

APPLICATION FOR COMPLIANCE AUDIT

Recommendation

The Commissioner of Legal and Administrative Services and City Solicitor recommends:

That this report be received; and,

That the candidate be requested to submit any additional information for Council's consideration prior to June 25, 2007.

Economic Impact

Not applicable.

Communications Plan

Not applicable.

Purpose

The purpose of this report is to provide information to Council to assist it in making a decision with respect to an Application for a Compliance Audit.

Background - Analysis and Options

On June 8, 2007 an Application for a Compliance Audit was filed with the Clerk in respect of the election campaign finances of Bernie DiVona for the 2006 Municipal Election. Council, on June 11, 2007 directed staff to report to the Committee of the Whole meeting of June 18, 2007 with respect to an Application pursuant to Section 81 of the *Municipal Elections Act, 1996*, for a Compliance Audit of election campaign finances.

In preparing this report, staff consulted extensively with Mr. George Rust-D'Eye of WeirFoulds LLP, making all of the material filed in respect of this application available to him for review. Mr. Rust-D'Eye's advice was obtained with respect to the jurisdiction of the City, the relevant provisions of the applicable legislation, and factors and issues relevant to the exercise by the Council of its jurisdiction to grant or reject the Application.

THE JURISDICTION OF THE COUNCIL

The proceedings in question are governed by the provisions of the *Municipal Elections Act, 1996* (the "Act"), particularly section 81.

Under section 81(1), an elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of the Act relating to election campaign finances, may apply for a compliance audit of the candidate's election campaign finances.

Under section 81(2), the application must be made within 90 days after the later of the filing date, the candidate's last supplementary filing date or any court-ordered extension for filing.

There is no supplementary filing date for candidate DiVona, and accordingly, his filing date was March 31, 2007. The application, filed on June 8, 2007, appears to be within the allowable period for making the application under the Act.

Under section 81(3), the Council is required, within 30 days after receiving an application properly made, to consider the application and decide whether it should be granted or rejected.

If the Council decides to grant the application, the Council is required, by resolution, to appoint an auditor licensed under the *Public Accounting Act, 2004* to conduct a compliance audit of the candidate's election campaign finances pursuant to section 81(4) of the Act.

In such circumstances, the auditor is required by section 81(6) to conduct promptly an audit of the candidate's election campaign finances to determine whether he has complied with the provisions of the Act relating to election campaign finances, and prepare a report outlining any apparent contravention by the candidate.

Under section 81(8), for the purposes of the audit, the auditor is entitled to have access to all relevant books, papers, documents or things in the possession of the candidate and the City, and has the powers of a commission under Part II of the *Public Inquiries Act*.

The City is required to pay the auditor's costs of performing the audit. If the auditor's report indicates no apparent contravention of the Act, and the Council finds that there were no reasonable grounds for the application, the Council is entitled to recover the auditor's costs from the applicant, pursuant to section 81(11).

Pursuant to section 81(7), the auditor must submit the report to the candidate, the Council, the clerk and the applicant(s).

Under section 81(10), the Council is required to consider the report within 30 days after receiving it. The Council may then commence a legal proceeding against the candidate for any apparent contravention of any provision of the Act relating to election campaign finances.

SUMMARY OF SPECIFIC ALLEGATIONS OF BREACH OF THE *MUNICIPAL ELECTIONS ACT, 1996*

In general terms, the applicants allege that candidate DiVona contravened various requirements of the *Municipal Elections Act, 1996*, grouped under a number of "issues" primarily contained in the Affidavit of Carlo DeFrancesca.

It is noted that the Act imposes certain responsibilities upon contributors, not candidates, in respect of limitations on the amount which they can contribute to candidates and the requirement that they be lawful contributors.

Consequently, most of the allegations against candidate DiVona arise under section 69(1)(m) of the Act, which requires a candidate to ensure that a contribution of money made or received in contravention of the Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention.

Attached (Attachment 1) is a copy of section 256 of the *Income Tax Act (Canada)*, referred to in section 72 of the Act with respect to determining whether corporations are associated with one another, in which case they are deemed to be a single corporation for the purposes of the *Municipal Elections Act, 1996*.

Also attached (Attachment 2) is a graph showing the provisions of the Act relevant to the seven issues raised by the applicants, and the specific provisions alleged to have been contravened by candidate DiVona.

A summary of the allegations are as follows:

Issues 1-4: Alleged Exceeding of Maximum Campaign Donations

The relevant paragraphs contained in the Affidavits of Carlo DeFrancesca allege that candidate DiVona failed to comply with his responsibilities under section 69(1)(m) of the Act by accepting contributions from a number of corporate donors, in each case said to be legally associated corporations for the purposes of the Act, resulting in four occasions upon which the contribution in question exceeded \$750.00 from a single donor, and that he breached the Act by failing to ensure that the contribution in question was returned to the contributor as soon as possible after he became aware of it.

In each case, it is alleged that:

- (1) the corporations in question are "associated" within the meaning of section 72 of the *Municipal Elections Act, 1996* and section 256 of the *Income Tax Act (Canada)*;
- (2) this conclusion results from the fact of:
 - (a) the similarity of names of some of the corporations;
 - (b) common founders, officers or directors of some of the corporations;
 - (c) common addresses;
- (3) some of the corporations named may not be incorporated legal entities;
- (4) in each case the associated corporations, said to be deemed to be a single donor for purposes of the Act, contributed more than \$750.00 to candidate DiVona's campaign;
- (5) the candidate DiVona is alleged to have known, or had a duty to know, that the corporations in question were associated, and failed to return the over-contributions as soon as possible, in contravention of section 69(1) (m) of the Act.

Issue 5: Alleged contribution of "goods and materials" not properly dealt with under the Act

Candidate DiVona's financial statement and auditor's report sets out under Part III "other revenue not deemed a contribution", a reference to "goods and services", in the amount of \$4,654.80, alleged in paragraph 24 of the Affidavit of Carlo DeFrancesca to have been "contributions" but not dealt with in accordance with the requirements of the Act.

Issue 6: Office Expenses

In paragraph 25 of the Affidavit of Carlo DeFrancesca, reference is made to items set out on candidate DiVona's financial statement relating to "office expenses subject to limitation" of \$2,020.00 and "office expenses excluded from limitation" of \$2,423.29 where it is alleged that fair market rent for the premises in question was a higher amount, and it is alleged that the landlord of the premises should have appeared as a contributor, and/or the over-contribution returned, in accordance with the requirements of the Act.

Issue 7: Distribution of Newsletter as Alleged Campaign Expense

Allegations relating to this issue are contained in the Affidavit of Paul De Buono, a candidate in the 2006 municipal election for local councillor of Ward 3 in the City.

Mr. De Buono alleges that candidate DiVona's newsletter, paid for by the City during the summer of 2006, was distributed to Ward 1 residents in what is referred to as the "Vellore area", and allegedly, candidate DiVona should not have used City resources for such campaign purposes, apparently due to the fact that he was "not effectively the councillor of Ward 1 at the time that he used City resources to communicate through Canada Post with Vellore residents as if he were the councillor".

LEGAL AND PRACTICAL CONSIDERATIONS RELEVANT TO DECISION-MAKING BY THE COUNCIL

The provisions of section 81 of the Act impose a specific and somewhat novel responsibility upon the City Council, as a form of tribunal functioning as a judge or arbiter over allegations against a candidate for municipal office, potentially leading to City expenditure for the retaining of an auditor, and a further possible duty to decide in such circumstances, based on the auditor's report, whether or not to initiate prosecutorial proceedings against such candidate for alleged breach of the Act.

In this role, the Council functions as a form of decision-making tribunal analogous to quasi-judicial tribunals established by or under various Provincial statutes.

In these circumstances, the Council is exercising a discretionary decision-making role, imposing requirements of fairness, impartiality and objective decision-making discretion, in the exercise of its specific duty under section 81(3) of the Act to decide, after reviewing the application for the compliance audit of a candidate's election campaign finances and supporting material, whether or not it should be granted or rejected.

If the Council decides to grant the application, this will lead to the appointment of the auditor, who will conduct the audit of the candidate's election campaign finances to determine whether he has complied with the provisions of the Act, and prepare a report outlining any apparent contravention, following which the Council will then be required to consider the report and decide whether or not to commence a legal proceeding against the candidate for any apparent contravention of one or more provisions of the Act relating to election campaign finances.

In exercising its discretion as to whether or not to grant the application for a compliance audit of candidate DiVona's election finances, the Council may wish to consider the following:

- if the application is properly made, within the time period following the later of the candidate's filing date or last supplementary filing date, the Council must make its decision within 30 days after receiving the application;
- the Council has no discretion to decline to deal with the application, only to decide whether to grant or reject it;
- the Council is required either to grant or reject the application, but which decision it makes, it must do so upon grounds relevant to the intention of the Act as expressed in terms included within it;
- the intent of the Act is that the election finances of candidates for municipal office be open and documented, that candidates ensure that all possible steps be taken

to ensure compliance with the Act relating to contributions and expenses, and that limitations on maximum contributions be strictly enforced;

- section 81 of the Act has been held by the Courts to be a complete code of procedure for any elector who alleges campaign finance wrongdoing by candidates. Its purpose and effect is to screen allegations by electors of election campaign finance wrongdoing by candidates and to weed out claims found to be frivolous, vexatious or otherwise devoid of merit;
- the principal question before the Council involves consideration of whether the elector has established reasonable grounds to believe that the candidate has contravened the Act;
- "reasonable grounds" is not to be equated with proof beyond a reasonable doubt. The appropriate standard of reasonable or credibly-based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted;
- the initial responsibility for ensuring compliance with the maximum contribution limit of \$750.00 per donor imposed by the Act is on the contributor, but the candidate is required to ensure that any contribution made in contravention of the Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention. If it is, the requirements of the Act are satisfied.

Relationship to Vaughan Vision 2007

Not applicable.

Regional Implications

Not applicable.

Conclusion

This report is provided for Council's information in its consideration of the Application for a Compliance Audit.

Given that Council should make its decision having considered all relevant information, it may be appropriate to provide the candidate with the opportunity to submit any additional relevant information he may possess prior to making a decision. In light of the Application date of June 8, 2007, a decision must be made by Council by July 8, 2007, so the decision could be made at the Council meeting June 25, 2007.

Attachments

1. Chart – "Alleged Contraventions Re: Bernie DiVona Campaign Expenses – November 2006 Election.
2. Excerpts – *Income Tax Act (Canada)*, s. 256

Report prepared by:

Janice Atwood-Petkovski

Respectfully submitted,

Janice Atwood-Petkovski
Commissioner of Legal and Administrative Services
and City Solicitor

**ALLEGED CONTRAVENTIONS
RE: BERNIE DIVONA CAMPAIGN EXPENSES— NOVEMBER 13, 2006 ELECTION**

Section(s) alleged to have been contravened by donor or defining a requirement of the Act	Section(s) alleged to have been contravened by candidate DiVona	Paragraphs in Affidavit of Carlo DeFrancesca	Paragraphs in Affidavit of Paul De Buono
<u>Issue 1</u> 70(3) 71(1), 72	70(7) 69(1)(m)	8 7-11 (MAIO/MAYSTAR)	
<u>Issue 2</u> 71(1), 72	69(1)(m)	12-14 (NATIVIO)	
<u>Issue 3</u> 70(3) 71(1), 72	69(1)(m)	15-18 (NHD/SORBARA)	
<u>Issue 4</u> 70(3) 71(1), 72	69(1)(m)	19-22 (BAIF)	
<u>Issue 5</u> 66(1)(2).1 and .2 67(1)	69(1)(d) 69(1)(k)	24 "contribution of goods" \$4,654.80	
<u>Issue 6</u> 66(1), (2), (3) 67 (1), (2)	69(1)(e) 69(1)(f), (m)	25 "office expenses"	
<u>Issue 7</u> 66(1), (2).1(iii), (3)(b) 67(1), (2).2 70(3), (4).3	69(1)(d), (f), (g)		3-21 "newsletter"

Income Tax Act (Canada), s. 256

Associated
corporations

256. (1) For the purposes of this Act, one corporation is associated with another in a taxation year if, at any time in the year,

(a) one of the corporations controlled, directly or indirectly in any manner whatever, the other;

(b) both of the corporations were controlled, directly or indirectly in any manner whatever, by the same person or group of persons;

(c) each of the corporations was controlled, directly or indirectly in any manner whatever, by a person and the person who so controlled one of the corporations was related to the person who so controlled the other, and either of those persons owned, in respect of each corporation, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock thereof;

(d) one of the corporations was controlled, directly or indirectly in any manner whatever, by a person and that person was related to each member of a group of persons that so controlled the other corporation, and that person owned, in respect of the other corporation, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock thereof; or

(e) each of the corporations was controlled, directly or indirectly in any manner whatever, by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one or more persons who were members of both related groups, either alone or together, owned, in respect of each corporation, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock thereof.

Definition of
"specified class"

(1.1) For the purposes of subsection 256(1), "specified class" means a class of shares of the capital stock of a corporation where, under the terms or conditions of the shares or any agreement in respect thereof,

(a) the shares are not convertible or exchangeable;

(b) the shares are non-voting;

(c) the amount of each dividend payable on the shares is calculated as a fixed amount or by reference to a fixed percentage of an amount equal to the fair market value of the consideration for which the shares were issued;

(d) the annual rate of the dividend on the shares, expressed as a percentage of an amount equal to the fair market value of the consideration for which the shares were issued, cannot in any event exceed,

(i) where the shares were issued before 1984, the rate of interest prescribed for the purposes of subsection 161(1) at the time the shares were issued, and

(ii) where the shares were issued after 1983, the prescribed rate of interest at the time the shares were issued; and

(e) the amount that any holder of the shares is entitled to receive on the redemption, cancellation or acquisition of the shares by the corporation or by any person with whom the corporation does not deal at arm's length cannot exceed the total of an amount equal to the fair market value of the consideration for which the shares were issued and the amount of any unpaid dividends thereon.

Control, etc.

(1.2) For the purposes of this subsection and subsections 256(1), 256(1.1) and 256(1.3) to 256(5),

(a) a group of persons in respect of a corporation means any two or more persons each of whom owns shares of the capital stock of the corporation;

(b) for greater certainty,

(i) a corporation that is controlled by one or more members of a particular group of persons in respect of that corporation shall be considered to be controlled by that group of persons, and

(ii) a corporation may be controlled by a person or a particular group of persons notwithstanding that the corporation is also controlled or deemed to be controlled by another person or group of persons;

(c) a corporation shall be deemed to be controlled by another corporation, a person or a group of persons at any time where

(i) shares of the capital stock of the corporation having a fair market value of more than 50% of the fair market value of all the issued and outstanding shares of the capital stock of the corporation, or

(ii) common shares of the capital stock of the corporation having a fair market value of more than 50% of the fair market value of all the issued and outstanding common shares of the capital stock of the corporation

are owned at that time by the other corporation, the person or the group of persons, as the case may be;

(d) where shares of the capital stock of a corporation are owned, or deemed by this subsection to be owned, at any time by another corporation (in this paragraph referred to as the "holding corporation"), those shares shall be deemed to be owned at that time by any shareholder of the holding corporation in a proportion equal to the proportion of all those shares that

(i) the fair market value of the shares of the capital stock of the holding corporation owned at that time by the shareholder

is of

(ii) the fair market value of all the issued shares of the capital stock of the holding corporation outstanding at that time;

(e) where, at any time, shares of the capital stock of a corporation are property of a partnership, or are deemed by this subsection to be owned by the partnership, those shares shall be deemed to be owned at that time by each member of the

partnership in a proportion equal to the proportion of all those shares that

(i) the member's share of the income or loss of the partnership for its fiscal period that includes that time

is of

(ii) the income or loss of the partnership for its fiscal period that includes that time

and for this purpose, where the income and loss of the partnership for its fiscal period that includes that time are nil, that proportion shall be computed as if the partnership had had income for that period in the amount of \$1,000,000;

(f) where shares of the capital stock of a corporation are owned, or deemed by this subsection to be owned, at any time by a trust,

(i) in the case of a testamentary trust under which one or more beneficiaries were entitled to receive all of the income of the trust that arose before the date of death of one or the last surviving of those beneficiaries (in this paragraph referred to as the "distribution date") and no other person could, before the distribution date, receive or otherwise obtain the use of any of the income or capital of the trust,

(A) where any such beneficiary's share of the income or capital therefrom depends on the exercise by any person of, or the failure by any person to exercise, any discretionary power, those shares shall be deemed to be owned at any time before the distribution date by the beneficiary, and

(B) where clause 256(1.2)(f)(i)(A) does not apply, those shares shall be deemed to be owned at any time before the distribution date by any such beneficiary in a proportion equal to the proportion of all those shares that the fair market value of the beneficial interest in the trust of the beneficiary is of the fair market value of the beneficial interests in the trust of all those beneficiaries,

(ii) where a beneficiary's share of the accumulating income or capital therefrom depends on the exercise by any person of, or the failure by any person to exercise, any discretionary power, those shares shall be deemed to be owned at that time by the beneficiary, except where subparagraph 256(1.2)(f)(i) applies and that time is before the distribution date,

(iii) in any case where subparagraph 256(1.2)(f)(ii) does not apply, a beneficiary shall be deemed at that time to own the proportion of those shares that the fair market value of the beneficial interest in the trust of the beneficiary is of the fair market value of all beneficial interests in the trust, except where subparagraph 256(1.2)(f)(i) applies and that time is before the distribution date, and

(iv) in the case of a trust referred to in subsection 75(2), the person referred to in that subsection from whom property of the trust or property for which it was substituted was directly or indirectly received shall be deemed to own those shares at that time; and

(g) in determining the fair market value of a share of the capital stock of a

corporation, all issued and outstanding shares of the capital stock of the corporation shall be deemed to be non-voting.

Parent deemed to own shares

(1.3) Where at any time shares of the capital stock of a corporation are owned by a child who is under 18 years of age, for the purpose of determining whether the corporation is associated at that time with any other corporation that is controlled, directly or indirectly in any manner whatever, by a parent of the child or by a group of persons of which the parent is a member, the shares shall be deemed to be owned at that time by the parent unless, having regard to all the circumstances, it can reasonably be considered that the child manages the business and affairs of the corporation and does so without a significant degree of influence by the parent.

Options and rights

(1.4) For the purpose of determining whether a corporation is associated with another corporation with which it is not otherwise associated, where a person or any partnership in which the person has an interest has a right at any time under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

(a) to, or to acquire, shares of the capital stock of a corporation, or to control the voting rights of shares of the capital stock of a corporation, the person or partnership shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to own the shares at that time, and the shares shall be deemed to be issued and outstanding at that time; or

(b) to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of a corporation, the person or partnership shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed at that time to have the same position in relation to control of the corporation and ownership of shares of its capital stock as if the shares were redeemed, acquired or cancelled by the corporation.

Person related to himself, herself or itself

(1.5) For the purposes of subsections 256(1) to 256(1.4) and 256(1.6) to 256(5), where a person owns shares in two or more corporations, the person shall as shareholder of one of the corporations be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

Exception

(1.6) For the purposes of subsection 256(1.2) and notwithstanding subsection 256(1.4), any share that is

(a) described in paragraph (e) of the definition "term preferred share" in subsection 248(1) during the applicable time referred to in that paragraph, or

(b) a share of a specified class within the meaning of subsection 256(1.1)

shall be deemed not to have been issued and outstanding and not to be owned by any shareholder and an amount equal to the greater of the paid-up capital of the share and the amount, if any, that any holder of the share is entitled to receive on the redemption, cancellation or acquisition of the share by the corporation shall be deemed to be a liability of the corporation.

Corporations associated through a third corporation

(2) Where two corporations

(a) would, but for this subsection, not be associated with each other at any time,

and

(b) are associated, or are deemed by this subsection to be associated, with the same corporation (in this subsection referred to as the "third corporation") at that time,

they shall, for the purposes of this Act, be deemed to be associated with each other at that time, except that, for the purposes of section 125, where the third corporation is not a Canadian-controlled private corporation at that time or elects, in prescribed form, for its taxation year that includes that time not to be associated with either of the other two corporations, the third corporation shall be deemed not to be associated with either of the other two corporations in that taxation year and its business limit for that taxation year shall be deemed to be nil.

Anti-avoidance

(2.1) For the purposes of this Act, where, in the case of two or more corporations, it may reasonably be considered that one of the main reasons for the separate existence of those corporations in a taxation year is to reduce the amount of taxes that would otherwise be payable under this Act or to increase the amount of refundable investment tax credit under section 127.1, the two or more corporations shall be deemed to be associated with each other in the year.

Saving provision

(3) Where one corporation (in this subsection referred to as the "controlled corporation") would, but for this subsection, be associated with another corporation in a taxation year by reason of being controlled, directly or indirectly in any manner whatever, by the other corporation or by reason of both of the corporations being controlled, directly or indirectly in any manner whatever, by the same person at a particular time in the year (which corporation or person so controlling the controlled corporation is in this subsection referred to as the "controller") and it is established to the satisfaction of the Minister that

(a) there was in effect at the particular time an agreement or arrangement enforceable according to the terms thereof, under which, on the satisfaction of a condition or the happening of an event that it is reasonable to expect will be satisfied or happen, the controlled corporation will

(i) cease to be controlled, directly or indirectly in any manner whatever, by the controller, and

(ii) be or become controlled, directly or indirectly in any manner whatever, by a person or group of persons, with whom or with each of the members of which, as the case may be, the controller was at the particular time dealing at arm's length, and

(b) the purpose for which the controlled corporation was at the particular time so controlled was the safeguarding of rights or interests of the controller in respect of

(i) any indebtedness owing to the controller the whole or any part of the principal amount of which was outstanding at the particular time, or

(ii) any shares of the capital stock of the controlled corporation that were owned by the controller at the particular time and that were, under the agreement or arrangement, to be redeemed by the controlled corporation or purchased by the person or group of persons referred to in subparagraph 256(3)(a)(ii),

the controlled corporation and the other corporation with which it would otherwise be so associated in the year shall be deemed, for the purpose of this Act, not to be associated with each other in the year.

Saving provision

(4) Where one corporation would, but for this subsection, be associated with another corporation in a taxation year by reason of both of the corporations being controlled by the same executor, liquidator or trustee and it is established to the satisfaction of the Minister

(a) that the executor, liquidator or trustee did not acquire control of the corporations as a result of one or more estates or trusts created by the same individual or two or more individuals not dealing with each other at arm's length, and

(b) that the estate or trust under which the executor, liquidator or trustee acquired control of each of the corporations arose only on the death of the individual creating the estate or trust,

the two corporations are deemed, for the purposes of this Act, not to be associated with each other in the year.

Idem

(5) Where one corporation would, but for this subsection, be associated with another corporation in a taxation year, by reason only that the other corporation is a trustee under a trust pursuant to which the corporation is controlled, the two corporations shall be deemed, for the purposes of this Act, not to be associated with each other in the year unless, at any time in the year, a settlor of the trust controlled or is a member of a related group that controlled the other corporation that is the trustee under the trust.

Control in fact

(5.1) For the purposes of this Act, where the expression "controlled, directly or indirectly in any manner whatever," is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection referred to as the "controller") at any time where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation, except that, where the corporation and the controller are dealing with each other at arm's length and the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the controller regarding the manner in which a business carried on by the corporation is to be conducted, the corporation shall not be considered to be controlled, directly or indirectly in any manner whatever, by the controller by reason only of that agreement or arrangement.

Idem

(6) For the purposes of this Act, where a corporation (in this subsection referred to as the "controlled corporation") would, but for this subsection, be regarded as having been controlled or controlled, directly or indirectly in any manner whatever, by a person or partnership (in this subsection referred to as the "controller") at a particular time and it is established that

(a) there was in effect at the particular time an agreement or arrangement enforceable according to the terms thereof, under which, on the satisfaction of a condition or the happening of an event that it is reasonable to expect will be satisfied or happen, the controlled corporation will

(i) cease to be controlled, or controlled, directly or indirectly in any manner

whatever, as the case may be, by the controller, and

(ii) be or become controlled, or controlled, directly or indirectly in any manner whatever, as the case may be, by a person or group of persons, with whom or with each of the members of which, as the case may be, the controller was at the particular time dealing at arm's length, and

(b) the purpose for which the controlled corporation was at the particular time so controlled, or controlled, directly or indirectly in any manner whatever, as the case may be, was the safeguarding of rights or interests of the controller in respect of

(i) any indebtedness owing to the controller the whole or any part of the principal amount of which was outstanding at the particular time, or

(ii) any shares of the capital stock of the controlled corporation that were owned by the controller at the particular time and that were, under the agreement or arrangement, to be redeemed by the controlled corporation or purchased by the person or group of persons referred to in subparagraph 256(6)(a)(ii),

the controlled corporation is deemed not to have been controlled by the controller at the particular time.

Simultaneous control

(6.1) For the purposes of this Act and for greater certainty,

(a) where a corporation (in this paragraph referred to as the "subsidiary") would be controlled by another corporation (in this paragraph referred to as the "parent") if the parent were not controlled by any person or group of persons, the subsidiary is controlled by

(i) the parent, and

(ii) any person or group of persons by whom the parent is controlled; and

(b) where a corporation (in this paragraph referred to as the "subject corporation") would be controlled by a group of persons (in this paragraph referred to as the "first-tier group") if no corporation that is a member of the first-tier group were controlled by any person or group of persons, the subject corporation is controlled by

(i) the first-tier group, and

(ii) any group of one or more persons comprised of, in respect of every member of the first-tier group, either the member, or a person or group of persons by whom the member is controlled.

Application to control in fact

(6.2) In its application to subsection (5.1), subsection (6.1) shall be read as if the references in subsection (6.1) to "controlled" were references to "controlled, directly or indirectly in any manner whatever,".

Acquiring control

(7) For the purposes of subsections 10(10), 13(21.2) and 13(24), 14(12) and 18(15), sections 18.1 and 37, subsection 40(3.4), the definition "superficial loss" in section 54, section 55, subsections 66(11), 66(11.4) and 66(11.5), 66.5(3) and 66.7(10) and 66.7(11), section 80, paragraph 80.04(4)(h), subsections 85(1.2) and 88(1.1) and

88(1.2), sections 111 and 127, subsection 249(4) and this subsection,

(a) control of a particular corporation shall be deemed not to have been acquired solely because of

(i) the acquisition at any time of shares of any corporation by

(A) a particular person who acquired the shares from a person to whom the particular person was related (otherwise than because of a right referred to in paragraph 251(5)(b)) immediately before that time,

(B) a particular person who was related to the particular corporation (otherwise than because of a right referred to in paragraph 251(5)(b)) immediately before that time,

(C) an estate that acquired the shares because of the death of a person, or

(D) a particular person who acquired the shares from an estate that arose on the death of another person to whom the particular person was related, or

(ii) the redemption or cancellation at any particular time of, or a change at any particular time in the rights, privileges, restrictions or conditions attaching to, shares of the particular corporation or of a corporation controlling the particular corporation, where each person and each member of each group of persons that controls the particular corporation immediately after the particular time was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to the corporation

(A) immediately before the particular time, or

(B) immediately before the death of a person, where the shares were held immediately before the particular time by an estate that acquired the shares because of the person's death;

(b) where at any time 2 or more corporations (each of which is referred to in this paragraph as a "predecessor corporation") have amalgamated to form one corporate entity (in this paragraph referred to as the "new corporation"),

(i) control of a corporation is deemed not to have been acquired by any person or group of persons solely because of the amalgamation unless it is deemed by subparagraph 256(7)(b)(ii) or 256(7)(b)(iii) to have been so acquired,

(ii) a person or group of persons that controls the new corporation immediately after the amalgamation and did not control a predecessor corporation immediately before the amalgamation is deemed to have acquired immediately before the amalgamation control of the predecessor corporation and of each corporation it controlled immediately before the amalgamation (unless the person or group of persons would not have acquired control of the predecessor corporation if the person or group of persons had acquired all the shares of the predecessor corporation immediately before the amalgamation), and

(iii) control of a predecessor corporation and of each corporation it controlled immediately before the amalgamation is deemed to have been acquired

immediately before the amalgamation by a person or group of persons

(A) unless the predecessor corporation was related (otherwise than because of a right referred to in paragraph 251(5)(b)) immediately before the amalgamation to each other predecessor corporation,

(B) unless, if one person had immediately after the amalgamation acquired all the shares of the new corporation's capital stock that the shareholders of the predecessor corporation, or of another predecessor corporation that controlled the predecessor corporation, acquired on the amalgamation in consideration for their shares of the predecessor corporation or of the other predecessor corporation, as the case may be, the person would have acquired control of the new corporation as a result of the acquisition of those shares, or

(C) unless this subparagraph would, but for this clause, deem control of each predecessor corporation to have been acquired on the amalgamation where the amalgamation is an amalgamation of

(I) two corporations, or

(II) two corporations (in this subclause referred to as the "parents") and one or more other corporations (each of which is in this subclause referred to as a "subsidiary") that would, if all the shares of each subsidiary's capital stock that were held immediately before the amalgamation by the parents had been held by one person, have been controlled by that person;

(c) subject to paragraph 256(7)(a), where 2 or more persons (in this paragraph referred to as the "transferors") dispose of shares of the capital stock of a particular corporation in exchange for shares of the capital stock of another corporation (in this paragraph referred to as the "acquiring corporation"), control of the acquiring corporation and of each corporation controlled by it immediately before the exchange is deemed to have been acquired at the time of the exchange by a person or group of persons unless

(i) the particular corporation and the acquiring corporation were related (otherwise than because of a right referred to in paragraph 251(5)(b)) to each other immediately before the exchange, or

(ii) if all the shares of the acquiring corporation's capital stock that were acquired by the transferors on the exchange were acquired at the time of the exchange by one person, the person would not control the acquiring corporation;

(d) where at any time shares of the capital stock of a particular corporation are disposed of to another corporation (in this paragraph referred to as the "acquiring corporation") for consideration that includes shares of the acquiring corporation's capital stock and, immediately after that time, the acquiring corporation and the particular corporation are controlled by a person or group of persons who

(i) controlled the particular corporation immediately before that time, and

(ii) did not, as part of the series of transactions or events that includes the

disposition, cease to control the acquiring corporation,

control of the particular corporation and of each corporation controlled by it immediately before that time is deemed not to have been acquired by the acquiring corporation solely because of the disposition; and

(e) where at any time all the shares of the capital stock of a particular corporation are disposed of to another corporation (in this paragraph referred to as the "acquiring corporation") for consideration that consists solely of shares of the acquiring corporation's capital stock and, immediately after that time,

(i) the acquiring corporation is not controlled by any person or group of persons, and

(ii) the fair market value of the shares of the capital stock of the particular corporation is not less than 95% of the fair market value of all the assets of the acquiring corporation,

control of the particular corporation and of each

corporation controlled by it immediately before that time

is deemed not to have been acquired by the acquiring

corporation solely because of the disposition.

Deemed exercise of right

(8) Where at any time a taxpayer acquires a right referred to in paragraph 251(5)(b) in respect of a share and it can reasonably be concluded that one of the main purposes of the acquisition is

(a) to avoid any limitation on the deductibility of any non-capital loss, net capital loss, farm loss or any expense or other amount referred to in subsection 66(11), 66.5(3) or 66.7(10) or 66.7(11),

(b) to avoid the application of subsection 10(10) or 13(24), paragraph 37(1)(h) or subsection 55(2) or 66(11.4) or 66(11.5), paragraph 88(1)(c.3) or subsection 111(4), 111(5.1), 111(5.2) or 111(5.3), 181.1(7) or 190.1(6),

(c) to avoid the application of paragraph (j) or (k) of the definition "investment tax credit" in subsection 127(9),

(d) to avoid the application of section 251.1, or

(e) to affect the application of section 80,

the taxpayer is deemed to be in the same position in relation to the control of the corporation as if the right were immediate and absolute and as if the taxpayer had exercised the right at that time for the purpose of determining whether control of a corporation has been acquired for the purposes of subsections 10(10) and 13(24), section 37, subsections 55(2), 66(11), 66(11.4) and 66(11.5), 66.5(3), 66.7(10) and 66.7(11), section 80, paragraph 80.04(4)(h), subparagraph 88(1)(c)(vi), paragraph 88(1)(c.3), sections 111 and 127 and subsections 181.1(7), 190.1(6) and 249(4), and in determining for the purpose of section 251.1 whether a corporation is controlled by any

person or group of persons.

Corporations without
share capital

(8.1) For the purposes of subsections 256(7) and 256(8),

(a) a corporation incorporated without share capital is deemed to have a capital stock of a single class;

(b) each member, policyholder and other participant in the corporation is deemed to be a shareholder of the corporation; and

(c) the membership, policy or other interest in the corporation of each of those participants is deemed to be the number of shares of the corporation's capital stock that the Minister considers reasonable in the circumstances, having regard to the total number of participants in the corporation and the nature of their participation.

Date of acquisition of
control

(9) For the purposes of this Act, where control of a corporation is acquired by a person or group of persons at a particular time on a day, control of the corporation shall be deemed to have been acquired by the person or group of persons, as the case may be, at the commencement of that day and not at the particular time unless the corporation elects in its return of income under Part I filed for its taxation year ending immediately before the acquisition of control not to have this subsection apply.

S.C. 1970-71-72, c. 63, s. 1"256"; S.C. 1977-78, c. 1, s. 99; S.C. 1977-78, c. 32, s. 56; S.C. 1980-81-82-83, c. 48, s. 112; S.C. 1980-81-82-83, c. 140, s. 131; S.C. 1984, c. 1, s. 106; S.C. 1986, c. 6, s. 127; S.C. 1987, c. 46, s. 71; S.C. 1988, c. 55, s. 192; S.C. 1994, c. 7, Sch. II, s. 198; S.C. 1994, c. 21, s. 114; S.C. 1995, c. 3, s. 55; S.C. 1995, c. 21, s. 44; S.C. 1998, c. 19, s. 246; S.C. 2001, c. 17, ss. 194, 231.