing to \$183,333.33 monthly from May 1, 2014 to and including April 30, 2015, and then increasing again to \$216,666.66 monthly from May 1, 2015 to April 30, 2023. The rental agreement further specifies that interest at 8% per annum will accrue on unpaid rent.

Despite the rental agreement, however, in seven consecutive fiscal periods (FPE)²⁵ the Organization did not collect, or make any attempt to collect, any of the amounts (that is, rents and interest for missing payments) that FADA owed. Rather, the Organization recorded and accrued the amounts owing in its accounting books and on its T3010 information returns. Additionally, at the end of the FPE September 30, 2017 the Organization reported an allowance for doubtful accounts equivalent to the entire receivable from FADA, consisting of all unpaid rent up to and including the FPE September 30, 2017. It is our view that this indicates that the Organization never expected or intended to collect the amounts owing from FADA according to the rental agreement.

During the audit, the Organization informed us that it believed that FADA intends to pay off its debts to the Organization, but no documentation or further justification to support the Organization's belief in this regard. This is especially true when one considers the professional opinion of a [REDACTED] auditor, who concluded as a result of an audit of the Organization, that it is unlikely that the Organization will collect any of the rent owed to it from FADA. This is important to note, as [REDACTED] audit resulted in the Organization reporting the allowance for doubtful accounts.

It is also significant that FADA is not at arm's length with the Organization. In our view, it is unlikely that the Organization would have similarly enabled an arm's length entity to

²⁵ The FPEs of September 30, 2012 – May 31, 2019.

not pay the rent and interest that was owed to the Organization. The lack of the Organization making any collection-relation actions to coerce FADA to pay the amounts owing suggests a willingness on the Organization's behalf to provide a benefit to FADA, a related non-qualified donee.

Furthermore, per the Limitations Act of British Columbia²⁶, there is a two year limitations period after which the Organization cannot collect an amount owing under an agreement. To explain, by failing to take any collection action for more than two years, the Organization has given up its ability to legally collect on the rent. As such, the Organization no longer has any legal recourse to enforce collection of the unpaid rent and interest even if it desires to be paid the amounts owing. That is, when FADA was first delinquent in making its rent payments, the Organization had recourse in that the rental agreement specified that interest of 8% per annum would be charged on late payments of rent. However, when the Organization willingly allowed the limitations period to elapse without insisting on its rights to either the unpaid rent or the related interest²⁷, the Organization essentially waived its right to repayment without receiving any consideration in return²⁸. This waiver of the requirement to pay amounts owing is effectively a gift to FADA; a non-qualified donee.

As a result of the above audit findings, it is our view that by enabling FADA to not pay either the rents or interest it owed the Organization, the Organization has provided a private benefit to FADA. We must now determine whether this private benefit is acceptable. That is, we must determine if the private benefit was necessary, reasonable and proportionate to the resulting public benefit.

According to the Organization, its rental agreement with FADA was intended to generate income and allow it to fulfill the Organization's charitable purposes as the income that was to be generated from the rental agreement was necessary in order for the Organization to conduct charitable activities that would help it to fulfill its charitable purposes.

As discussed above, by not enforcing the terms of the rental agreement the Organization has provided a private benefit to FADA. However, by providing this benefit the Organization has not been able to generate the revenues necessary to enable it to fulfill its charitable purposes; meaning that the private benefit has not resulted in any discernable public benefit. As such, the private benefit can not be regarded as necessary.

Given that, as explained in the preceding paragraph, there was no public benefit resulting from the private benefit, it is our view that the private benefit is not reasonable, nor can be considered to be proportionate to the resulting public benefit²⁹.

²⁶ Limitation Act, SBC 2012, c 13 at s.6(1).

²⁷ The Organization made no effort to collect either the rent owing per the agreement with FADA, or the interest owing to the Organization as a result of the late (missed) rental payments.

²⁸ That is, the Organization received nothing in return for waiving its right to payment of either rents or interest.

²⁹ The private benefit can not be proportionate to a public benefit that doesn't exist.

In conclusion, because the private benefit was not necessary, reasonable or proportionate to the resulting public benefit, it is our view that by not enforcing the terms of its rental agreement with FADA, the Organization has provided an unacceptable private benefit to FADA.

As stated above, it is our view that in enabling FADA to not pay either the rent or interest owing as per the conditions of a legally binding rental agreement, and willingly allowing the limitations period to elapse, that the Organization has effectively given all of the amounts owing per the agreement to FADA³⁰.

While gifting such amounts to FADA constitutes a private benefit, it is our position that the gifting of said funds represents a disbursement by way of a gift, made by the Organization, to a non-qualified donee. The gift of these funds was not made in the course of a charitable activity nor was it made in pursuit of a charitable purpose. As a result, it is our position that there may be grounds for revocation of the charitable status of the Organization under subparagraph 149.1(3)(b.1) of the Act.

2) Amounts loaned by the Organization to the Institute

The Organization had an unwritten expense-sharing arrangement with the Institute which based on records made available to the CRA during the audit, appears to have began during the FPE September 30, 2013 FPE and was operative up to at least the end of the FPE May 31, 2019. The arrangement was established as the employees of the Institute also provide services to the Organization. The Organization would forward funds to the Institute to cover the payroll-related expenses, which were paid directly by the Institute. Based on available information, no interest was charged by the Organization nor were there any repayment terms.

The mechanics of the arrangement were as follows:

- 1) The Institute's employees provided services to the Organization and the Institute;
- 2) The Institute recorded a payable equal to the full amount of wages owed to the employees;
- 3) Since the Institute did not have funds to cover this payable, the Organization provided the funds (to the Institute) to cover the full amount of wages of the employees;
- 4) The Organization recorded these funds as an amount owing (that is, a receivable) from the Institute;
- 5) The Organization also recorded a wage expense for the portion of the wages that were attributable to work performed by the employees for the Organization; This wage expense reduced the amount otherwise owing from the Institute.

³⁰ The financial figures related to this benefit are outlined in detail below under the subheading entitled "Conferred an undue benefit on a person".

PROTECTED B

- 16 -

It is our view that the expense-sharing arrangement was effectively operating as a loan of funds from the Organization to the Institute. As indicated above, the Organization paid the entire upfront cost, yet according to its books and records, the Organization did not charge interest to the Institute in return for the use of the Organization resources³¹. By providing the Institute with access to its resources, without charging the Institute a reasonable rate of interest, we believe that the Organization has provided a private benefit to the Institute³².

As with the private benefit the Organization provided to FADA discussed above, we must now consider whether the private benefit the Organization has provided to the Institute is acceptable. That is, we must determine if the private benefit was necessary, reasonable and proportionate to the resulting public benefit.

The expense-sharing arrangement between the Organization and the Institute was established as a result of the fact that the two entities share employees. As such, a portion of the total wage expense was incurred to conduct the Organization's own charitable programs. Inarguably, the portion of the wage expenses related to providing such services was necessary and contributed to the potential public benefit that the Organization was hoping to provide through its charitable activities. However, as a result of the expense-sharing arrangement, the Organization forwarded funds to the Institute in excess of the amounts required to cover the Organization's portion of the wage expenses. Accordingly, this latter portion of the wage expense, that is the amount of which the benefit is based, was not necessary in order for a public benefit to be provided by the Organization. As such, we do not view the private benefit that the Organization provided to the Institute (that is, the interest-free loan) to be necessary.

Regarding the reasonableness of the private benefit, since the Organization received no compensation (such as interest payments) for paying the Institute's portion of the wage expenses, we do not believe that the private benefit it provided to the Institute was reasonable.

Finally, as discussed during our analysis of the Organization's rental agreement with FADA, as it unclear if the Organization's activities ever provided a material public benefit, there is no public benefit for this private benefit to be proportionate to.

In conclusion, because the private benefit derived by the Organization providing an interest-free loan to the Institute was not necessary, reasonable and proportionate to the resulting public benefit, it is our view that the private benefit is unacceptable.

³¹ The resources being the Organization's upfront payments of the wage expenses.

³² For a calculation of the private benefit, please refer to the section of this letter that discusses undue benefits.

Penalty proposed**IV. Conferred an undue benefit to a person**

As outlined above, it is our view that the Organization provided unacceptable private benefits both by:

- 1) Not collecting rental payments from FADA as per an existing rental agreement (see Rental agreement with FADA); and
- 2) Loaning funds without charging interest to the Institute (see Amounts loaned by the Organization to the Institute).

In our view, both of these unacceptable private benefits also meet the definition of undue benefits. Our rationale is provided below.

1) Rental agreement with FADA

As explained above, by not enforcing its rental agreement with FADA and allowing the limitations period to elapse, the Organization has effectively gifted all of the amounts owing (to the Organization) to FADA; a non-qualified donee.

The gifted funds were not reasonable consideration for property acquired or services received by the Organization³³, were not made in the course of a charitable act³⁴, and were not given to a qualified donee³⁵.

As such, the gifted funds can be considered as undue benefits per the definition of “undue benefits” that is provided in subsection 188.1(5) of the Act. Please see Table 1 below for a calculation of the total undue benefit in this regard.

Table 1: Undue benefit conferred by the Organization as a result of its rental agreement with FADA

Fiscal Period end	Uncollected rent
Sept 30, 2015	\$ 2,366,667
Sept 30, 2016	\$ 2,600,000
Sept 30, 2017	\$ 2,600,000
Sept 30, 2018	\$ 2,600,000
May 31, 2019 ³⁶	\$ 1,733,336
Total Undue Benefit	\$ 11,900,003

³³ Paragraph 188.1(5)(a) of the Act.

³⁴ Paragraph 188.1(5)(b) of the Act.

³⁵ Paragraph 188.1(5)(c) of the Act.

³⁶ During this fiscal period, the Organization changed its fiscal period end to May 31. We prorated this amount so that it does not include the amounts for June 1, 2019 - September 30, 2019.

Please note that despite interest being payable according to the terms of the rental agreement, we are only proposing to assess an undue benefit sanction on the amounts related to the rents themselves. This is because we are considering the rents to be gifts as a result of the Organization allowing the aforementioned limitation period to elapse. That is, interest cannot be charged on gifts.

2) Amounts loaned by the Organization to the Institute

As explained above each time the Organization paid the Institute's portion of the wage expense, it loaned its resources to the Institute. The only known term of the expense-sharing arrangement is the eventual repayment of the amounts paid by the Organization on the Institute's behalf. To our knowledge, there is no fixed repayment schedule or interest rate that the Organization is charging the Institute as consideration for loaning the funds.

As we outlined in our discussion of private benefits, it is our view that the Organization has provided an unacceptable private benefit to the Institute equal to the interest payments that the Organization would have received had the terms of the expense-sharing arrangement been established at a reasonable, or market, rate.

When it loaned resources to the Institute as part of the expense-sharing arrangement, the Organization made its resources available for the benefit of the Institute, an entity that does not deal at arm's length with the Organization. This benefit was not provided as reasonable consideration for property acquired or services received by the Organization, was not made in the course of a charitable act, and was not provided to a qualified donee.

As such, the private benefit related to the non-collection of reasonable interest payments can also be considered undue benefits per the definition of "undue benefits" that is provided in subsection 188.1(5) of the Act. Please see **Table 2** below for a calculation of the total undue benefit in this regard.

Please note that to calculate this benefit, we have used the following figures:

- the average prime interest rate for the fiscal periods as per bankofcanada.ca; and
- the opening balance due from the Institute as at the start of the fiscal periods as per the Organization's financial statements.

Note: We have used the prime interest rate as a reasonable and non-arbitrary approximation of the market value interest rate during the fiscal periods in question. We have not modified the prime rate with any + or - percentage (%) variances to ensure that it remains as non-arbitrary as possible. Additionally, to simplify the calculation of the interest benefit, we have calculated the benefit on a per annum basis and have not compounded the interest.

Table 2: Undue benefit conferred by the Organization as a result of the amounts it loaned to the Institute

Fiscal period ended	Opening balance due from Fortius Institute	Average prime rate (%)	Interest payable at prime rate
Sept 30, 2015	\$ 460,992	2.867	\$ 13,217
Sept 30, 2016	\$ 2,098,392	2.700	\$ 56,657
Sept 30, 2017	\$ 3,551,884	2.767	\$ 98,281
Sept 30, 2018	\$ 4,676,144	3.431	\$ 160,439
May 31, 2019	\$ 5,761,083	3.921 *8/12 ³⁷	\$ 150,595
Total Undue Benefit			\$ 479,189

Table 3: Calculation of the total undue benefits conferred by the Organization

Fiscal period ended	Table 1	Table 2	Annual Total
Sept 30, 2015	\$ 2,366,667	\$ 13,217	\$ 2,379,884
Sept 30, 2016	\$ 2,600,000	\$ 56,657	\$ 2,656,657
Sept 30, 2017	\$ 2,600,000	\$ 98,281	\$ 2,698,281
Sept 30, 2018	\$ 2,600,000	\$ 160,439	\$ 2,760,439
May 31, 2019	\$ 1,733,336	\$ 150,595	\$ 1,883,931
Total Undue Benefit			\$ 12,379,192

The table below details the calculation of the penalty assessed.

Fortius Foundation					
Fiscal period ended	Type of Sanction	Sanction %	Sanctioned Amount	Sanction	
Sept 30, 2015	Undue Benefit	105%	\$ 2,379,884	\$ 2,498,878	
Sept 30, 2016	Undue Benefit	105%	\$ 2,656,657	\$ 2,789,490	
Sept 30, 2017	Undue Benefit	105%	\$ 2,698,281	\$ 2,833,195	
Sept 30, 2018	Undue Benefit	105%	\$ 2,760,439	\$ 2,898,461	
May 31, 2019	Undue Benefit	105%	\$ 1,883,931	\$ 1,978,127	
Total					\$ 12,998,151

Per paragraph 188.1(4)(a) of the Act, the value of the undue benefit penalty is 105% of the amount of the undue benefit. Accordingly, the amount of the undue benefit penalty for the fiscal periods ended September 30, 2015 through May 31, 2019 total \$12,998,151.

Note: Assessment of undue benefits penalty outside of stated audit period

³⁷ We prorated this amount by 8/12 to represent the fact that we are only calculating the undue benefit for an 8-month period.

PROTECTED B

- 20 -

As outlined at the beginning of this letter, we have identified the audit period as October 1, 2014 to September 30, 2016. Accordingly, the focus of this review has been to determine if the Organization exhibited any material non-compliance during this two-year period.

Nevertheless, during our review of the above period, we identified non-compliance that continued to occur in the years following the stated audit period. Notably, the material undue benefits discussed above.

Due to the materiality of the undue benefits identified, it is our view that the assessment of the undue benefit penalty should be considered for years subsequent to the stated audit period. As a result of the limitations periods discussed above, we are proposing to the assess the penalty against undue benefits that the Organization conferred up to the end of the FPE May 31, 2019.

In summary

Based on the above audit findings, we are considering revoking and/or penalizing the Organization for not devoting its resources to charitable activities carried on by the Organization itself.

Accordingly, it is our view that by gifting funds to non-qualified donees and loaning funds to a non-qualified donee at below fair-market terms, the Organization has provided unacceptable private benefits. As a result, the Organization has failed to meet the requirements of 149.1 of the Act that it devote its resources to charitable activities carried on by the Organization itself. As such, there are ground for the Minister to revoke the charitable status of the Organization in the manner as described under subsection 168 of the Act.

Additionally, it is our view that the above mentioned unacceptable private benefits are also considered to be undue benefits as described in subsection 188.1(5) of the Act. As such, there may also be grounds for the Minister to sanction the Organization under subsection 188.1(4) of the Act.

3. Failed to meet the disbursement quota

Legislation and jurisprudence

The disbursement quota is the minimum amount a registered charity is required to spend each year on its own charitable activities, or on gifts to qualified donees (for example, other registered charities). The disbursement quota calculation is based on the value of property (for example, cash in bank accounts, inventory, stocks, bonds, mutual funds, GICs, land, and buildings) that a charity does not use for carrying out its own charitable activities or by way of gifts to qualified donees, or for its administrative expenses such as fundraising costs.

The disbursement quota for a charitable organization is calculated as follows:

If the average value of a registered charity's property not used directly in charitable activities or by way of gifts to qualified donees, or for its administrative expenses during the 24 months before the beginning of the fiscal year exceeds \$100,000, the charity's disbursement quota is: 3.5% of the average value of that property.³⁸

Audit Findings

We reviewed the Organization's calculations of DQ and found an error in the years when the Organization had negative net assets. Instead of using zero as the current DQ for those years, and as required by paragraph b of the definition of DQ in subsection 149.1(1) of the Act, the Organization calculated a negative DQ which resulted in an incorrect current DQ excess for those years.

Please see the attached Appendix for the Organization's DQ as calculated by the CRA. As at the end of the 2016 fiscal period, there is a cumulative DQ shortfall of \$39,998.

In summary

The Organization has not met its minimum disbursement requirements as contained in the definition of disbursement quota in subsection 149.1(1) of the Act. For this reason, it is our view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraphs 149.1(3)(b) and 168(1)(b) of the Act.

4. Failed to maintain adequate books and records

Legislation and jurisprudence

Subsection 230(2) of the Act requires that every registered charity shall maintain adequate records³⁹ and books of account at an address in Canada recorded with the Minister or designated by the Minister containing;

- (a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;
- (b) a duplicate of each receipt containing prescribed information for a donation received by it; and

³⁸ For more information, see CRA website: Disbursement quota calculation.

³⁹ Subsection 248(1) of the Act defines a record in the following way: "record includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form."

(c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

This provision is necessary to enable a charity to accurately provide the CRA with the information required by the Act, as well as ensuring the CRA can verify the accuracy of reported information through an audit and determine whether there are any grounds for revocation of the charity's registration.

Subsection 231.1(1) of the Act permits an authorized person to inspect, audit, or examine the books and records of a taxpayer, as well any document of the taxpayer, or of any other person that relates, or may relate, to the information that is, or should be, contained in the books and records of the taxpayer, or to any amount payable by the taxpayer under the Act.

In order to meet these requirements, a charity's books and records must allow the CRA to verify the charity's revenues and expenses, as well as any official donation receipts it may have issued. Further, the Act requires that a charity's records contain such information to allow the CRA to determine whether the charity's activities continue to be charitable at law.

Subsection 230(4) also states that every person required by this section to keep records and books of account shall retain:

- (a) the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and
- (b) all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.

Subsection 230(2) of the Act requires that registered charities maintain adequate books and records⁴⁰ of account, at an address in Canada registered with the CRA, containing information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under the Act.

The requirement relating to the maintenance of books and records, and books of account, is based on several court decisions, which have held, among other things, that:

- the onus is on the registered charity to prove that its charitable status

⁴⁰ Subsection 248(1) of the Act defines a record in the following way: "record includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form."

should not be revoked.⁴¹

- a registered charity must maintain, and make available to the CRA at the time of an audit, meaningful books and records, regardless of its size or resources. It is not sufficient to supply the required books and records at some later date.⁴²
- Paragraph 168(1)(e) of the Act provides that the Minister may propose to revoke registration of a charitable organization if it fails to comply with, or contravenes, any of sections 230 to 231.5 of the Act., and the Federal Court of Appeal has determined that non-compliance with section 230(2) of the Act is a proper basis upon which the Minister may issue such a notice.⁴³
- The requirement to keep proper books and records is foundational and non-compliance with the requirement is serious and justifies revocation.⁴⁴

While paragraph 230(2)(a) of the Act does not explicitly set out the types of books and records that a registered charity is required to maintain, which could therefore lead to a technical failure to comply with the Act, given the significant privileges that flow from registration as a charitable organization under the Act, the Minister must be able to monitor the continuing entitlement of charitable organizations to those privileges. In that regard, the Federal Court of Appeal has held that there exists a serious obligation for registered charities to maintain adequate books and records, and that material or significant, and/or repeated, non-compliance with the requirements of subsection 230(2) of the Act constitutes sufficient grounds for revocation.⁴⁵

Audit Findings

As previously noted, the Organization's T3010 returns for the 2015 and 2016 fiscal year ends did not account for the Organization's audited financial statements which resulted in material errors and omissions. While the books and records of the Organization do include the audited financial statements with the correct figures, there was a failure of internal controls to ensure that the information in the Organization's T3010 returns matched its financial statements. Better procedures and systems should be put into place

⁴¹ See Canadian Committee for the Tel Aviv Foundation, 2002 FCA 72 at paras 26-27, [2002] 2 CTC 93.

⁴² Canadian Committee for the Tel Aviv Foundation v Canada, 2002 FCA 72 at para 39, [2002] 2 CTC 93. Furthermore, failing to comply with the requirements of section 230 of the Act by refusing to make documents available can lead to a fine and imprisonment, in addition to the penalty otherwise provided. See subsection 238(1) of the Act. See also The Lord's Evangelical Church of Deliverance and Prayer of Toronto v Canada, 2004 FCA 397.

⁴³ Opportunities for the Disabled Foundation v Canada (National Revenue), 2016 FCA 94 at para 39; and Ark Angel Foundation v Canada (National Revenue), 2019 FCA 21 at para 43.

⁴⁴ Jaamiah Al Uloom Al Islamiyyah Ontario v Canada (National Revenue), 2016 FCA 49 at para 15; and Ark Angel Foundation v Canada (National Revenue), 2019 FCA 21 at para 43.

⁴⁵ Ark Angel Foundation v Canada (National Revenue), 2019 FCA 21 at para 43.

to ensure that all of the Organization's books and records, including its T3010s, are updated and accurate.

In addition, the Organization had some issues with its donations receipts. Please see the next section for the details. While these issues are not significant, combined with the failure in internal controls identified above they do raise concerns about the Organization's books and records.

In summary

There were material inconsistencies between the Organization's books and records, including its audited financial statements, and the 2015 and 2016 T3010s filed. For this reason, it is our view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(e) of the Act.

Suspension Proposed

In addition, the Minister may suspend the Organization's authority to issue official donation receipts for one year for having inadequate books and records under subsection 188.2(2)(a) of the Act.

5. Failed to issue donation receipts in accordance with the Act and/or its Regulations

Legislation and jurisprudence

The law provides various requirements with respect to issuing official donation receipts by registered charities. These requirements are contained in Regulation 3500 and 3501 of the Act and are described in detail in Income Tax Folio S7-F1-C1, Split-receipting and Deemed Fair Market Value.

Subsection 3501(1) of the Regulations provides that each official donation receipt that a registered charity issues must contain, in a manner that cannot be readily altered, the prescribed contents of a receipt.

Audit Findings

We found the following errors and omissions in the Organization's official donation receipts:

- There was inadequate support for receipt █ issued for \$2,381.78 for a gift in kind. Specifically, the receipts provided only totalled \$1,449.57. The gift in kind refers to used gym equipment and the fair market value determined by the Organization was apparently 70% of the cost value.
- Receipt █ was missing from the series of receipts issued during the audit period. No information was provided about this receipt number.

- None of the official donation receipts contain the current website address of the CRA. The website address has changed to canada.ca/charities-giving. The Organization had until March 31, 2019, to update its receipts.⁴⁶

In summary

There were various errors and omissions noted in the Organization's official donation receipts. For this reason, it is our view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(d) of the Act.

6. Failed to file an information return as and when required by the Act and/or its Regulations

Legislation and jurisprudence

Subsection 149.1(14) of the Act states that:

Every registered charity and registered Canadian amateur athletic association shall, within six months from the end of each taxation year of the charity or association and without notice or demand, file with the Minister both an information return and a public information return for the year in prescribed form and containing prescribed information.

It is the responsibility of a charity to ensure that the information provided in its Form T3010, Registered Charity Information Return, 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. The Federal Court of Appeal has confirmed that a significant number of inaccuracies, or beyond what might reasonably be viewed as minor, in a T3010 are a sufficient basis for revocation.⁴⁷

Audit Findings

The amounts of revenue, expenses, assets and liabilities reported on the Organization's T3010 returns for the 2015 and 2016 fiscal year ends, do not match its financial statements and accounting records. We outline the identified discrepancies below.

There is a material variance in the revenues of \$437,174 in 2015 and \$395,650 in 2016 between the adjusted trial balance and the T3010s filed, largely due to the property taxes that are due from FADA and that were adjusted at year end after the T3010 was filed.

⁴⁶ See <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/issuing-receipts/what-information-must-on-official-donation-receipt-a-registered-charity.html>

⁴⁷ Opportunities for the Disabled Foundation v MNR, 2016 FCA 94 at paras 50-51.

There is a material variance in the expenses of \$1,181,516 in 2015 and \$4,712,573 in 2016. There were fewer expenses reported on the T3010 than in the adjusted trial balance. Discrepancies are largely due to bad debt expense that was adjusted at year end after the T3010 was filed.

Assets are over-reported on the 2015 T3010 by \$3,342,241 when compared to the adjusted trial balance and the financial statements from the external accountant. The variance in 2015 is largely due to two adjustments to retained earnings in 2015 to report the 2014 allowance for doubtful accounts that totalled \$3,265,301 and \$9,194 of additional amortization expense. On the 2016 T3010 assets are over-reported by \$11,472,357 when compared to the adjusted trial balance and over-reported by \$7,990,456 when compared to the financial statements. The external accountant wrote off \$8,353,374 of amounts owing from non-arm's length parties, in combination with the adjustment to retained earnings in 2014 accounts for the majority of the difference.

Finally, the accounting records do not support the amount of liabilities reported on the T3010. Specifically, the amount of liabilities reported on the 2015 T3010 does not agree with the adjusted trial balance and financial statements by \$697,980. There is a minor variance in 2016.

The Organization filed its T3010 returns before its year-end adjustments were made, and did not file a Form T1240, Registered Charity Adjustment Request, to reflect its audited financial statements. The difference between the Organization's draft financial statements and audited financial statements were significant and material.

In summary

The Organization's T3010 returns for the 2015 and 2016 fiscal year ends contained significant and material errors, and the Organization failed to file a Form T1240 to account for the material differences. As such, the Organization is not compliant with its obligation to file an accurate T3010 return as prescribed at subsection 149.1(14) of the Act. For this reason, it is our view that there are grounds for the Minister to revoke the charitable status of the Organization under paragraph 168(1)(c) of the Act.

The Organization's options

a) Respond

If the Organization 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, we 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;

PROTECTED B

- 27 -

- 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 Organization in the manner described in subsection 168(1) of the Act.

b) Do not respond

The Organization may choose not to respond. In that case, we may issue a notice of intention to revoke the registration of the Organization in the manner described in subsection 168(1) of the Act.

If the Organization 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 below. My team leader, Crystal Scott, may also be reached at 250-857-2222.

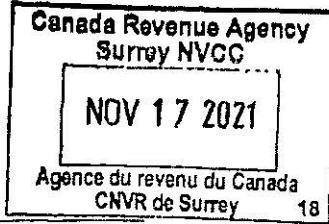
Yours sincerely,



Maria Popova
Audit Division
Vancouver Island and North Tax Services Office

Telephone: 778-835-3255
Facsimile: 250-363-3000
Address: Vancouver Island and North Tax Services Office
c/o Surrey Tax Center
9755 King George Boulevard
Surrey BC V3T 5E1

c.c.: A black rectangular box used to redact a list of names.



Fortius Foundation

c/o [REDACTED]

November 15, 2021

Canada Revenue Agency
 Audit Division – Charities Directorate
 Vancouver Island and North Tax Services Office
 c/o 9755 King George Boulevard
 Surrey BC V3T 5E1

Attention: Ms Popova

Re: **Fortius Foundation (the "Foundation") BN3578 0958 RR0001 File #3037178**

My response to your letter dated September 7, 2021 letter is much shorter than your 30 pages because I have tried to respond in layman's terms. Your letter focuses on complex explanations of the law which would provide a feast of legal fees if I turned it over to a lawyer. The Foundation is reluctant to spend the considerable amount in fees which it would take to respond to all the audit findings in detail and seek to refute all the technical legal arguments made. It is hoped that expense can be avoided by the Foundation receiving an education letter or signing a compliance agreement rather than having to engage lawyers to build responses which will form the basis for resolving our differences in a court battle.

General Legal Principles

You dedicate pages 3-5 almost exclusively to "General Legal Principles" and discuss charitable purposes in terms of a 19th century English case and spend a lot of time talking about "public benefit". You refer to the Foundation as the "Organization" and go on as if Fortius was a charitable organization rather than a charitable foundation. When the Foundation was registered, I was told that the *Income Tax Act* had a one-line definition of charitable purposes which restricted the Foundation's activities to investing and writing cheques to qualified donees. There was no discussion of public benefit; but I assumed that since CRA was the regulator which determined which donees qualified it was CRA's duty to have made certain that a recipient charity met whatever public benefit test the law requires.

I realize that it is possible that I have completely misinterpreted what you have written in this section. If so, please write me a follow-up letter so that I understand the legal principles correctly.

Collateral Charitable Purpose

Your letter acknowledges that the stated purposes are charitable. It also says that the monthly lease rate "appears to be FMV". You also state that "the Foundation reported total revenues of \$22,978,361" so there is no doubt that it not only intended to collect lease payments but actually did collect them. The facts set out in your letter contradict your determination that the Foundation operated for the unstated non-charitable purpose of enabling a non-qualified donee

to use charitable assets. The Foundation owned the building with the intention of earning income from property and had every intention of collecting lease payments set at FMV. It would not have gone to the trouble of creating a legally binding lease at FMV if the Foundation's purpose was merely to enable a non-qualified donee to use charitable assets.

Limitations Act of British Columbia

Your letter states that the audit period is October 1, 2014 through September 30, 2016. However, your criticisms with regard to the non-payments of Fortius Athlete Development Association ("FADA") apply to fiscal periods subsequent to the audit period. The two year limitation period for uncollected amounts had not expired during the audit period. Can you please advise what standards of fairness CRA applies when the majority of criticism is for issues outside the audit period.

Further, I had no idea that the Limitations Act applied to mean that the Foundation "cannot collect an amount owing under an agreement" as per your interpretation of the law. Your letter admits that FADA told the auditor that it intended to make up overdue payments. FADA never advised the Foundation that it was relying on the Limitations Act of British Columbia to deny its obligation. While I am unfamiliar with legal issues, I have enough experience with accountants in business to know that when they add a "note" to the audited financial statements, it reflects the caution of the auditors and not the wishes of the directors. When the Foundation receives your response, it reserves the right to seek legal advice on the interpretation of the Limitations Act to determine whether it applies to render a debt void if the debtor does not plead it.

Undue Benefit

Your letter states "typically, private benefits that are unacceptable under the common law will also be undue under subsection 188.1(5) of the Act". It seems strange that Parliament would take the trouble to put a comprehensive definition of "undue benefit" in the Act when CRA applies the common law meaning of "private benefit". However, I do not have the expertise or the legal budget to challenge CRA's interpretation of the law.

Loans to the Institute

The Foundation depended upon the Institute to generate revenue which would enable the lease payments to be made. Consequently, the Foundation made these loans with the intent of ultimately helping the Foundation by helping the Institute. Having said that, in hindsight the Foundation is able to see why CRA finds these loans unacceptable because while some were repaid, not all were. The Foundation is quite willing to enter into a compliance agreement to prevent it from carrying on such a practice in the future.

Undue Benefit Penalties

The Foundation does not agree with your determination that a penalty for undue benefits is applicable but would have to retain legal counsel to make the technical arguments. However, I am hoping to avoid that expense because, in any event, the Foundation does not have the funds required to pay the penalty should CRA apply the penalty. However, there are enough funds to fight this issue in the Tax Court of Canada should CRA proceed.

I also am doubtful that a failed commercial arrangement should be considered a "private benefit" for purposes of revocation. Many foundations lose millions of dollars in investing in the stock market or real estate and it is not considered a nefarious scheme to confer private benefit but simply as a failed commercial investment

Disbursement Quota

Given the magnitude of dollars involved, it seems extremely hostile for CRA to propose revocation over an alleged cumulative shortfall of \$39,998. If you are correct in taking the position that the unpaid debts are of no value, they should be deducted from the value of the Foundation's assets. The recalculation of the Foundation's disbursement quota should result in there being an excess rather than a shortfall.

Books and Records

Your letter does not set out any specifics as to mistakes in the books and records and even concedes that the audited financial statements have the correct figures. I have carefully read everything you have written about mistakes with regard to section 230 and can find no reference to mistakes in filing T3010s as being grounds for revocation. However, having been supplied with no specifics I have no idea of how to respond

Donation Receipts

Thank you for providing specifics as to the problems with receipts. The Foundation accepts responsibility for the errors identified. However, it does not think that the appropriate response is revocation but is quite willing to accept an education letter or compliance agreement

Information Return

The Foundation was extremely concerned that it comply with subsection 149 1(14) and file its T3010 within 6 months of its fiscal year end. Unfortunately, the audited financial statements had not been completed in time so it filed based upon its trial balances. This error occurred because of the Foundation's eagerness to comply with the statutory provision you cited and it did so. You have cited no authority for revoking because it failed to file a Form T1240. In any event, it seems very harsh to propose revocation for a mistake which occurred as a consequence of trying to comply with the provision cited

Conclusion

As you are well aware, the Foundation has disposed of its primary investment to the City of Burnaby, a Qualified Donee. Without conceding the private benefits you allege, there can be no doubt that for decades to come the land acquired by the Foundation and the facilities it built will achieve a public benefit for the people of Burnaby which will pass any test which CRA may apply

The Foundation has disposed of all of its real estate, chattels and equipment so is unlikely to repeat any of the mistakes alleged in your letter. It currently owns less than \$1 million and all of its assets are in cash and conservative publicly traded securities which generate enough income to meet its disburse quota by making conventional gifts to other Qualified Donees. Unfortunately, it will be imprudent to make larger capital gifts until the conclusion of this audit as the Foundation may be required to use these funds to retain a law firm to make further complex

technical legal representations and to represent the Foundation in the Federal Court of Appeal and/or the Tax Court of Canada.

We have provided our response and the information herein for your consideration in determining the appropriate course of action. Given that the material change in asset composition makes it almost impossible to continue the non-compliance complained of in your letter, I respectfully request that you consider issuing an educational letter or compliance agreement and conclude this audit in a timely manner.

Yours sincerely,

FORTIUS FOUNDATION

Per: [REDACTED]

Scott Cousens

Director

Fortius Foundation

c/o [REDACTED]

Fax. 1250 363.3000

November 17, 2021

ATTN: MARIA POPOVA

Canada Revenue Agency
Audit Division – Charities Directorate
Vancouver Island and North Tax Services Office
c/o 9755 King George Boulevard
Surrey BC V3T 5E1

Attention: Ms. Popova:

Re: Fortius Foundation (the "Foundation") BN3578 0958 RR0001 File #3037178

As you know, on November 15 2021, I provided you with the Foundation's response to your letter dated September 7 2021 ("Sept 7 2021 letter") wherein the Foundation was invited to provide written representations to the compliance issues that were articulated in complex legal language based exclusively on CRA's perspective and findings outlined in your letter. I sent that letter in my capacity as a director of the Foundation on November 15 2021 to satisfy the time constraints imposed by CRA. That letter strictly followed the form and content of your Sept 7, 2021 letter. This letter is an addendum to the November 15 letter and is also sent in my capacity as a director but articulates a more personal response which is not constrained by the format of your letter. We ask that you ensure that this letter is included as a subsequent submission to our November 15 2021 response to your September 7 2021.

Today, I re-read your Sept 7 2021 letter and was offended by the tenor of CRA's analysis and the underlying suggestion that the Fortius endeavour was nothing more than a nefarious scheme to provide facilities rent-free to FADA. That is not only a false assumption but is insulting to me as an individual as well as a businessman. Years of preparation went into building a sophisticated business plan that would result in FADA making all of its lease payments and enable the Foundation to meet its disbursement quota from those payments. The lenders demanded and vetted such a business plan prior to putting up the millions of dollars required for construction.

Unfortunately, the collapse of the financial market in 2008 deprived the Foundation of the large capital donations from colleagues in my industry we anticipated in the planning stages. These would have significantly reduced the interest payments on debt. I hold on to the belief that if there had been no market crash at the outset of Fortius building this facility and the negative ripple effects through the economy, the facility would have opened with a manageable financial burden and been well positioned to succeed. Unfortunately, the financial collapse and lack of capital donors resulted in the facility opening without the Foundation being able to persuade a major bank to replace the construction financing with a mortgage at a much lower rate of interest.

In spite of these challenges and difficulties in the start up years, the Fortius program began to generate revenues equal to the facility's operating expenses and the Foundation thought it was going to succeed. Unfortunately, just as it was beginning to gain financial stability, the Covid 19 pandemic inflicted a devastating economic blow. The pandemic not only forced the facility to close completely for a period of time but, when it re-opened, the restrictions imposed on sports and other communities served by Fortius mandated by Dr. Bonnie Henry and the government to reduce the spread of Covid was the final nail in the Foundation's coffin. During the early months of the pandemic, not only were all forms of team sport banned but travel by athletes from outside Fortius' own health region was restricted or denied. The demand and need for sports medicine specialists, training and rehab programs was reduced to a fraction of pre-Covid numbers. It is immeasurably frustrating to have watched the facility and the Foundation suffer a second blow of such a magnitude that it was unable to prevail and carry on. I firmly believe that the facility would be flourishing today and would be contributing a unique and professional calibre program to enhance the performance athletes in Canada and on the world stage if not for the pandemic.

It is also interesting timing that I happen to be writing this letter the day after Canada's men's soccer team beat Mexico to go to the top of the table in the Concacaf Final Round of FIFA World Cup Qatar 2022. [REDACTED] was an enthusiastic backer of Fortius' program from its inception and this team's amazing achievement can in part be credited to the programs at Fortius. In fact, [REDACTED] in his [REDACTED] also centered the development of the entire Canadian Women's Soccer Program (U14 to the National team) out of Fortius. Many of the athletes on Canada's Women's Soccer Team who won the Gold Medal in the Tokyo Olympics frequently trained and did their medical rehab at Fortius.

In closing, it adds insult to injury for CRA to treat all the time, talent and money which went into this pioneering endeavour which during its short life proved the benefits of making such sophisticated medical and training equipment and facilities available to Canada's national athletes as little more than a scam. I feel it necessary to balance the initial unremittingly negative analysis of CRA with this subsequent response which highlights some of the aspirations and successes of Fortius.

Yours sincerely,

Scott Cousens