GUARDIAN CAPITAL®

Amplify

Guardian Endowment Services Magazine

EDITION 7 | NOVEMBER 2022

IN THIS ISSUE

Community Solidarity	2
Engagement vs. Divestment	3
Covenant House Toronto's Sleep Out	8
Bill C-19 is Amended to Simplify Funding of Non-Qualified Doneeds	10

GUARDIAN CAPITAL®

Community Solidarity

Anthony J. Messina, CA, CPA, CFA
Managing Director, Guardian Capital Advisors LP
President, Guardian Partners Inc.
Board Member: Villa Colombo Vaughan

As we move towards the end of the year and days get shorter, the summer begins to fade into a distant memory for many of us.

The economy is on all our minds as high inflation levels and elevated costs of living continue to make things challenging for so many. We appreciate the incredible work charities and non-profits are doing to support their local communities at a time when their services are needed perhaps more than ever.

In this issue of Amplify:

- **Carters Professional Corporation (Carters)** explains the amendments to Bill C-19 designed to simplify the funding of non-qualified donees.
- We shine our charity spotlight on **Covenant House Toronto's Sleep Out** which encourages solidarity with Canadian youth experiencing homelessness and raises much-needed funds to help them rebuild their lives.
- With Responsible Investing (RI) continuing to gain importance in the investment world, we highlight two basic approaches – Divestment and Engagement. We provide arguments for both approaches and why **Guardian Capital LP** ultimately believes that Engagement can more effectively enact the societal changes that responsible investors want to see.

We hope you enjoy this issue of Amplify.

Anthony J. Messina

Engagement vs. Divestment

THE RIGHT RESPONSIBLE INVESTING APPROACH DEPENDS ON YOUR OBJECTIVE

Over the past few years, responsible investing (RI) has become mainstream in the investment world, as investors look to ensure the money they are investing is not contributing to societal harm. Despite the progress made in integrating RI into mainstream portfolios, there remains a 'tug-of-war' of sorts between two basic approaches to managing such portfolios.

The first approach is to sell a company whose products or practices you disagree with – Divestment. The second is Engagement – the idea that more progress can be made by instead speaking with corporate leaders to encourage positive change. This article outlines the arguments for both approaches and why Guardian Capital LP ultimately believes that Engagement can more effectively enact the societal changes that responsible investors want.

Divestment

The categories of potential divestment are as varied as the values that lead to such decisions.

Divestment is easy to understand at face value. Selling a stock that is disagreeable with your values seems like a common sense approach. For example, one can sympathize with a doctor not wanting to own a tobacco company in their portfolio. As a physician, they have witnessed the suffering caused by these products, and they would correctly argue that no amount of negotiation with such companies could convince corporate leaders to change the essence of what they are – a tobacco company.

Divestment is not a new concept. Its roots trace back to religious groups in the 1700s shunning "sin" stocks (alcohol, gambling, weapons, tobacco, slavery and more). From the 1960s to the 1980s, the anti-South African, anti-apartheid movement asked investors to divest any company dealing with that country. Fast forward to today – and divestment campaigns have expanded to include a wide variety of values-based issues, such as nuclear energy and adult entertainment. The categories of potential divestment are as varied as the values that lead to such decisions.

Also common today are divestment campaigns that ask large asset owners to sell stocks or companies of "undesirable" industries. These are similar to consumer boycotts of products, but rather than an effort to

abstain from buying a product, efforts are made to encourage large asset owners, such as pension funds or endowments, to exclude a specific industry.

One of the most-well known divestment campaigns today is 350.org. This movement was founded in 2008 and sought to 'encourage' asset owners to divest of fossil fuels to help keep carbon dioxide below 350 parts per million in the atmosphere.[1] This campaign was most prevalent on university campuses, with proponents arguing that engaging with management is too slow of a process and that action on climate change is needed now.

The challenge with divestment

If an investor cares about producing positive environmental or social change, selling a company could be seen as leaving the responsibility of driving change to someone else.

The biggest argument against divestment is that even if an investor does not like what a company is doing, selling the company will have no impact on reducing societal harm. The old stock market adage is that there is a seller for every buyer, and conversely, there is a buyer for every seller. If an investor is concerned about a company's environmental, social, and governance (ESG) practices and sells, it may well end up in the hands of an investor who cares less about those same issues. In essence, selling a company could be seen as leaving the responsibility of driving change to someone else.

One of the earlier arguments for divestment was that such actions in a public company would help to starve these organizations of capital. Most public companies routinely issue shares to raise equity or raise capital in the bond market to help fund corporate initiatives. This approach argues that if a company were to be labelled as an ESG offender, it might turn off the taps to such capital-raising efforts. Such arguments are rarely heard today as it has become obvious that these threats are empty because of the depth and breadth of capital markets.

Despite numerous studies, there is almost no evidence that there is any link between targeted divestment campaigns and difficulty accessing capital – either through increasing costs or decreasing access – even for companies in "undesirable" sectors. Regardless of how unsavoury a company may be to some investors, there always seems to be another investor willing to put forward capital. An article in The Economist magazine sums this up nicely:

> *"The Western world's dirty assets are heading into the shadows. Public firms, including European oil majors such as Shell, and large listed mining outfits, are selling their most polluting assets in order to please ESG investors and meet their carbon-reduction targets. But those oil wells and coal mines are not being shut down. Instead they are being bought by private companies and funds that have alternative sources of capital and stay out of the limelight. Little wonder: owning dirty assets may require a thick skin, but it is likely to be profitable. Private-equity firms have snapped up $60bn-worth of fossil-fuel-linked assets in the past two years alone, from shale fields to pipelines."*
>
> — THE ECONOMIST, "THE TRUTH ABOUT DIRTY ASSETS" FEBRUARY 12, 2022

In other words, to encourage investors not to sell their stock, certain oil and gas or mining companies are dumping problem assets into the willing hands of others, but nothing changes from an emissions standpoint. Clearly, a different approach is required.

Serious ESG investors have done the math with regards to divestment. Even in undesirable sectors or industries, there will always be other investors. With this backdrop, if the goal is to address climate change and reduce carbon emissions, then the best approach to prevent companies from dumping high-emission operations and assets into the hands of the uncaring and instead acting like an owner and engaging with corporate leaders.

Engagement shows demonstrated results

Shareholders can use their power to influence corporate behaviour through engagement.

The flipside of divestment is Active Ownership, in which shareholders use their power, guided by ESG considerations, to influence corporate behaviour through engagement with senior management and corporate boards, as well as through proxy voting.

Engagement has become a common practice among institutional investors and involves a series of meetings with corporate leaders to understand and question current practices and encourage positive change. This approach recognizes that change to a large organization with built infrastructure and entrenched industry practices takes time and that ongoing engagement

and collaboration are critical. The simple idea behind engagement is to be 'top of mind' with corporate leaders when they make business decisions.

Consider a simple scenario:

Institutional investors routinely meet with corporate leaders in one-on-one and conference settings. Traditionally, these meetings focus on business strategy, financial results and outlook; however, many investors now use this time to also ask about ESG risks and opportunities specific to the company. For example, how the company is measuring and disclosing greenhouse gas emissions. The company's response to any specific issue may not be immediate, but with persistence, the company is more like to address the issue and/or provide the requested data. The next round of meetings might focus on asking the same company to explore more aggressive ways to reduce emissions. A third iteration could be asking the company to incentivize senior management to reduce emissions by including ESG targets as part of compensation. Through this engagement process, continual progress is made toward better ESG practices and results.

Similarly, by exercising their proxy voting rights, shareholders can influence companies by electing ESG-oriented board members or voting for shareholder proposals that require the company to take more action in disclosing or setting goals for ESG matters.

By applying this concept to the fossil fuel industry, one that divestment campaigns have increasingly targeted, advocates for Active Ownership see it as a tool that will help push oil and gas companies to become greener, faster.

For example, Canada's largest fossil fuel producer Suncor is part of a group of Canadian oil and gas companies that have committed to achieving net-zero emissions status by 2050[1] by investing heavily in new technologies. This move is significant for an energy producer with a price tag that will likely be in the billions. One can only wonder if this would have happened if all investors who were unhappy about greenhouse gas emissions sold their holdings to investors who were solely profit-oriented. It is reasonable to assume that, in part, this change resulted from the years of engagement.

Engagement enables companies to be part of the solution – not just part of the problem

Engagement leverages the company's expertise to address the issue.

Incumbent companies are often best placed to effect change in an industry because they have the deepest experience and capability to understand and address complex issues. In addition, they are highly incentivized to do to protect their own long-term survival.

There are industry leaders and laggards when it comes to sustainability. Returning to the energy industry, ESG leaders in this space have been proactive in addressing ESG issues, have strong track records of ethical operations and are focused on reducing carbon emissions and developing a path to net zero. A group of leading oil and gas companies in Canada established the "Oil Sands Pathways to Net Zero" Alliance. This group, which represents 90% of Canada's oil sands production, will work with the federal and provincial governments and has laid out a credible plan to achieve net-zero greenhouse gas emissions from its members by 2050.[2] The plan follows a three-phase approach and recognizes that multiple parallel pathways are needed to achieve the goal – it addresses numerous areas, including electrification, fuel substitution, energy efficiency, carbon capture, process improvements and the implementation of emerging technologies.

This approach recognizes that oil and gas companies, with their long operating history and strong research and development (R&D) track record, are well-placed to further develop existing technologies like carbon capture and storage technology. In addition, they can invest and advance R&D on new technologies and solutions, like hydrogen or small modular nuclear reactors, as well as emerging technologies like direct air capture. Many of these oil and gas companies have been engaging with investors on sustainability for years. This engagement has led to constructive dialogue and a progressive approach.

No silver bullet – tackling real-life issues is complex

Deeper understanding and considerations are needed to address real-life situations.

Another drawback of divestment is that it is often too simplistic of an approach to effectively address complex real-life situations. It is becoming increasingly difficult to

categorize companies as "good" or "bad" purely based on the sector in which they operate.

For example, the renewable energy sector is generally viewed as having favourable ESG characteristics, but digging deeper uncovers that the sector faces its share of controversial issues. A November 2021 report published by The Business & Human Rights Resource Centre, an international corporate watchdog, found over 200 allegations of serious human rights violations. These include land grabs and violations of the rights of Indigenous nations in the renewable energy sector, with 44% of these allegations connected to the wind and solar sectors.[3] Another example relates to the sourcing of polysilicon, a key component in solar panels, from the Xinjiang region in China, which allegedly uses the Uyghur minority group as forced labour.[4] This region currently supplies 80% of the world's polysilicon, yet the ability to trace components back through the supply chain is limited. Renewable companies involved in solar development are actively trying to address these issues, but finding solutions will take time. A divestment approach, which penalizes these companies for their involvement – even indirectly through their supply chain – would not only fail to solve the issue but could also delay or impede much-needed growth in renewable energy production.

Similarly, developers of electric vehicles (EVs) have benefitted as EVs are widely believed to be more environmentally friendly than internal combustion engine (ICE) vehicles. However, the lifetime carbon emissions footprint of an EV depends largely on the source of energy used in manufacturing the car. In regions that use coal-fired energy for manufacturing, such as China or India, EVs' overall lifetime carbon emissions can be higher than for ICE vehicles. Furthermore, some of the key components needed to make EV batteries (lithium and cobalt) are found primarily in countries like the Democratic Republic of Congo, which are plagued with human rights abuses. In addition, an environmentally friendly solution to the disposal of expired car batteries has yet to be found. Again, companies involved are working to discover solutions to these issues, but this will take time. A straight divestment approach will not directly help with this objective.

These are just some examples that emphasize the complexity of addressing ESG concerns, such as climate change and energy. Even industries or companies that seem "green" have their share of ESG issues to contend with. The path to a more socially responsible world must be carefully considered. Simply selling a stock is a blunt instrument to a complex problem.

Can divestment and engagement work together?

Investors can utilize engagement and divestment together to drive change.

Even though engagement takes a more thoughtful approach to enacting change than divestment, there can still be issues. While most companies willingly engage with investors to improve their ESG profile, some companies do not. What should an investor do if a company is unwilling to engage with investors or does not sufficiently address it's business's ESG risks and considerations?

As with many things, the best solution is not binary when it comes to the debate between engagement and divestment. Recent studies[5] have shown that these approaches should not be mutually exclusive and that the best results come from a combination of the carrot (engagement) and the stick (divestment). Many institutional investors have escalation strategies for companies that are either not addressing their concerns or moving slower than desired. Some believe that investors have no leverage when employing an engagement-only approach without the threat of divesting if the company does not change its behaviour. Having a stick is a way to incentivize the company to embrace the carrot and, as a result, the efficiency of each is reinforced.

Ultimately, while pure divestment might be the right approach for certain values-based investors, we view engagement as more effective when the goal is to influence corporate behaviour and enact societal change. Within an engagement approach, divestment can be used as a tool in strategies. Yet, with the complexities of real-life scenarios, investors need to be thoughtful when determining the best approach to bringing the world towards the change we all want to see.

Previously published March 30, 2022 by Guardian Capital LP.

[1] About 350, 350.org, accessed January 10, 2022, https://350.org/about.
[2] Oil Sands Pathway to Net Zero, Helping Canada achieve its climate goals, accessed January 10, 2022, https://www.oilsandspathways.ca.
[3] Business and Human Rights Resource Centre, Renewable Energy & Human Rights Benchmark 2021, Briefing November 2, 2021. https://www.business-humanrights.org/en/from-us/briefings/renewable-energy-human-rights-benchmark-2.
[4] Murtaugh, D., with C. Murphy, J. Maygar and B. Eckhouse, Secrecy and Abuse Claims Haunt China's Solar Factories in Xinjiang, Bloomberg Green, Bloomberg,L.P., (April 13, 2021). https://www.bloomberg.com/graphics/2021-xinjiang-solar.
[5] Amenc, N. and Christiansen, E., Esakia, M., & Goltz, F., ESG Engagement and Divestment: Mutually Exclusive or Mutually Reinforcing?, A Scientific Beta Publication, May 2020. https://www.scientificbeta.com/download/file/esg-engagement-and-divestment.

DISCLAIMER: This document is for educational purposes only and does not constitute investment, financial, legal, accounting, tax advice or a recommendation to buy, sell or hold a security. Individuals should seek the advice of professionals, as appropriate, regarding any particular investment. Responsible investing may incorporate considerations beyond traditional financial information into the investment selection process. This could result in investment performance deviating from, including underperforming, other comparable investment strategies or broad market benchmarks. Guardian Capital LP is a signatory of the UN-supported Principles for Responsible Investment (UN PRI), and our Responsible Investing policies are publicly available on our website at: https://www.guardiancapital.com/investmentsolutions/responsible-investing. The opinions expressed are as of the published date and are subject to change without notice. Assumptions, opinions and estimates are provided for illustrative purposes only and are subject to significant limitations. Reliance upon this information is at the sole discretion of the reader. This document may include information and commentary concerning financial markets that was developed at a particular point in time. This information and commentary are subject to change at any time, without notice, and without update. This commentary may also include forward looking statements concerning anticipated results, circumstances, and expectations regarding future events. Forward-looking statements require assumptions to be made and are, therefore, subject to inherent risks and uncertainties. There is significant risk that predictions and other forward looking statements will not prove to be accurate. Investing involves risk. Equity markets are volatile and will increase and decrease in response to economic, political, regulatory and other developments. The risks and potential rewards are usually greater for small companies and companies located in emerging markets. Bond markets and fixedincome securities are sensitive to interest rate movements. Inflation, credit and default risks are also associated with fixed income securities. Diversification may not protect against market risk and loss of principal may result. Certain information contained in this document has been obtained from external sources which Guardian believes to be reliable, however we cannot guarantee its accuracy.

Guardian Capital LP is a signatory of the United Nations-supported Principles of Responsible Investment (UN PRI). The UN PRI does not prescribe the exclusion of any particular type of company or industry; rather it requires that, as the Manager, we are informed on the ESG issues, and that we are comfortable with the activities and practices of the companies that we invest in. Our Responsible Investing policies are publicly available on our website at https://www.guardiancapital.com/investmentsolutions/responsible-investing/

Responsible investing is an approach to investing that incorporates ESG considerations into investment decisions. This approach may incorporate considerations beyond traditional financial information into the investment selection process, which could result in investment performance deviating from other products with comparable objectives or from broad market benchmarks.

Guardian's Sustainable Funds and GEM Pools have ESG-related investment objectives, while other Guardian Mutual Funds and ETFs do not have ESG-related investment objectives. All Guardian Funds integrate ESG considerations into the investment analysis of all holdings within their respective portfolio. A Fund's ESG characteristics and performance may change from time to time. Please review the Fund's prospectus for details on how the Fund's investment strategy incorporates responsible investing considerations and the associated risks, and consult your financial professional prior to investing.

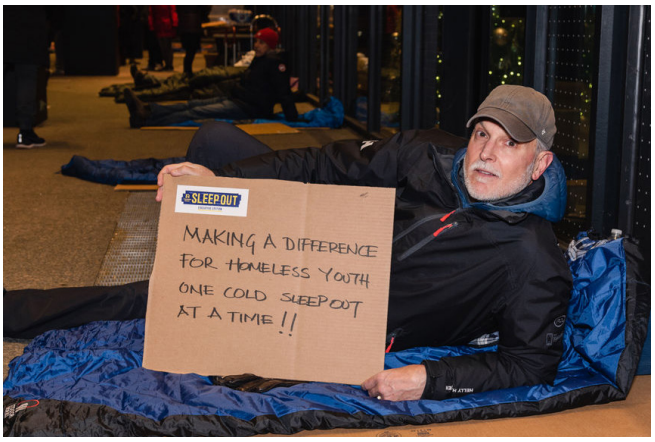
Guardian Capital LP manages portfolios for defined benefit and defined contribution pension plans, insurance companies, foundations, endowments and investment funds. Guardian Capital LP is a wholly-owned subsidiary of Guardian Capital Group Limited, a publicly traded firm, the shares of which are listed on the Toronto Stock Exchange. For further information on Guardian Capital LP and its affiliates, please visit www.guardiancapital.com.

Covenant House Toronto's Sleep Out

ONE PURPOSE. ONE NIGHT. ONE COMMUNITY.

For over 10 years, hundreds of GTA executives, professionals and community members have left the comforts of their beds to spend a night in solidarity with the over 6,000 Canadian youth experiencing homelessness every night and raise much-needed funds during Covenant House's Sleep Out events.

As Canada's largest agency serving youth who are homeless, trafficked or at risk, Covenant House offers the widest range of services to an average of 280 young people every day. More than a place to stay, they provide 24/7 crisis shelter and transitional housing on-site and in the community, along with comprehensive services, including education, counselling, health care, employment assistance, job training and after-care. Since 1982, Covenant House has supported more than 100,000 young people.



Consisting of the Executive Edition for senior business leaders and the Champions Edition for professionals and community members, Sleep Out events have raised more than $6 million to date.

"Simply put, Sleep Out helps us to reach more young people and support them as they rebuild their lives off the streets," said Covenant House's Executive Director, Mark Aston, who has participated in the annual event since joining the agency in 2019.

Ninety per cent of every dollar raised by Sleep Out events goes directly to Covenant House's programs and services that benefit youth experiencing homelessness and sex trafficking, allowing the agency to meet the emerging needs of the youth it serves.

"Sleeping on the street for one night by no means represents what some of our youth experience every single day. In fact, the sleeping portion of the event is simply the catalyst to start the conversation with senior leaders and those they influence about the plight of at-risk youth in our city," said Paula Courtney, Committee Chair of Sleep Out Executive Edition.

The youth who come to Covenant House are often experiencing neglect, abuse and family breakdown. They may also be struggling with mental health and addiction issues.

Through the years, the agency has taken significant strides to enhance its services in recognition of the evolving needs of youth. Their comprehensive youth-driven programming centres around unconditional love, absolute respect and relentless engagement.

By taking up the challenge of spending one night on the street, Sleep Out participants demonstrate their commitment to making a difference in the lives of the most vulnerable.

"Covenant House has had a profound impact on keeping youth safe from the streets and from predators. For me, there is no greater call to action than to protect the lives of our youth."

— PAULA COURTNEY, COMMITTEE CHAIR, SLEEP OUT EXECUTIVE EDITION

For more information and to register for this year's events, please visit Covenant House Toronto's website:

www.covenanthousetoronto.ca/the-problem/youth-homelessness/

BILL C-19

Amended to Simplify Funding of Non-Qualified Donees

By Terrance S. Carter & Theresa L.M. Man*

Significant amendments have been made to Bill C-19, Budget Implementation Act, 2022, No. 1 ("Bill C-19") after the charitable sector expressed serious reservations regarding the original content of the Bill. Bill C-19 was tabled on April 28, 2022, and, as explained in greater detail in Charity & NFP Law Bulletin No. 511, many in the charitable sector were concerned that it "perpetuate[d] the colonial relationship between charities and groups without charitable status" and increased the administrative burden for most Canadian charities.1 After Bill C-19 completed Second Reading on May 10, 2022, it was studied by the Standing Committee on Finance, which heard from numerous stakeholders in the charitable sector. Several amendments to Bill C-19 were then adopted when the House of Commons passed Bill C-19 on its Third Reading on June 9, 2022. Bill C-19 was subsequently passed by the Senate without further changes to these amendments and received Royal Assent on June 23, 2022.

Because of the technical nature of Bill C-19, this Bulletin explains the changes adopted at Third Reading in the House of Commons and the effect of those changes. This Bulletin also provides a summary of the key issues of Bill C-19 as it relates to the charitable sector.

Regulation of Charities under the Income Tax Act and Calls for Change

The legal reality for charities working with non-qualified donees ("QDs") prior to Bill C-19 had been criticized by many in the sector as administratively intense, colonial and out of step with global best practices.[2] This was because, under the *Income Tax Act* ("ITA"), charities could only use their resources in two ways: (1) by making gifts to QDs, and (2) devoting their resources to charitable activities carried on by the charities themselves (referred to as a charity's "own activities"). The Canada Revenue Agency ("CRA") administers the own activities provision in the ITA by requiring charities to conduct activities that are directly under the charities' direction and control and for which the charities can account for any funds or other resources expended.

There have been many calls for changes to how registered charities can work with non-QDs. Some of the most notable examples of these calls for change include the charitable sector's support and advocacy for Bill S-222, *An Act to amend the Income Tax Act (use of resources)* and its successor legislation, Bill S216, *An Act to amend the Income Tax Act (use of resources of a registered charity)*. Both Bill S-222 and Bill 216 propose to eliminate the requirement for "own activities" and the corresponding requirement for "direction and control." Bill S-216

passed through the Senate and received Second Reading in the House of Commons on May 16, 2022, but has been supplanted by Bill C-19.

Further background information leading up to Bill C-19 is explained in *Charity & NFP Law Bulletin No. 511*.

New regime of "qualifying disbursements" to "grantee organizations" in bill C-19

Despite promises in Budget 2022 (released on April 7, 2022) that amendments to the ITA would be in the "spirit of Bill S-216," the charitable sector expressed serious concern that the first draft of Bill C-19 did not achieve this goal. Bill C-19 introduced a new secondary regime of "qualifying disbursements" and "grantee organizations" to allow charities to make disbursements by way of a gift or by otherwise making resources available to QDs and non-QD grantee organizations.[3]

For the gift or resources to be made to non-QDs, the disbursements would need to meet three requirements: (1) the disbursement must further a charitable purpose of the funder charity; (2) the funder charity must ensure that the disbursement is exclusively applied to charitable activities in furtherance of the funder charity's charitable purpose; and (3) the disbursement must meet "prescribed conditions."

1. Concerns About "Prescribed Conditions"

One of the main concerns with Bill C-19's original draft was that the "prescribed conditions" requirement was too onerous. The prescribed conditions (set out under proposed Regulation 3703) would have required a detailed written agreement between a funder charity and a recipient grantee organization, as well as pre-disbursement due diligence, ongoing monitoring, review of a final report and fulfillment of obligations to take "adequate remedial action" if the written agreement was not complied with.[4] While the prescribed conditions in Regulation 3703 were similar to the guidelines set out in the CRA's direction and control guidances CG-002 and CG-004,[5] these conditions would have become mandatory legal requirements, to be followed regardless of the circumstances. In many instances, the prescribed conditions were more onerous than the direction and control regime.[6]

2. The Elimination of "Prescribed Conditions" and Introduction of "Sufficient Documentation"

In light of the concerns regarding the prescribed conditions, the charitable sector engaged in significant and coordinated advocacy of the Federal Government. Representatives from organizations such as Imagine Canada and Samaritan's Purse voiced the sector's concerns before the Standing Committee on Finance,[7] while more than 60 Canadian global development and humanitarian organizations sent an open letter through Co-operation Canada to The Honourable Chrystia Freeland, Deputy Prime Minister and Minister of Finance.[8] Following these advocacy efforts, amendments to the text of Bill C-19 were adopted on June 9, 2022, which deleted proposed Regulation 3703 and replaced requirement #3 (that a qualifying disbursement meet prescribed conditions) with a less onerous requirement.

Now that the amended Bill C-19 has received Royal Assent, charities will be able to use their resources in three ways: (a) conducting their "own activities" under their "direction and control," (b) making qualifying disbursements of gifts and other resources to QDs, and (c) making qualifying disbursements of gifts and other resources to non-QD grantee organizations. Under the new regime in the third category, three requirements must be met:[9]

1. ***the disbursement must further a charitable purpose of the funder charity;***
2. ***the funder charity must ensure that the disbursement is exclusively applied to charitable activities in furtherance of the funder charity's charitable purpose; and***
3. ***the funder charity must maintain documentation sufficient to demonstrate the purpose for which the disbursement was made, and that the disbursement was exclusively applied by the grantee organization to charitable activities in furtherance of the funder charity's charitable purposes.***

It is difficult to say how the CRA will administer the new qualifying disbursement regime. As the regulator of registered charities, the CRA often provides guidance that, while not carrying the force of law, is highly persuasive in determining how charities are to comply with the ITA. It is expected that the CRA will release guidance in the coming months to clarify details of the new qualifying disbursement regime. Until this guidance becomes available, it is premature to speculate how the CRA will administer the new regime. As such, charities that wish to make qualifying disbursements in the short term should consider waiting until the guidance from the CRA becomes available or otherwise consult with their legal counsel for advice.

Key issues to consider going forward

Bill C-19 adds to and modifies certain aspects of the existing federal tax regime regulating charities. As explained in this Bulletin, Bill C-19 improves the current tax regime by allowing charities to make qualifying disbursements to non-QD grantee organizations. However, unlike Bill S-216, Bill C-19 does not remove the "own activities" requirement from the ITA, leaving that portion of the legislation unchanged. Bill C-19 also amends existing rules to allow charities to make qualifying disbursements (which may be either gifts or other resources) to QDs, instead of simply making gifts to QDs under the previous regime.

While the amendments to Bill C-19 are an improvement over the original text of the Bill, there remain several aspects of Bill C-19 that will be potentially confusing or concerning for charities. Some of these concerns were explained in *Charity & NFP Law Bulletin No. 511*, which readers should refer to if they are looking for details beyond the scope of the summary below.

1. Concerns about Making Qualifying Disbursements to Grantee Organizations

There are two concerns regarding qualifying disbursements to grantee organizations that amendments to Bill C-19 did not address.

The first concern is the proposed "anti-directed gifts" provision Bill C-19 amends paragraph 168(1)(f) of the ITA to provide that a registered charity may have its charitable status revoked if it accepts a gift, given expressly or implicitly conditional on the charity making a gift to "another person, club, society, association or organization." The intention of this provision is to prevent charities from acting as conduits to other organizations.[10] Until the CRA releases a guidance regarding how this provision will be interpreted and enforced, it is difficult to say which activities will or will not be caught by this new provision. In this regard, it is likely that charities will be prevented from fundraising where it is clearly communicated that proceeds will go to supporting a particular non-QD grantee organization. This will, in effect, preclude a charity from acting as a "shared platform" for fundraising purposes for other organizations that are non-QDs. However, subject to what the CRA may have to say in their forthcoming guidance, there would not appear to be a problem with a Canadian charity fundraising for one of their particular charitable programs (such as providing humanitarian aid for refugees forced to leave a war zone — like those currently fleeing the war in Ukraine), provided there is no mention in the charity's fundraising communications about any non-QDs for which the charity intends to work with as grantee organizations.

A second concern for charities is the T3010 reporting requirements introduced in Bill C-19 under Regulation 3704. Regulation 3704 requires charities to report certain information about grantee organizations to which the charity has given more than $5,000 in qualifying disbursements in a taxation year, including the grantee organization's name and the amount and purpose of the qualifying disbursement. Most sections of the T3010 information return are available to the public, while certain sections are specifically held confidential (such as Section F and Schedule 4 of Form T3010) but may still be shared by the CRA with other government agencies and departments. It is unclear at this point whether information reported under Regulation 3704 will be made available to the public. If the information may be available to the public, it could put certain grantee organizations at risk. For example, organizations carrying out charitable activities at great risk to themselves, such as advocating for women's rights in certain countries. Further clarification from the CRA in this regard would be helpful.

2. Concerns about Making Qualifying Disbursements to Qualified Donees

As mentioned above, Bill C-19 modifies the existing tax rules that allow charities to make gifts to QDs. Under the changes introduced in Bill C-19, charities will continue to be able to make gifts to QDs, but such gifts are now included as part of the funder charities' qualifying disbursements. In other words, a qualifying disbursement applies to the making of gifts and other resources to both QDs and non-QD grantees.

However, Bill C-19 provides that qualifying disbursements to QDs are subject to a new subsection 149.1(6.001) in the ITA, which states that "disbursements of income of a charitable organization by *way of gifts* to a qualified donee" [emphasis added] cannot exceed 50% of the funder charitable organization's income for that year. It also provides that disbursements over the 50% limit "are not qualifying disbursements."

The combined effect of these amendments means that it is unclear if there is a qualifying disbursement limit which applies to some disbursements (*i.e.*, gifts) but not others (*i.e.*, other resources). In addition, it is also unclear if a charitable organization does

make a disbursement in excess of the qualifying disbursement limit, such a disbursement (which is neither a qualifying disbursement nor intended for the charity's own activities), if this would be grounds for the Minister of National Revenue to revoke the charity's charitable status.[11]

3. Concerns for foundations with a singular purpose

Some foundations in Canada may have a singular charitable purpose that permits them to only make gifts to QDs. Such a purpose would not be broad enough to allow those foundations to make qualifying disbursements to grantee organizations because grantee organizations are not QDs. As a result, these foundations may consider updating their charitable purposes if they wish to make qualifying disbursements to grantee organizations.

While changing their sole purpose from "making gifts to QDs" to "making qualifying disbursements" would allow foundations to continue to make gifts to QDs, this would not allow them to make qualifying disbursements to non-QD grantee organizations because of how "qualifying disbursements" is defined in Bill C-19. Specifically, the definition of "qualifying disbursement" requires a gift (or resources otherwise made available) must be "in furtherance of a charitable purpose" of the grantor charity and that the disbursement be "exclusively applied to charitable activities in furtherance of a charitable purpose" of the grantor charity.[12] This means that when the purpose of the grantor charity is to make qualifying disbursements, Bill C-19 would require the recipient grantee organization to likewise use the gift or resources from the grantor charity for that same purpose, i.e., to make qualifying disbursements to other entities. This is because making qualifying disbursements to grantee organizations is a means to an end of achieving a charitable purpose but is not an actual charitable purpose in itself. As such, if a foundation that has a singular charitable purpose of only making gifts to QDs would like to start making qualifying disbursements to grantee organizations, it would need to add active charitable purposes to its constating documents.

4. Other changes of note

Budget 2022 announced that the disbursement quota rate for charities would increase from 3.5% to 5%. However, this change was not incorporated as part of Bill C-19 and is therefore expected to be introduced in future budget implementation legislation in the fall. Nevertheless, Bill C-19 amends portions of the ITA to reflect that qualifying disbursements will be included in calculating whether a charity has met its disbursement quota obligations and updates the definition of disbursement excess. The language in some of the provisions is somewhat confusing as it references "*gifts* made by [a charity] that are qualifying disbursements" [emphasis added] when qualifying disbursements may be both gifts or other resources made available.[13] Despite this ambiguity, the important takeaway for charities is that qualifying disbursements will be included as a credit in meeting their disbursement quota requirement.

Concluding comments

Although Bill C-19 is not without issues, the amendments made to the original wording of Bill C-19 has resulted in remarkable improvement. The amendments are a result of the effective and coordinated lobbying efforts by many within the charitable sector. While the complete elimination of the own activities and direction and control regime (as proposed in Bill S-216) would have been ideal, the addition of the qualifying disbursement regime in Bill C-19 nevertheless provides a workable alternative mechanism for charities wanting to work with non-QDs.

CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW BULLETIN NO. 513

JUNE 28, 2022

EDITOR: TERRANCE S. CARTER
ASSISTANT EDITORS: NANCY E. CLARIDGE,
RYAN M. PRENDERGAST AND ADRIEL N. CLAYTON

Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trademark Agents / Avocats et agents de marques de commerce
www.carters.ca | www.charitylaw.ca | www.antiterrorismlaw.ca
Toronto · Ottawa · Orangeville
Toll Free: 1-877-942-0001

* Terrance S. Carter, BA, LLB, TEP, Trade-Mark Agent, is the managing partner of Carters, and counsel to Fasken on charitable matters. Theresa L.M. Man, BSc, MMus, LLB, LLM, is a partner at Carters who practices exclusively in charity and not-for-profit law. The authors would like to thank Lynne M. Westerhof, BA, JD, associate at Carters, for her assistance in preparing this *Bulletin*.

[1] Tim Harper, "For the philanthropic sector, a step forward on 'direction and control,' but more work ahead" (12 May 2022), online: *The Philanthropist* <https://thephilanthropist.ca/2022/05/for-the_philanthropic-sector-a-step-forward-on-direction-and-controlbutmore-work-ahead/>.

[2] Open Letter to The Honourable Chrystia Freeland, Deputy Prime Minister and Minister of Finance (17 May 2022), online (pdf): <https://cooperation.ca/wp-content/uploads/2022/05/DC-Open-Letter-v202205_Final_EN.pdf>.

[3] Bill C-19 defines a "grantee organization" to include "a person, club, society, association or organization or prescribed entity but does not include a qualified donee." C-19, *Budget Implementation Act, 2022, No.1*, 1st Sess, 44th Parl, 2022 (second reading in Senate 14 June 2022) at s. 16(3).

[4] An in-depth analysis can be found in Terrance S. Carter & Theresa L.M. Man, "Bill C-19 Budget Implementation Act, 2022, No. 1 Proposes Major Changes to Legislative Framework Governing Charities" *Charity & NFP Law Bulletin No. 511* (25 May 2022), online (pdf): *Carters Professional Corporation* <https://www.carters.ca/pub/bulletin/charity/2022/chylb511.pdf>.

[5] CG-002 "Canadian registered charities carrying on activities outside Canada" (27 November 2020), online: Government of Canada <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-002-canadianregisteredcharities-carrying-activities-outside-canada.html>; CG-004 "Using an intermediary to carry on a charity's activities within Canada" (27 November 2020), online: Government of Canada <https://www.canada.ca/en/revenueagency/services/charitiesgiving/charities/policies-guidance/using-intermediary-carry-a-charitys-activities-within-canada.html>.

[6] Carter & Man, *supra* note 4.

[7] See Standing Committee on Finance, 44th Parl, 1st Sess, Meeting 44 on Monday May 16, 2022 and Meeting 48 on Thursday May 19, 2022. Additional comments were offered by a representative of the Native Women's Association of Canada at Meeting 48.

[8] Open Letter, *supra* note 2.

[9] When these amendments come into force, they will be found at subsection 149.1(1) of the *Income Tax Act*, under the definition of "qualifying disbursement". They are set out at subclause 16(3) of Bill C-19, *supra* note 3.

[10] "Budget 2022" (7 April 2022), online: *Government of Canada*: <https://budget.gc.ca/2022/report-rapport/toc-tdm-en.html> and Department of Finance Canada, "Explanatory Notes Relating to the Income Tax Act and Other Legislation" (April 2022) online: *Government of Canada* <https://fin.canada.ca/drleg-apl/2022/nwmm-amvm-0422-n-eng.pdf>.

[11] See Bill C-19, supra note 3 at subclauses 16(4)-(6) which would amend the language in paragraphs 149.1(2)(c), (3)(b.1) and (4)(b.1) of the *Income Tax Act*.

[12] See Bill C-19, supra note 3 at subclause 16(3) which would add the definition of "qualifying disbursement" in subsection 149.1(1) of the *Income Tax Act*. See especially "qualifying disbursement" at (b)(i), (ii), and (iii)(B).

[13] Bill C-19, *supra* note 3 at subclauses 16(4)-(6), (10). These sections modify the ITA at paragraphs 149.1(2)(b), (c); 149.1(3)(b), (b.1); 149.1(4)(b), (b.1), and subsection 149.1(21) respectively.

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general informationpurposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation. ©2022 Carters Professional Corporation

GUARDIAN CAPITAL®

CONTACT US

For further information on Guardian Capital Advisors LP, please click here

TORONTO

Anthony Messina, CA, CPA, CFA
Managing Director,
Private Wealth Management
416-364-8054
amessina@guardiancapital.com

Thierry Di Nallo, CFA
Vice President & Portfolio Manager
416-947-4075
tdinallo@guardiancapital.com

Doug Farley, CFA
Senior Vice President &
Portfolio Manager
416-350-3114
dfarley@guardiancapital.com

Matthew Baker, CFA
Vice President & Portfolio Manager
416-947-4095
mbaker@guardiancapital.com

Erik Brandt, CFA, CIM
Client Portfolio Manager
416-350-8190
ebrandt@guardiancapital.com

Micha Choi, CFA, CFP
Client Portfolio Manager
416-947-3710
mchoi@guardiancapital.com

Ala Ramahi, CFA
Associate Client Portfolio Manager
aramahi@guardiancapital.com

CALGARY

Christie Rose, CFA
Vice President &
Portfolio Manager
403-296-3832
crose@guardiancapital.com

Sean Convey, CFA
Associate Client Portfolio
Manager 403-296-3831
sconvey@guardiancapital.com

VANCOUVER

Mark Bodnar, CFA
Client Portfolio Manager
604-632-9596 x6022
mbodnar@guardiancapital.com

Michael Frisby
Senior Vice President &
Portfolio Manager
604-632-9596 x6011
mfrisby@guardiancapital.com

Michael Barkley, CFA
Senior Vice President &
Portfolio Manager
604-632-9596 x 6012
mbarkley@guardiancapital.com

Andrew McLeod, CIM
Associate Client Portfolio Manager
amcleod@guardiancapital.com

This publication is for informational purposes only and does not constitute investment, financial, legal, accounting, tax advice or a recommendation to buy, sell or hold a security. It is not an advertisement and shall under no circumstances be considered an offer or solicitation to deal in any product or service mentioned herein. It is only intended for the audience to whom it has been distributed and may not be reproduced or redistributed without the consent of Guardian Capital Advisors LP. This information is not intended for distribution into any jurisdiction where such distribution, publication, availability or use is restricted by law or regulation. Certain information contained in this document has been obtained from external sources which Guardian believes to be reliable, however we cannot guarantee its accuracy.

Guardian Capital Advisor LP is a wholly-owned subsidiary of Guardian Capital Group Limited (Guardian), a publicly traded firm listed on the Toronto Stock Exchange. Guardian is a diversified financial services firm and Guardian Capital Advisors LP may rely on different Guardian affiliates to provide investment services or products to clients. Guardian Capital LP is an affiliate of and acts as a sub-adviser to Guardian Capital Advisors LP for certain accounts and strategies and is also the manager of the Guardian Capital Funds. Guardian, Guardian Capital and the Guardian gryphin design are trademarks of Guardian Capital Group Limited, registered in Canada.

Published November 2022