

Government Support of Journalism: Canada's New Qualified Donee Meets a U.K. Review — Part I

Daniel Frajman and Alana Petraske

Editor's Note: *This is the first of a two-part series.*

This article will review some of the technical aspects of the proposed new class of qualified donee under the *Income Tax Act* (the "Act"), a registered journalism organization, and also look at the use of this organization in a multi-vehicle structure. That will serve as a lead-in to a summary below of a recent review published in the United Kingdom that examines the state of journalism in today's digital world, and different ways to support quality journalism.

Qualified Canadian Journalism Organization: The 2019 federal budget, in introducing the registered journalism organization, requires the organization to be recognized as a Qualified Canadian Journalism Organization (a "QCJO") by an administrative body that will apply eligibility criteria established by an independent panel. Therefore, even though this concept is stated as applying as of January 1, 2020, only after recognition is received from the yet to be established administrative body will the QCJO begin to operate, essentially as a charity, and therefore exempt from income tax and with the ability to issue donation tax receipts. A concern has therefore been expressed by some that there will be significant bureaucratic delay in getting

the first QCJOs recognized. Hopefully that will not be the case, and time will tell.

By looking at the proposed QCJO definition in subsection 248(1) of the Act, the proposed qualified journalism organization definition in subsection 149.1(1) of the Act, and related amendments, we see that a QCJO would have to be primarily engaged in the production of original news content focused on matters of general interest and current events including coverage of democratic institutions and processes. The QCJO would be a Canadian corporation or a trust (if a corporation, it would be incorporated in Canada, and its chairperson or presiding officer and at least 75 percent of its directors would be Canadian citizens) operating in Canada, although worldwide digital publication of its content would of course be allowed.

Furthermore, the QCJO will need to have purposes exclusively relating to journalism, its business activities will have to relate to those purposes, all directors will have to be unrelated to each other, the QCJO must be controlled by a group of unrelated persons, no one donor can represent more than 20 percent of total gifts received in a year (other than gifts from bequests or on initial establishment), and no part of its income can be payable or available to a member, shareholder, director, trustee or similarly connected individual.

How will the QCJO be structured in practice? Consider for example *La Presse*, the major French-language newspaper in Quebec that now publishes only online. After the preliminary announcement on non-profit journalism made in the 2018 federal budget, *La Presse* acted quickly to restructure and declared itself to be a non-profit. The pre-existing *La Presse* operating company (a share capital CBCA corporation indirectly owned by Power Corporation of Canada) transferred its assets to a new operating company, also a share capital CBCA corporation, but with the new operator wholly owned by a new non-profit social trust formed under the *Civil Code of Quebec*, akin to a common law charitable purpose trust, and with the trust having the stated purpose of promoting *La Presse's* mission of journalistic quality. Power Corporation provided the trust with a sizable initial grant of \$50 million, and exited from the structure by having no continuing role with the trust or the new operating company.

Multi-vehicle structure: The new QCJO rules allow one to think about how *La Presse's* above-mentioned structure established in 2018 could be usefully tinkered with, given

the new 2019 rules, and how other news organizations could use the new rules, as follows:

- A trust (or a second corporation) separate from the operating company is not a requirement, but can be useful as a recipient body for donations, kept separate from the operating company;
- The operating company would apply for QCJO status, and upon receiving it become a qualified donee;
- Presumably the operating company could be the legacy operating company without necessarily having to form a new operator, and could be a share capital corporation, but would need a shareholders' agreement or amendment to the corporate articles that would prevent future dividends or similar distributions (presumably introducing that limitation on distributions would not be a taxable event¹);
- The operating QCJO would need an unrelated group of shareholders (perhaps being identical or similar to the board), and since a group of one is not an unrelated group, *La Presse's* trust, which is currently the sole shareholder of the *La Presse* operating company, apparently would have to give up control of the operating company. (Of course, as an apparent non-profit currently holding unreceipted funds, in essence there is nothing else preventing the *La Presse* trust from passing on its funds to the operating company.);
- However, perhaps the *La Presse* trust can remain as the sole shareholder. This is because the trust deed for the *La Presse* trust obliges the sole trustee to approve the operating company's independent board, unless the trustee is convinced that the recommended board will not carry out the journalistic mission. Therefore, perhaps the *La Presse* trust will end up asking the future administrative body for QCJOs for a view as to whether the trust's control is sufficiently limited so as to allow it to wholly own the operating company once the latter is a QCJO;
- Receiptable donations could be made directly to the QCJO, or if a separate vehicle is desired to receive receiptable donations for purposes of creditor protection or other administrative reasons, the corporation or trust used for that should apply to be a registered charity, likely with the restricted purposes of collecting funds and distributing interest and capital to qualified donees

(such as a QCJO), so that actual charitable activity does not have to be undertaken by that separate vehicle.

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¹ See by analogy CRA Views 2016-0658841E5, "Purpose tests and allocation of safe income" (April 6, 2017), which appears to show that where only one class of shares of a taxable corporation was entitled to "safe income", that did not cause a taxable event for the other class of shares for which the income would be unavailable.

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In contrast to the more concrete proposals in Canada, the United Kingdom has recently seen the publication of a new independent review on the sustainable future of journalism in the U.K.

Against a backdrop of “fake news” and the impact of the Internet on print journalism, the U.K. government tasked Dame Frances Cairncross in 2018 with conducting the Review, which was published in February 2019.¹ The basic conclusion of the Review is that high quality, independent journalism matters in a democratic society, and that government intervention to ensure a sustainable future may therefore be warranted. If this intervention includes the introduction of new charitable tax reliefs, the Review will not only be a significant advance for U.K. journalism, but also for the nonprofit and philanthropic sector.

The recommendations of the U.K. Review: The Review considers the state of journalism in the U.K., in particular the challenges posed by online distribution and social media. It culminates with nine recommendations which are intended to improve the market for journalism, encourage innovation, and incentivize the production (and consumption) of high-quality news. While several of these are focused on the market for commercial news, social media and the imbalance between publishers and online platforms, there are three recommendations of particular interest to the nonprofit sector:

1. The creation of a new Institute for Public Interest News. This would act as a centre for excellence, commission research and collaborate widely on initiatives designed to encourage the supply of public interest news. This body is conceived of as a potential equivalent to the U.K. Arts Council.

2. The proposed Institute would receive “innovation funding” from government, another of the Recommendations contained in the Review. It would also potentially receive funding for local public interest news and possibly take over, or co-manage, the existing BBC initiative known as the *Local Democracy Reporting Service*.
3. The recommendation of most interest to the non-profit and philanthropy sector is that new forms of tax relief should be launched to encourage the provision of local and investigative journalism, as well as to encourage payments for online news content.

Tax reliefs: the U.K. status quo: In common with Canada, the United States, and many other countries worldwide, the U.K. grants certain tax reliefs as a matter of public policy to organizations that are charitable, and in respect of donations to them. A charity for U.K. tax purposes must, among other things, be formed for purposes that are “exclusively charitable” for the public benefit, currently codified in 12 specific “heads” of charity, as well as anything, under a 13th head, that is recognized as being sufficiently analogous.

However, public interest journalism is not one of the recognized heads and attempts to register charitable organizations with this purpose have failed. There are certainly organizations undertaking or funding journalistic activities, but these may only be a means of achieving another recognized purpose, such as the advancement of education or the promotion of human rights. In other words, public interest journalism, no matter how laudable, is not charitable *per se*. Without charitable status:

- (a) donations from private individuals or businesses wishing to support investigative journalism fail to attract charity tax reliefs;
- (b) an existing charity (including a philanthropic foundation) may not make unrestricted grants to support investigative journalism; and
- (c) an organization that carries out or commissions investigative journalism will only enjoy charity tax reliefs (including relief from tax on its profits of trade and ancillary reliefs such as on local property tax) if its activities are a satisfactory means of carrying out another charitable purpose.

It is important to note that journalism charities would be subject to all the existing regulation applicable to other charities, including the limitation in the U.K. on certain

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review.pdf.

types of campaigning and political activity, and the limitations on private benefit.

More narrowly, in relation to U.K. Value Added Tax (VAT), digital newspapers and magazines are currently not zero-rated, which discourages mechanisms for online payment of journalistic content.

Changing the landscape: Recognition of public interest journalism as “charitable” could be achieved in a number of ways, including a reference to the Charity Tribunal. However, coming out of the Review, the most likely route seems now to be changes to the primary legislation to extend the list of recognized charitable purposes.

Amendment of the *Charities Act of 2011*, and if thought locally appropriate, the corresponding legislation in Scotland and Northern Ireland would allow access to the generous charitable tax reliefs without the introduction of a bespoke incentive.

Following publication of the Review, there has been some support for the recommendation within government. Jeremy Wright MP, of the Department for Digital, Culture, Media and Sport (which covers civil society matters), has since announced to Parliament that he has “written to the Charity Commission and look[s] forward to hearing how they can help move this forward”.

Alternative options suggested in the Review include a scheme analogous to the reliefs introduced to develop the British film and video game industries.

Forecasting the future: charitable journalism in the U.K.: While the Review represents an exciting step forwards in U.K. public interest journalism, it has no effect on the existing state of the law. It is also not the first time charitable status in this area has been the subject of public attention. Back in 2012, the House of Lords Select Committee on Communications’ *Inquiry into the future of investigative journalism* nearly coincided with the high profile second rejection of the Bureau of Investigative Journalism’s application for charitable status. The HL Committee suggested that charitable status for certain types of journalism could unlock philanthropic investment and enable responsible investigative journalism to flourish. Its principal message has no doubt informed the present Review: that high quality public interest journalism matters for the “wellbeing of democracy”.

Whether the U.K. Parliament will pursue the legislative changes proposed by the U.K. Review is not clear, particularly with Brexit dominating the legislative reform

landscape. In any event, the U.K. Review serves to underline the same concerns with the current journalistic landscape that caused Canada to take concrete steps in the 2019 Canadian federal budget to provide for new forms of tax relief to support quality journalism. This highlights that Canada has taken a lead on addressing this issue, but the Canadian proposals will be illusory if undue time is taken to establish the independent panel and the administrative body called for by the proposals.

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