



**REGISTERED MAIL**

July 27, 2007

The Millennium Charitable Foundation  
45 Coalport Drive  
Toronto, ON, M1N 4B5

BN: 890451412 RR0001  
File #: 3015600

Attention: Thomas A. Koger, C.A.

**Subject: Audit of The Millennium Charitable Foundation**

Dear Mr. Koger:

This letter is further to the audit of the books and records of The Millennium Charitable Foundation (the "Charity") by the Canada Revenue Agency (the "CRA"). The audit related to the operations of the registered charity for the period from January 1, 2003 to December 31, 2004.

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

<b>AREAS OF NON-COMPLIANCE:</b>		
	<b>Issue</b>	<b>Reference</b>
1.	Charitable Purposes	168(1)(b)
2.	Gifts	118.1
3.	Official Donation Receipts	Regulation 3501, 168(1)(d)
4.	Books and Records	230(2)
5.	Charity Information Return (T3010)	168(1)(c), 149.1(2)
6.	Director/Trustee Remuneration	168(1)(b), 149.1(1)
7.	Other Deficiencies	259(4.1) ETA

The purpose of this letter is to describe the areas of non-compliance identified by the CRA during the course of our audit as they relate to the legislative provisions applicable to registered charities and to provide the Charity with the opportunity to address our concerns. In order for a registered charity to retain its registration, it is required to comply with the provisions of the ITA and Common Law applicable to registered

charities. If these provisions are not complied with, the Minister of National Revenue may revoke the Charity's registration in the manner prescribed in section 168 of the ITA.

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

### **Identified Areas of Non-Compliance:**

#### **1. Charitable Purposes:**

The Charity is registered as a public foundation. In order to satisfy the definition of a "public foundation" pursuant to subsection 149.1(1) of the ITA, an organization must be "a corporation or trust that is constituted and operated exclusively for charitable purposes".

This is a two-part test. Firstly, the purposes it pursues must be wholly charitable and secondly, the activities that a charity undertakes on a day-to-day basis must support its charitable purposes in a manner consistent with charitable law. Charitable purposes are not defined in the ITA and it is therefore necessary to refer, in this respect, to the principles of the common law governing charity. An organization that has one or more non-charitable purposes or devotes resources to activities undertaken in support of non-charitable purposes cannot be registered as a charity.

**It is our view, based on our review, that the Charity does not operate for charitable purposes. In fact, the evidence on the file, as outlined below, demonstrates that the preponderance of the effort and resources of the Charity are devoted to participating in tax planning donation arrangements. Operating for the purpose of promoting a tax planning donation arrangement is not a charitable purpose at law.**

The Charity has participated in the following tax shelters in the noted fiscal periods by agreeing to accept cash and/or property from taxpayers who were also participants in the tax shelter:

- Insured Giving Program (TS068437) – 2003
- Global Learning Gifting Initiative (TS70003) – 2004, 2005, 2006

A detailed description of the Insured Giving Program and a brief description of the Global Learning Gifting Initiative tax shelters are provided in Appendix "A".

**Through these tax shelter arrangements, the Charity receives a combination of property and cash, and in return, issues a substantial amount of receipts for this property and cash.** We note with concern, however, that the Charity's involvement in these arrangements is merely as a conduit for the identified tax shelters by lending its support and tax-receipting privileges for non-charitable purposes. In the Insured Giving Program arrangement, the Charity enabled itself to accept the artwork being promoted and to issue official donation receipts for the amounts determined by the tax shelter promoter. All but a small portion of the cash received, which was based on a predetermined percentage of the appraised value of the artwork, was returned to the promoter as fundraising fees.

Further, the Charity makes little, if any, attempt to verify the values of the donations represented by the promoters. In each of the donation arrangements identified, the Charity has relied upon the professional opinions provided by the promoters of each donation arrangement. The Charity has failed to demonstrate any due diligence undertaken to verify the authenticity of each donation program, the goods involved, the value of said goods or how participation in each program furthers the objects of the organization. The Charity relied upon the opinions and valuation reports provided by the promoters without undertaking any additional efforts to corroborate or contradict the opinions provided by persons directly associated with the tax shelter promoters. In many cases, the Charity has no interaction whatsoever with the donors, as this is handled entirely by the tax promoters. **All of these facts point to a pattern of active willingness to participate in schemes designed to produce inappropriate tax benefits.**

In 2004, the Charity received only cash donations based on a percentage of the purported fair market value of courseware that the donor donated to another charity (Canadian Charity Association) that participated in the tax shelter. Out of these funds, a predetermined percentage (20%) was paid to the promoter as fundraising fees and most of the balance was paid to Canadian Charity Association ("CCA"). Although no formal agreement was found with respect to the funds paid to CCA, the amount paid also appears to be based on a predetermined fixed percentage. This appears to be supported by copies of emails from the promoter giving instructions to the Charity regarding how it is to disburse funds it received, including the amount to be paid to CCA. The notation "as per agreement" was also found written on some copies of the emails. Out of the funds paid to CCA, over 90% was returned to the promoter of the tax shelter as fundraising fees. There was therefore no (or only a negligible) charitable purpose to the 2004 operations.

Given the manner in which the Charity structures and conducts its activities to accommodate these tax shelters, and the proportional levels of involvement in these arrangements, **it is our view that a collateral purpose, if not primary purpose of the organization is, in fact, to support and promote tax shelter arrangements. In this regard, it appears that the Charity enthusiastically lends its physical, financial and human resources (not to mention tax receipting privileges) to support these tax shelter arrangements, with little regard for the mandate and best interests of the Charity itself.** Operating for the purpose of promoting tax shelters is not a charitable purpose at law. It is further our view, therefore, that by pursuing this non-charitable purpose, the Charity has failed to demonstrate that it meets the test for continued registration under 149.1(1) as a charitable foundation in that it is not "constituted and operated exclusively for charitable purposes".

See also the section entitled **Books and Records** below for further indications that the Charity is being used as a conduit.

## 2. Gifts:

It is our position that both the cash donations and the artwork received by the Charity from "donor" participants are not valid gifts under section 118.1 of the ITA. We offer the following explanations to support our position.

**No *Animus Donandi*** - At law, a gift is a voluntary transfer of property without consideration. In most cases, a gift is a voluntary transfer of property without valuable consideration to the donor. An essential element of a gift is *animus donandi* - that the donor must be motivated by an intention to give. It must be clear that the donor intends to enrich the donee, by giving away property, and to grow poorer as a result of making the gift.

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

In support of this position, we note that the promotion materials primarily focus on the significant return on investment as a result of donor participation. Minimal investment is required by the participant donors. Donors bought goods from the promoter or received a distribution of courseware from a trust and transferred ownership of the property to the Charity without using or seeing the property. The goods are typically transferred from the donors to the Charity within a few days of purchase or trust distribution. Minimal information is provided to the prospective "donors" as to how the "donations" will benefit the charity, or to the activities of the charity they are supporting. Transactions are pre-arranged and handled entirely by promoters or other pre-arranged third parties. Participants in these arrangements are merely expected to put forward a minimal investment to receive generous tax receipts in return.

These points, in our opinion, evidence that these transactions are primarily motivated by a donor to enrich him/herself rather than an intent to make a gift to charity. As such, it is our position that there is no intention to make a "gift" within the meaning assigned at 118.1 of the ITA.

**Transfers not gifts** - Additionally, we are of the opinion that the transactions themselves lack the necessary elements to be considered gifts at law. The "donors" received some form of consideration or benefit that was linked to their cash donations. The amount of the consideration or benefit received was directly linked to the amount of the cash donation made; therefore the transfer of the artwork and the cash payments are not valid gifts per section 118.1 of the ITA.

**Trust Validity** - For a Trust to be valid it must have the "three certainties": certainty of intention, certainty of subject matter, and certainty of objects. Where the intention to create a Trust and the subject matter of the Trust are clear, one must be able to say with certainty who qualifies as a beneficiary and to what extent under the Trust. There

is no certainty of objects in the Trust. The beneficiaries are not described with sufficient certainty to allow a determination as to whether an individual is, or is not, a beneficiary. Where there is insufficient certainty of objects the trust must fail and the property will revert to the Settlor.

As a result, in this case there can be no subsequent transfer of title of the works of art from the Trust to the Beneficiary and subsequently from donors to the Charity. Therefore, they cannot have made a gift.

**Cash payment** - In our view, based on the above, we do not recognize the cash donations received as gifts made to the Charity. The amount represents a charge levied by the tax shelter/donation arrangement promoter to participate in the arrangements described in Appendix "A". While the payment was transferred to the Charity, it is clear this amount was not a voluntary transfer of property within the sense contemplated by the term "gift".

The donee must have unfettered discretion as to the use of the funds in order for it to qualify as a gift. We are of the view that the Charity did not have any discretion as to the use of the funds received. It was required to expend the cash in a particular manner that resulted in the promoter and other third parties of the Tax Shelter receiving all but a small percentage of the funds.

There is a clear link between the amount of cash received from donors and the amount paid to the promoter as fundraising fees. In 2003, the fundraising fees paid represent over 90% of the total cash gifts received from donors. In 2004, only 20% was paid directly to the promoter while over 78% was paid to CCA as a "donation". While the Charity received the cash donations, substantially all of the cash was paid to the promoter, and without the cash donations, the "donors" would not have become beneficiaries of the trusts.

### 3. Official Donation Receipts:

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

As noted above under **Gifts**, we do not consider the amounts of cash and works of art to qualify as gifts at law. Donors received consideration for their donations to the Charity in the form of a benefit that was linked to and flowed from certain predetermined conditions. They received the benefit of becoming a capital beneficiary of a trust and having options (to acquire works of art or courseware) distributed to them, without cost, from the trust, which was facilitated through the participation of the Charity in a predetermined series of transactions. In addition, they made a cash donation to the Charity and their entitlement to receiving the options from the trust was linked to the amount of cash donated. Therefore, the options were distributed to them as a result of them making the cash donation and agreeing to donate the works of art or courseware thus received. The receipt of the benefit from the trust was connected to both donations

and, consequently, both the donation of works of art and the donation of cash are not valid gifts per section 118.1 of the *Income Tax Act*.

The Charity should therefore not have issued any donation receipts for either the works of art or the cash received.

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

**Fair Market Value:**

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

**The Case Law:**

The well-accepted definition of fair market value is found in the decision of Cattanach J. in *Henderson Estate & Bank of New York v M.N.R.* 73 D.T.C. 5471 at 5476:

*The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter, which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element, which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the use of the word "fair" adds anything to the words "market value".*

As outlined by Rothstein, J. A. in *AG (Canada) v Tolley et al* 2005 FCA 386, in applying the Henderson definition of fair market value, the first step is to accurately identify the asset whose fair market value is to be ascertained. The non-resident Settlor gifted in bulk the Options (to acquire Works of Art) to the Trust. The Options were allocated in bulk. Upon the exercising of the Options, Works of Art received were donated in bulk to the Charity. As such, the relevant asset was the "bulk" Works of Art and not the individual pieces.



The second step in applying the Henderson definition is to identify the market in which the asset was to be traded. The works of art in the program were sold in bulk by the artists to the "Art Dealers", the "Art Dealers" sold the works of art in bulk to the Grantor, the Grantor sold the works of art in bulk to the capital beneficiaries, and the capital beneficiaries donated the works of art in bulk to MCF – all for the donation market. In fact, the Charity sold the works of art in bulk, via two transactions, both at December 31, 2003. Thus, the relevant market was not the retail market, but the donation market in bulk transactions.

The appraised values for the works of art included in the Certificates of Appraisal are not considered appropriate under the circumstances. For example, the appraisals assumed the retail and gallery sales as the common market and the assets were valued item by item.

As such, taking into account the relevant asset (a multitude of works of art) and the relevant market (the donation market), at most, if there are no other factors to consider, the fair market value of the works of art is what participants actually paid for the options, that being 16% of the receipted donation amount for the works of art.

However, in *Klotz v The Queen 2004 TCC 147*, Bowman, A.C.J. states that it is an interesting question whether the price paid for something is truly indicative of fair market value where the predominant component in the price paid is the tax advantage that the purchaser expects to receive from acquiring the object.

It is our position that in arriving at the fair market value for the works of art, one has to take into account the price paid for the tax advantage participants expected to receive from participating in the donation program. In arriving at the true fair market value and price participants had paid for the tax advantage, the following was taken into account:

- a) The Thorsteinssons Tax Lawyers' legal opinion dated November 10, 2003, stated that the Grantor "*will acquire the Works of Art from one or more non-residents of Canada (the "Art Dealers") at prices near the Appraised Value of the particular Works of Art. The Art Dealers will acquire the Works of Art in bulk purchase transactions at prices considerably below the Appraised Value*";
- b) Works of a particular artist representing over 49% of the Program's total value were initially acquired by an Art Dealer at no more than 3% of their appraised values.
- c) In February 2002, the entire Henry Moore print collection was acquired by the non-resident art dealer from a private collector for \$1,450,000US;
- d) On December 31, 2003, the Works of Art were traded via two transactions for 242 Henry Moore prints, that being 35% ( $242/693=35\%$ ) of the complete Henry Moore print collection;
- e) In a letter dated September 28, 2005 to the Canadian art gallery, a world leading New York based independent auction house estimated that the value of a complete collection of Henry Moore prints would not be higher than \$1,292,400CDN;

- f) In a letter dated October 3, 2005 to the Canadian art gallery, a world leading London based independent auction house proposed that the value of the Henry Moore print collection held by the art gallery would not be higher than \$1,144,766CDN.

As the Works of Art were traded for property of equal value, i.e., 242 of the Henry Moore prints, the true fair market value of all the Works of Art donated to the Charity is no greater than \$656,000 (35% x \$1,450,000 US x 1.2924 [12/31/03 exchange rate]). However, the donation receipts issued for works of art amounted to \$16,856,516 (as reported), an overstatement of \$16,200,516.

Based on our findings, the fair market value on the donation receipts issued is not indicative of the fair market value of the goods donated. The appraised value is based on suggested retail price. We are of the opinion the retail market is not the relevant market as the goods were acquired, sold and donated in blocks of goods; therefore the more relevant market is the wholesale market. The fair market value of the art works is the last known arm's length price paid for the goods.

#### Donation Receipts Issued to Other Than Donor:

A significant number of cash donations were received from corporations, but the corresponding donation receipts were issued to individuals. For example:

- A cheque dated December 7, 2004 was received from Outside Heating System Ltd. for \$22,500, but the donation receipt (# 1105) was issued to Arthur Turple
- A cheque dated November 7, 2004 was received from 4221699 Manitoba Ltd. for \$60,000, but receipts were issued to Allan Mitchell (# 483 for \$45,000) and to Lorie Mitchell (# 482 for \$15,000)

Regulation 3501 provides for official receipts to be issued to only the donor.

#### **4. Books and Records:**

Pursuant to paragraph 230(2)(a) of the ITA, every registered charity shall keep records and books of account at an address in Canada recorded with the Minister or designated by the Minister containing information in such form as will enable the Minister to determine whether there are any grounds for revocation of its registration under the ITA.

The Charity's books and records were found to be inadequate as follows:

- A review of the numerical sequence of the donation receipts revealed that a number of 2004 receipts were missing. Copies were obtained and it was determined that the receipts, which amounted to \$389,000, had not been recorded on the books of the Charity.
- Documentation to support the donation receipts was requested on September 6, 2006, but was not provided until March 13, 2007. It was determined that, on the basis of a sale agreement and other documentation, the above noted receipts represented purported payments to a corporation located in the Virgin Islands



that were made by Canadian residents pursuant to a "Direction" from the Charity. The \$389,000 was supported by a list of works of art ("Photographs") that were purported to have been appraised at that value. To date, no evidence has been provided that the donors actually made payments amounting to \$389,000, nor have appraisals been provided as requested.

The director of the Charity was apparently not aware that the Charity owned the art worth \$389,000 that it had purchased on December 22, 2004 until he was questioned about the missing donation receipts, and he indicated that the works of art would be donated to another charity. This appears to be another indication that the Charity is being used as a conduit and that it does not have any discretion as to how the funds and other resources provided to it are used.

#### **5. Charity Information Return (T3010):**

Pursuant to subsection 149.1(14) of the ITA, every registered charity must, within six months from the end of the charity's fiscal period (taxation year), without notice or demand, file a Registered Charity Information Return with the applicable schedules.

It is the responsibility of the Charity to ensure that the information that is provided in its Return, schedules and statements, is factual and complete in every respect. A charity is not meeting its requirement to file an Information Return if it fails to exercise due care with respect to ensuring the accuracy thereof.

The Charity improperly completed the Information Return for the fiscal periods ending December 31, 2003 and December 31, 2004 as follows:

- As noted earlier, Total tax-receipted gifts (Line 4500) for 2004 were understated by \$389,000 with respect to unrecorded donation receipts. Total revenue (Line 4700) and Inventories (Line 4150) were also understated by \$389,000.
- Fundraising expenses of \$3,072,477 were incorrectly reported on line 5000 (Total charitable programs expenditures) on the 2003 return. They should have been reported on Line 5020.

#### **6. Director/Trustee Remuneration:**

The interpretation of "charitable foundation" in Section 149.1(1) of the ITA, includes the stipulation that no part of a charity's income "...is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor." In general, a registered charity cannot pay its directors/trustees simply for occupying their positions.

A review of the Charity's operations and records including the Trustee Minutes indicates that, other than the executive director, the trustees performed no duties that would entitle them to remuneration. However, in the years audited, trustees were paid the following amounts:

	<u>2003</u>	<u>2004</u>
Norman Silver	\$4,000	\$6,000
Thea Rott	-	6,000
Linda Quinn	-	6,000
Total	<u>\$4,000</u>	<u>\$18,000</u>

### **7. Other Deficiencies:**

The Charity claimed an excessive amount with respect to its GST rebate for 2004, caused by claiming the full 7% GST paid with respect to Fundraising fees paid, rather than the 3.5% to which it was entitled. The excess amount of \$65,653.24 was repaid to CRA on October 19, 2006, after a CRA auditor advised the Charity of the error.

### **Conclusion:**

If you do not agree with the concerns outlined above, we invite you to submit your written representations **within 30 days from the date of this letter**. After considering the representations submitted by the Charity, the Director General of the Charities Directorate will decide on the appropriate course of action, which may include the issuance of a Notice of Intention to Revoke the registration of the Charity in the manner described in subsection 168(1) of the ITA. Should you choose not to respond, the Director General of the Charities Directorate may proceed with the issuance of a Notice of Intention to Revoke the registration of the Charity in the manner described in subsection 168(1) of the ITA.

If you appoint a third party to represent you in this matter, please send us a written authorization naming the individual and explicitly authorizing us to discuss your file with that individual.

If you have any questions or require further information or clarification, please do not hesitate to call the undersigned at the numbers indicated below.

Yours truly,



Henry Brunsveld  
Audit Division  
Kitchener/Waterloo Tax Services Office

Telephone: (519) 896-5933  
Facsimile: (519) 585-2803  
Address: 166 Frederick Street  
Kitchener, ON N2G 4N1

Internet: [www.cra-arc.gc.ca/tax/charities/menu-e.html](http://www.cra-arc.gc.ca/tax/charities/menu-e.html)

Enclosure - Appendix "A", Tax Shelter Descriptions



CANADA REVENUE  
AGENCY

AGENCE DU REVENU  
DU CANADA

**REGISTERED MAIL**

The Millennium Charitable Foundation  
45 Coalport Drive  
Toronto ON M1N 4B5

Attention: Thomas A. Koger, C.A.

BN: 89045 1412 RR0001

File #:3015600

January 12, 2009

**Subject:     Revocation of Registration**  
**The Millennium Charitable Foundation**

Dear Mr. Koger:

The purpose of this letter is to inform you that a notice revoking the registration of The Millennium Charitable Foundation (the "Organization") was published in the *Canada Gazette* on January 10, 2009. Effective on that date, the Organization ceased to be a registered charity.

**Consequences of Revocation:**

- a) The Organization is no longer exempt from Part I Tax as a registered charity and is no longer permitted to issue official donation receipts. This means that gifts made to the Organization are no longer allowable as tax credits to individual donors or as allowable deductions to corporate donors under subsection 118.1(3), or paragraph 110.1(1)(a), of the *Income Tax Act* (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 prescribed form T-2046 "Tax Return Where Registration of a Charity is Revoked" (the "Return"). The Return must be filed, and the tax paid, on or before the day that is one year from the date of the Notice of Intention to Revoke. A copy of the Return is enclosed. The related Guide RC-4424, "Completing the Tax Return Where Registration of a Charity is Revoked", is available on our website at

[www.cra-arc.gc.ca/E/pub/tg/rc4424](http://www.cra-arc.gc.ca/E/pub/tg/rc4424).

Section 188(2) of the Act stipulates that a person (other than a qualified donee) who receives an amount from the Organization is jointly and severally liable with the Organization for the tax payable under section 188 of the Act by the Organization.

- c) The Organization no longer qualifies as a charity for purposes of subsection 123(1) of the *Excise Tax Act* (the ETA). As a result, the Organization may be subject to obligations and entitlements under the ETA that apply to organizations other than charities. If you have any questions about your GST/HST obligations and entitlements, please call GST/HST Rulings at 1-888-830-7747 (Quebec) or 1-800-959-8287 (rest of Canada).

In accordance with *Income Tax Regulation* 5800, the Organization is required to retain its books and records, including duplicate official donation receipts, for a minimum of two years after the Organization's effective date of revocation.

Finally, we wish to 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 of National Revenue (the "Minister") in prescribed form, containing prescribed information, for each taxation year. The *Return of Income* must be filed without notice or demand.

If you have any questions or require further information or clarification, please do not hesitate to contact the undersigned at the numbers indicated below.

Yours sincerely,



Danie Huppé-Cranford  
Director  
Compliance Division  
Charities Directorate  
Telephone: 613-957-8682  
Toll free: 1-800-267-2384

**Enclosures**

- Copy of the Return (form T-2046)
- Canada Gazette publication

cc: