

**A PALLIUM LEGACY MANAGEMENT  
VEHICLE**

***Select Options, Strategic Issues, Next Steps***

**May 2004**

**Petrine Consulting Inc. and Bennett Jones LLP**

***Petrine Consulting Inc  
Box 21053 584 Riverbend Square  
Edmonton, Alberta T6H 2V4***

May 15, 2004

Dr. Jose Pereira, MBChB, CA, CCFP  
Pallium Project Leader c/o  
FMC Palliative Care Office  
Suite 710, 3031 Hospital Drive NW  
Calgary, Alberta  
T2N-2T8

Re: Pallium Legacy Management Vehicle Initiative (LMVI)

Dear Dr. Pereira

Please find enclosed the report of the Pallium Legacy Management Vehicle Initiative prepared by myself and Martin Kratz of Bennett Jones LLP. As outlined in Schedule A of the engagement letter approved by Executive Management Committee February 18, 2004, the report contains:

- Options to guide the Executive Management Committee in considering structures for a legacy management vehicle
- A list of strategic issues which must be considered early in order to protect the capacity building assets of Pallium and minimize relational, legal and financial exposure and liability, and
- A suggested sequencing of key steps to adequately engage establishment of the chosen legacy management for Pallium.

As this completes the terms of our agreement, on behalf of Mr. Kratz and myself, thank you for the opportunity to have advised the Pallium Executive Management Committee in this important and timely matter.

Yours truly,

Frances Picherack, President  
cc. Dr. Anthony Fields, Executive Sponsor  
Michael Aherne, Director, Initiative Development  
Martin Kratz, Bennett Jones LLP

## TABLE OF CONTENTS

<b>A. BACKDROP AND INTRODUCTION.....</b>	<b>3</b>
<b>B. BASIC ASSUMPTIONS.....</b>	<b>5</b>
<b>C. SCOPE.....</b>	<b>7</b>
<b>D. OPTIONAL STRUCTURES.....</b>	<b>7</b>
<b>E. THE INCORPORATED PALLIUM PROJECT.....</b>	<b>10</b>
<b>F. TAX STATUS OF THE PALLIUM PROJECT.....</b>	<b>12</b>
<b>G. ROLE OF THE STAKEHOLDERS.....</b>	<b>22</b>
<b>H. FUNDRAISING AND SUSTAINABILITY.....</b>	<b>23</b>
<b>I. RELATED BUSINESS.....</b>	<b>24</b>
<b>J. INTELLECTUAL PROPERTY CONSIDERATIONS.....</b>	<b>27</b>
<b>K. TRANSITIONAL AND OPERATIONAL ISSUES.....</b>	<b>29</b>
<b>L. NEXT STEPS.....</b>	<b>33</b>
<b>M. SUMMARY.....</b>	<b>33</b>
<b>APPENDIX A.....</b>	<b>34</b>
<b>APPENDIX B.....</b>	<b>35</b>
<b>APPENDIX C.....</b>	<b>36</b>
<b>APPENDIX D.....</b>	<b>37</b>

## A. BACKDROP AND INTRODUCTION

In its foundational planning documents, the mission of The Pallium Project (herein referred to as Pallium) states that, “Pallium exists to significantly improve access to education and training resources in palliative care for Canadian health care professionals and the Canadian public.” (RRHII Project Report, p.12). Pallium was initially conceived as health human resources, continuing professional development (CPD), applied research and development project. Pallium’s early focus was on conceiving and testing innovations in learning in professional practice, especially in rural and remote locations in Canada, leading to improved quality and access to hospice palliative care.

The CPD model of Pallium has been substantively distinguished from traditional continuing education for health professionals from the outset. The orientation is on transcending education as the sole strategy for aiding learning and change, and facilitating a range of learning as a means to increased capacity building for hospice palliative care.

The early participants in Pallium recognized its mission would be most effectively realized through collaborations of knowledge workers naturally or “organically” ordered and functionally arrayed in a collective of shared interests; with implied and assumed shared access to project development and resources; and shared accountability for achieving results. These knowledge workers were initially academics and health service delivery leaders, but have evolved to include members of the voluntary sector and various levels of government.

The deliberate design and evolution of Pallium to-date has embraced the *Communities of Practice* construct, which recognizes the “importance of communities of practice as the social fabric of knowledge” (Wenger, 1998, 2004). The *Community of Practice* vision shaping the diversity of pathways and resources for continuing professional development endorsed by Pallium recognized “the idea that learning does not come solely from educational interventions, and that learning, especially workplace and professional practice learning, is experiential and fundamentally social.” Pallium clearly recognizes communities of practice “as the social fabric of knowledge.” (Wenger, 1998, 2004, p.1).

The *Communities of Practice* construct is an emerging and powerful way of thinking about, organizing for and acting on the shared development and utilization of knowledge. *Communities of Practice* lends itself quite well to hospice palliative care as *domain of knowledge*. As the domain is a relatively young arena, the resources in Canada for teaching and researching in the field are relatively scarce, and the population health challenges inherent in providing quality hospice palliative care continue to present with universal themes (e.g., reduction of undue pain and suffering, end-of-life care issues, etc.).

*Communities of Practice* are facilitated by information and communications technologies that make traditional organizational boundaries and relationships porous. *Communities of Practice* invite opportunities for the shared and collective development and utilization of new knowledge among Community members residing in many organizations. With this porous nature and highly relational

orientation, however, *Communities of Practice* invite new challenges to how knowledge is appropriately owned, and access to knowledge shared and sustained.

At Phase 2, Pallium is proceeding, by design, as a capacity-building project that embraces and further leverages the relational and knowledge development and utilization efficiencies of *Communities of Practice*. The Phase 2 project design also recognized that, “the most pressing enabler in moving towards a capacity-building orientation for knowledge, skill, and attitude development is the design of social infrastructures that foster workplace and professional learning and contribute to better patient care. (RRHII Project Report, p. 23).

Pallium continues to advance the emergent framework of “an accountable and responsive palliative care system-linked development.” Now a clearly intersectoral and transdisciplinary initiative, Pallium has grown the intended conceptual and relational infrastructure to support the stakeholder network and partnership relationships required to advance its mission.

However, as has been pointed out by Health Canada reviewers of the Pallium application to the Primary Health Care Transition Fund (PHCTF) in August 2003, sustainability cannot be assumed or taken for granted. As astutely recognized by the Pallium Executive Management Team, the management challenge of ensuring the proper infrastructure for sustainability and for Pallium to endure with vitality into the future requires prospective and anticipatory intervention. This intervention has been identified as the Legacy Management Vehicle Initiative (LMVI) and is the subject of this technical report.

Aimed at the strategic or oversight level, the LMVI is intended to describe governance and structural parameters to support the processes that need to be in place to establish a possible Pallium legacy associated, in particular, with its Phase 2 activities.

Pallium faces a classic 21<sup>st</sup> century management challenge, that of *managing paradox* recognized by Drucker (1999), Nesbitt (2000), and Prahalad and Ramaswamy (2004) among others. Pallium combines a collaboration-based *Community of Practice* vision for knowledge development and utilization and a technologically advanced and innovative set of operating processes. It also develops services and products to achieve its mission; and must manage significant public funds to achieve its accountability. In this complex “basket of activities, in our view Pallium will have to straddle and indeed accommodate unusually coupled arrangements such as *shared access without shared ownership*. Sustainability will in large part be a function of the continued participation of a diverse and inter-sectoral base of collaborators who perceive they are treated as equals within the *Community of Practice* and enjoy the full benefits and respect of a collective contribution. Especially important to this dynamic is the belief that members continue to accrue benefits that exceed the relational, transactional and economic costs of participation within the Community.

The LMVI deliberately focuses explicitly and formally on such matters as sustainability and responsible ownership and use of Community-generated assets, in contrast to the assumed and implied intentions of the collaborative network and relational aspects at the forefront of Pallium developments to date. Ironically, however, it does so to ensure the very flexibility that can only be preserved through clarity and a common understanding of such parameters by all at the outset.

Assuming shared access to Pallium capacity-building resources is the continued expectation and sustainability a commitment; the legal and financial accountability of Pallium requires clarification of ownership. It also requires early and thoughtful attention to other realized or assumed contractual and relationship matters to animate the *Community of Practice* for anticipated Phase 2 results.

The LMVI is intended to inform the necessary asset ownership, intellectual property and dispute resolution aspects of Pallium. This is important in order to manage the associated legal, financial and relational risks for the Stakeholders and new collaborators. It will do so in keeping with state of the art legal regimes informed by experience-based anticipatory legacy challenges, in arrangements such as Pallium.

The Pallium Legacy Management Vehicle must also be designed to embrace the strategic intent and infrastructure design agreed to by Stakeholders, funders and the executive sponsors for Phase 2. Along with this intent, project design elements are enshrined in the letters of support to the PHCTF project application and the Health Canada Contribution Agreement on behalf of Pallium with the administrative hosting authority. With the project development process well underway since late 2003, Pallium is already affecting significant CPD and associated hospice palliative care resource development.

Against this backdrop, this LMVI Report outlines select structural options for a legacy management vehicle that directly addresses Health Canada's concerns about sustainability, identifies associated strategic issues, and suggests a sequence of steps for going forward (consistent with the scope of this engagement). This LMVI report is intended to facilitate a dialogue among the Stakeholders of the Pallium Project, a consequent refinement and recommitment to the Pallium Project, and Stakeholder decisions that provide the basis on which a long-term legacy of Pallium can be realized.

## **B. BASIC ASSUMPTIONS**

In consideration of the materials provided to by Pallium, and the discussion with the Executive Management Committee, we have based our analysis and review upon the following assumptions.

1. The Pallium Project is an initiative to develop, maintain and expand learning and system-performance in the domain of hospice palliative care through a *Community of Practice*. More details on the Pallium Project are attached as Exhibit A.
2. The Pallium Project consists of numerous stakeholders from health care institutions, universities, voluntary organizations and governments, primarily in Western Canada as well as select national organizations ("Stakeholders"). Those Stakeholders are listed in Exhibit B.
3. All Stakeholders are equal in the Pallium Project and expected to participate in a legacy management vehicle in a manner that maintains, reinforces and continually energizes their participation and involvement in collectively developing and disseminating new hospice palliative care knowledge and capacity-building resources.

4. While all Stakeholders are equal in the Pallium Project in principle and as a core value; it is expected that given the nature of the diverse group of Stakeholders and the nature of their organizations, activities and skills; each Stakeholder will be able to contribute to and benefit from the activities of the Pallium Project in different ways. It is further acknowledged that inherent structural authority, accountability and influence (or status) differences exist among Stakeholders. It is also assumed that the LMVI will serve to reinforce the value of equal status within the *Community of Practice*, so as to facilitate the continued collaboration required for sustainability.
5. The objective of the LMVI is to identify key strategies and suitable options for a legal structure (within the scope of this engagement) which accommodates the desires of the Pallium Project and the Stakeholders to achieve:
  - (a) The potential for sustainability of Pallium; its mission, vision and values; and if established legally, its objects;
  - (b) An entity which can own the assets arising from Pallium, consistent with the governance intent of the Project. That being collective development using public investment for collective benefit in the public interest;
  - (c) An entity which can provide governance and accountability to the Stakeholders for the activities of Pallium;
  - (d) An entity which can serve to attract additional resources in order to support the maintenance and logical evolution of Pallium for the benefit of the Stakeholders and the public;
  - (e) The protection of the constituent Stakeholder organizations from potential liability arising from the activities of Pallium;
  - (f) Elements critical to Pallium are that the legacy management vehicle should facilitate the development of processes for:
    - Stakeholder network partnership support and involvement
    - an accountability framework
    - ethical integrity
    - legal soundness and due diligence in operations
    - financial viability
    - tax considerations
    - mission advancement
    - continued leadership leveraging

## **C. SCOPE**

Legacy management, and a suitable vehicle(s) for such, has been identified as a fundamental sustainability issue and essential to long-term infrastructure development and asset management for Pallium. The intent is to leverage Pallium from a strategic, mission sensitive, Stakeholder supportive infrastructure (the principal elements) to an ethically and legally sound, duly constituted and sustainable vehicle that retains these principal elements post Phase 2.

The scope of this report is to identify a possible structure that might operate as that legacy management vehicle. Strategic issues that emerge will also be identified, as will key steps for going forward.

## **D. OPTIONAL STRUCTURES**

We identify below several optional structures for the legacy management vehicle.

### **1. Unincorporated Option**

One option is to avoid the steps of incorporation and maintain the existing structure of Pallium as a loose association of the Stakeholders currently with a single Stakeholder designated as an administrative hosting authority. This is the status quo.

#### **Advantages**

The only advantage of this approach is that the modest costs and effort associated with incorporation are saved.

#### **Disadvantages**

Without the governance structure provided through the corporate form there is a substantial likelihood that internal conflict would arise and decision-making would likely be paralyzed.

Without an entity to hold the assets resulting from the Pallium Project, if Pallium were to continue beyond the current funding terms and be viable, one or more of the Stakeholders would be required to hold those assets. Difficulties are likely to arise as that Stakeholder would be placed under obligations owed to the other Stakeholders<sup>1</sup>. Further difficulties would arise in respect of the tax and financial impact of transactions conducted with the assets of the Pallium Project. Until expressly identified and agreed, it will remain unclear whether the Stakeholder operating as the administrative hosting authority assumes risk and exposure on behalf of the collective by default, in conjunction with the use of assets by the collective.

---

<sup>1</sup> This would require one or more of the Stakeholders to act as agents or trustees for the other Stakeholders.

An informal association of Stakeholders will not have in place the established pathways for process arrangements between Pallium and individual Stakeholders or between Pallium and third parties outside the Stakeholder network.

An informal association of the Stakeholders is likely to be less effective as a vehicle for future fundraising.

The shared access of resources among Stakeholders cannot assist in deciding ownership, shared or otherwise of Pallium assets, which will inevitably need to be, addressed for asset allocation and risk management purposes.

Inevitably, over time, it is likely that the spirit of equality, which is at the core of the Pallium Project, may be lost.

From an overall management perspective, lack of official or legally established status narrows the range of options for achievement and likely increases the financial as well as relational costs of results achievement, asset protection, risk management in general and management of governance or accountability challenges or crises.

The main disadvantage of the unincorporated Pallium Project is that the Pallium is not a legal entity, and has no standing at law. Governance, administration and other dealings with entities such as health authorities, universities, and health industry organizations will be somewhat awkward as a non-entity, and predictably lead to increase costs as formalizations of “one off” arrangements become necessary for management or financial accountability purposes. The status quo also makes it difficult to responsibly address the concerns about sustainability of Pallium.

### ***RECOMMENDATION 1***

***As a result, in our view, we cannot recommend the status quo as likely to result in the development of a legacy from the Pallium Project.***

## **2. Incorporation Option**

The Pallium Project could be incorporated.

### **Advantages**

There are several advantages of the corporate form, which appear to address some of the needs of the Pallium Project and its Stakeholders. These include:

- members or shareholders can have a sense of real "ownership" and involvement;
- the Stakeholders are almost all organized in this form (or very familiar with this structure) and so would be very familiar with its structures and processes;

- the corporate decision making process provides focus, structure, clear boundaries or parameters and well established governance principles in order to guide the actions of the directors and ultimately management of the entity;
- as a separate legal entity the corporation is able to own property and deal with that property, hence providing a vehicle for the legacy developed from the Pallium Project;
- a major advantage of the corporate form is limited liability for the Stakeholders thereby insulating their operations from any potential liability or issues arising from the Pallium Project or its operations;
- issues of conflict of interest and the rules for decision making in an ethical framework are typically set out in the bylaws or incorporating documents of the corporation and therefore provide a fundamental foundation for decision-making reflecting such ethical principles. As the corporate form does require true governance responsibility from its board of directors, that real responsibility drives prudent decision making and due diligence in the activities of the board of directors for the benefit of the Stakeholders who we presume will be the shareholders or members.
- the corporate form provides an accountability framework that is well established, balancing between the needs for operational autonomy and a policy direction and the protection of the interests of the Stakeholders, shareholders or members;
- the corporate structure easily accommodates a variety of governance models which could embrace the community of practice infrastructure for Pallium, and support the partnership driven relational model and the resultant “value chain” for management and operations that embraces, while at the same time allowing the governance and due diligence attributes outlined above.
- in the event of conflict among the Stakeholders regarding the use of the assets of the Pallium Project, it is preferable to have such conflict managed through an independent structure accountable to all Stakeholders such as corporate form rather than relying on the good will of one or more Stakeholders in order to act appropriately;
- the corporate form has other advantages including:
  - a governance framework and structure which can accommodate the registration of the organization as a charity (if desired);
  - the potential, in appropriate circumstances, of claiming scientific research and experimental developments tax credits under the *Income Tax Act* for eligible research activities;
  - the necessary structure for matching assistance programs under the National Research Council's Industry Research Assistance Program and other assistance programs;

- inherent in the corporate form is a dispute resolution structure addressing conflict among Stakeholders (who we presume would be the shareholders or members of the corporation) and a set of well established rules to address such conflict;
- the rules surrounding the departure or addition of new Stakeholders are well understood and predictable and would occur within an accountability framework as determined by the Stakeholders.
- Conversion of the Pallium Project to a corporation should be relatively inexpensive and simple provided that all Stakeholders agree and cooperate.
- A corporation may more readily deal with other private, public and governmental entities

### **Disadvantages**

The only material disadvantage of this approach is that there will be some initial costs and effort associated with incorporation and that the corporation will need to conduct annual filings in order to maintain its existence. We note, however, that these matters also assist in providing the governance structure, which is of benefit to the Stakeholders.

Strategically, the challenge of integrating the culture developed to date at Pallium with a now legally established governance and accountability framework will require concerted dialogue and transparency with Stakeholders as well as strategic change management interventions especially by the executive sponsors to date. This matter will be discussed below.

### ***RECOMMENDATION 2***

***As a result, it is our recommendation that the Pallium Project consider incorporation as the preferred form in order to establish a legacy management vehicle.***

### **E. AN INCORPORATED PALLIUM PROJECT**

An incorporated Pallium Project may acquire the rights and own the intellectual property developed under the Pallium Project and such trademarks as the Pallium Project may adopt. It would control the distribution and use of intellectual property and deal with any licensing and infringements, if any.

When formed, the Corporation could arrange for transfer of rights to the pre-existing works or projects. It is important for purposes of establishing ownership and control that the Pallium Project is under a single, identifiable entity (as distinct from a disparate group of Stakeholders who created the Pallium Project).

The corporate structure further supports the needs of the Stakeholders of the Pallium Project. The desire of the Pallium Project is for a governance and accountability structure. The corporate form, as noted above, provides that structure in a predictable and clearly defined manner.<sup>2</sup>

A corporate form is key to the potential for continued existence and indeed, to sustainability. This is relevant to the Pallium Project's desire for some continuity so that the assets developed from the Pallium Project could continue to be of enduring benefit. The advantage of the corporate structure is a clear decision making framework in respect of decisions regarding use or disposal of such assets. Further, the corporate form has the potential of continuing indefinitely by contrast with the status quo, which is dependent upon the continued good will, cooperation and participation of each of the Stakeholders in the present informal association.

An incorporated Pallium Project will be able to more readily deal with other private, public, and government entities and organizations outside Pallium. It will be more identifiable, more transparent, and more easily able to promote the objects and purposes for which the Pallium Project was created. The main aspect of the fundraising advantage, mentioned above, is the ability to be a registered charity, discussed in detail below, and the ability to qualify under certain federal and provincial and perhaps local assistance programs.

To mark the development of the Pallium Project to incorporated status that establishes it as a legally sanctioned entity enabling the rights and clarifying the duties associated with the above circumstances, Stakeholders may wish to differentiate the newly established arrangements through a name change. The modified and renamed Pallium, by design, would be the integration of the Pallium Project as currently formulated, with a Pallium that has the attributes and capacity of the intended legacy management vehicle.

### **A For Profit or Not For Profit Pallium Project**

A legacy management vehicle could be conducted either in a "for profit manner" or a "not for profit manner". The "for profit" structures, with few exceptions<sup>3</sup>, would be taxable.

In order to achieve public support for the broad mission of the Pallium Project and to avoid the appearance of self-benefit or preferential treatment among the Stakeholders and prospective donors, a not for profit and non-taxable structure is recommended. As will be seen from the discussion below, operating in a "not for profit" manner would be a fundamental requirement in order to achieve registered charity status. Further, the appearance or the incidence of conflict of interest can be reduced through a "not for profit" structure. A further advantage of a "not for profit" structure is that taxes, otherwise payable, can be applied to the objects of the Pallium Project.

---

<sup>2</sup> Further, if the Pallium Project were incorporated as a registered charity then further accountability requirements would need to be met. These are discussed in more detail in the discussion of Registrable Charitable Status below.

<sup>3</sup> For examples, if a provincial or federal Crown held the ownership of the Corporation, then the entity may not be taxable. Such an arrangement was not considered as it is less likely to accommodate the needs for equality of all Stakeholders and may result in operational and other difficulties.

The Pallium Project may be incorporated either as an Alberta or a Canada corporation, in either case as a "not for profit company." Incorporation may be under either of the *Alberta Companies Act* or similar legislation in other provinces, or the *Canada Corporations Act*.

The Pallium Project may be incorporated as a federal corporation under Part II of the Canada Corporations Act for the purpose of carrying on without pecuniary gain to its members, objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, *or the like objects*.

The By-laws of the Corporation would incorporate the objects of the Pallium Project, mission, vision and values, and other usual governance provisions. Its members (or shareholders, as applicable) would be, initially we suggest, the Stakeholder organizations and a board of directors would be elected/appointed by them.

As additional Stakeholders wished to join, they could become members (or shareholders, as applicable) subject to the By-laws and incorporating documents of the incorporated Pallium Project.

### ***RECOMMENDATION 3***

***As a result, it is our recommendation that the Pallium Project consider operating on a not-for-profit basis and seek incorporation of a not-for-profit legacy management vehicle.***

## **F.TAX STATUS OF THE PALLIUM PROJECT**

It is preferable if the Pallium Project could be tax exempt so that all resources could be dedicated to achievement of its objects.

### **1. Types of Tax-Exempt Entities**

An organization can be exempt from income tax under Part I of the *Income Tax Act* if the organization is either (1) a Non Profit Organization ("NPO") as set out under the NPO exemption,<sup>4</sup> or (2) a registered charity within the meaning of the Act.<sup>5</sup>

The primary advantage of achieving registered charity status is that the organization can issue tax receipts for the donations that it receives. An NPO cannot issue tax receipts unless it is a specific type of organization set out in the Act (for example, an amateur athletic association). Some organizations, however, choose not to register as a charity because they do not wish to incur the expenses involved in applying for and maintaining registered charity status. Also, some organizations wish to avoid the restrictions that the Act imposes on the operations of charities. Some of these restrictions, such as disbursement quotas, are discussed below.

---

<sup>4</sup> Paragraph 149(1)(f).

<sup>5</sup> Paragraph 149(1)(l).

## II. Non-Profit Organizations

### A. Achieving And Maintaining NPO Status

The various requirements that an organization must meet in order to be tax-exempt as an NPO include the following.<sup>6</sup>

- The organization must be a “club, society or association”. This expression has been interpreted as broad enough to include a corporation.
- The organization cannot, in the opinion of the Minister, be a “charity” under the Act. If the organization does not wish to register as a charity, but still wishes to be tax-exempt, it should ensure that it does not fall within the definition of “charity”. In order to do this, the organization may have to change its constating documents.
- The organization must be organized and operated exclusively for a purpose other than creating profit, such as social welfare, civic improvement, pleasure, or recreation. CRA has stated that an organization will not be operating exclusively for non-profit purposes if it promotes a member’s services or goods and receives a commission. Also, if the organization accumulates assets greater than the amount the organization needs to carry on its non-profit activities, the organization will be in danger of being considered to have a secondary purpose of creating profit.
- The *Income Tax Act* requires that no part of the income of the organization be paid or made available to any proprietor, member, or shareholder of the organization. This requirement will not be violated only because salary or expenses are paid to directors, proprietors, members, or shareholders, as long as the amounts are reasonable and the salary is no more than the amount that the person would have been paid by an arm’s length organization for similar services. However, if, for example, the organization has the power at any time to declare and pay dividends out of income, it will not be an NPO.
- If an organization is an NPO in one year, it must be careful to maintain its status as an exempt entity in each subsequent taxation year. For example, if the organization carries on any business for the purpose of profit or pays a dividend to a shareholder, then it will have to pay income tax for that taxation year.

We note that the above requirements appear to coincide with what we understand is the spirit or objectives of the Pallium Project.

---

<sup>6</sup> Paragraph 149(1)(l).

## **B. NPO Filing Requirements**

An NPO must file a Non-Profit Organization Information Return (Form T1044) within 6 months of the end of its fiscal period if:<sup>7</sup>

- the organization's assets (valued in accordance with generally accepted accounting principles) at the end of its preceding fiscal period exceeded \$200,000; or
- the total of all interest, rent, royalties, and taxable dividends received or receivable by the organization exceeded \$10,000 in the taxation year.

Once the organization has to file an information return in one year, it will have to continue filing information returns in each subsequent year.

A corporation must file regular corporate income tax returns even if the corporation is an NPO.<sup>8</sup>

## **III. Registered Charities**

### **A. Types of Charities**

Upon receiving an application for registration as a charity, the Minister will determine whether the organization falls within the definition of "charity" under the Act. A "charity" includes a "charitable organization", a "public foundation", and a "private foundation".<sup>9</sup>

#### **1. Charitable Organization**

A charitable organization must devote its resources exclusively to charitable activities carried on by it. A charitable organization carries out the "good works" within its own organization and generally does not fund other charities. A registered charity is registered or designated as a charitable organization if:

- it devotes all of its resources to charitable activities carried on by itself;
- no part of its income is payable to, or otherwise available for, the personal benefit of any of its proprietors, members, shareholders, trustees, or settlers;

"Arm's length"<sup>10</sup> is generally defined to mean "related persons." "Related persons" include (1) individuals connected by blood or marriage, and (2) a corporation and

- (i) a person who controls the corporation,

---

<sup>7</sup> Subsection 149(12).

<sup>8</sup> Subsection 150(1).

<sup>9</sup> Subsection 149.1(1).

<sup>10</sup> Subsection 251(1).

- (ii) a person who belongs to a group of persons who are related to one another which controls the corporation, and
- (iii) a person related to a person described in (i) or (ii).

While a charitable organization is generally a "doer", it can fund other registered charities within certain limits.<sup>11</sup> Generally stated, a charitable organization cannot gift more than 50% of its expenditures to qualified donees (which includes registered charities) in a year or it may be recharacterized as a foundation. An organization is thus required to be more active than a foundation in carrying on charitable activities directly.

## 2. Public Foundation

All charitable foundations must be constituted and operated exclusively for charitable purposes. A public foundation is generally a funding body. In other words, charitable foundations can generally transfer money to other registered charities that carry out or, in turn, fund activities carried on by others. Both charitable organizations and public foundations must have an arm's length board and broad funding sources. The distribution of funds (without limit) to others involved in charitable activities will meet the test of being a charitable purpose for a charitable foundation, whether public or private. Therefore, a foundation has greater flexibility than a charitable organization in meeting its disbursement obligations under the Act by making gifts to other charities, as discussed below.

An organization will be a public foundation if:

- (a) it is constituted and operated exclusively for charitable purposes;
- (b) it is constituted as a corporation or a trust;
- (c) more than 50% of its directors/ trustees/ officers deal at arm's length with
  - (i) each other,
  - (ii) each of the other directors/trustees/officers, and
  - (iii) each person who, and each member of a group of persons who do not deal with each other at arm's length that, has contributed more than 50% of the charity's capital; and
- (d) the organization is not controlled in any way by

---

<sup>11</sup> Subsection 149.1(6).

- (i) any person who has contributed more than 50% of the charity's capital, or
- (ii) any group of persons who do not deal at arm's length with each other, if any member of the group does not deal at arm's length with a person who has contributed more than 50% of the charity's capital; and
- (iii) no part of its income is payable to, or otherwise available for, the personal benefit of any of the organization's proprietors, members, shareholders, trustees, or settlers.

### 3. Private Foundation

The distinction between a private foundation on the one hand and a public foundation or charitable organization on the other is essentially a private/public one. Generally, a private foundation has directors or trustees of whom 50% or more of the members do not deal at arm's length with each other. An organization is a private foundation if it meets the following requirements:

- it is constituted and operated exclusively for charitable purposes;
- it is constituted as a corporation or a trust;
- no part of its income is payable to, or otherwise available for, the personal benefit of any of the organization's proprietors, members, shareholders, trustees, or settlers; and
- it is not a public foundation.

#### **B. Charitable Purposes and Activities**

The *Income Tax Act* does not define "charity" or "charitable purposes". Qualifications for charitable status in Canada are based on old English legislation, as interpreted by the common law. The Supreme Court of Canada recently undertook a review of the common law of charities in the case of *Vancouver Society of Immigrant & Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10. The case stated that in order for an organization to be a charity, the purposes of the organization must fall within one of the following categories:

- relief of poverty,
- advancement of education,
- advancement of religion, or
- other purposes beneficial to the community.

The last category has been interpreted narrowly by both CRA and the courts, and generally requires some analogy to the purposes set out in the historical case of *McGovern v. Attorney General*, [1882] Ch. 321:

the relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; repairs or bridges, ports, havens, causeways, churches, seabanks and highways, education and preferment of orphans; relief, stock or maintenance for houses of corrections; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

In the application for registration with the CRA, the purposes expressed must be wholly charitable and must provide a public benefit. Generally speaking, the objects of a charity must be of a public character and must be sufficiently specific to enable a court to categorize the entity under one of the above four heads of charity.

In its Guide T4063(E) entitled *Registering a Charity for Income Tax Purposes*, the CRA describes the following standards that a charity must meet to qualify for registration:

[A]n organization must be established and operated for charitable purposes, and it must devote its resources to charitable activities. The charity must be resident in Canada, and cannot use its income to benefit its members. [Emphasis Added]

In addition to the requirement that a charity not benefit its members, a charity also has to meet a public benefit test. To qualify under this test, an organization must show that:

- its activities and purposes provide a tangible benefit to the public;
- those people who are eligible for benefits are either the public as a whole, or a significant section of it, in that they are they are not a restricted group or one where members share a private connection; and
- the charity's activities must be legal and must not be contrary to public policy.

The following factors may disqualify an organization from registration:

- existence of private benefit;<sup>12</sup>

---

<sup>12</sup> No part of a charity's income can be payable or otherwise available to personally benefit any member of the organization. However, payments for services rendered or normal operating costs are not caught here.

- political purposes or activities;
- objects are not fully charitable; or
- "related business" issues.<sup>13</sup>

In our view it appears that raising awareness and providing education concerning hospice palliative care may be considered a charitable purpose by the CRA. The CRA has stated that the “advancement of education” category includes “undertaking research in a recognized field of knowledge” where the research is carried out for educational purposes and the results are made available to the public. The organization must provide a full and fair presentation of the facts, and therefore cannot be an “advocacy group”. The objects of Pallium Project may, possibly, fall under the "educational" or the “purposes beneficial to the community” category. *This will need to be reviewed in more detail.*

You may wish to discuss your potential charitable registration with other registered charities that engage in similar activities, if such charities exist. A list of registered charities is available on the CRA website.

### **C. First Steps In Seeking Charitable Registration**

The CRA requires a prospective charity to complete Form T2050. In addition to a description of the organization’s programs and activities, the applicant must include the amount it expects to receive and spend in the next year, the assets it expects to have by the end of the next fiscal period, the liabilities it expects to owe by the end of the next fiscal period, financial transactions with directors, trustees, and founders, and financial statements.

In our experience CRA usually takes between one to four months to process the application for registration.

### **D. Annual Disbursement Quotas**

The Canadian taxpayer is, in a financial sense, the “partner” of every registered charity. Accordingly, to ensure that charities do what they are supposed to, the Act sets out the minimum amount that charities are required to spend on charitable activities every year.<sup>14</sup> A charity may meet these disbursement requirements by either engaging in charitable activities itself or disbursing money to other charities. In the case of a charitable organization, only 50% of the disbursements can be to other charities, while a foundation can disburse an unlimited portion of its disbursements to other charities. Generally stated, the purpose of a disbursement quota is:

- to ensure that most of a charity's funds are used to further its charitable purposes and activities,

---

<sup>13</sup> Charities are restricted as to what types of business, if any, they can carry on.

<sup>14</sup> Subsection 149.1(1).

- to discourage charities from accumulating excessive funds, and
- to keep other expenses at a reasonable level.

Disbursement rules vary depending on the type of charity. In order to determine what the disbursement quota of a particular charity is, one must first determine whether the charity is a charitable organization or a charitable foundation.

1. Quota for Charitable Organizations

The basic rule is that a charitable organization must spend an amount equal to at least 80% of the income for which it issued official donation receipts in the immediately preceding taxation year. Accordingly, \$4 out of every \$5 received by the charity must be expended on charitable activities. Non-receipted income (for example, gifts of volunteer labour or sales of items, such as daffodils) is not included in this 80% amount. This rule is subject to a number of exceptions. In particular, where donation receipts are issued for Exempt Gifts (discussed below), those amounts are not included in the 80% amount.

2. Quota for Charitable Foundations

The disbursement quota for public foundations is a complicated formula but generally requires that 80% of prior year receipted donations (excluding Exempt Gifts) and 4.5% of the value of invested assets be expended each year.

3. Exempt Gifts

An Exempt Gift is a gift made to a charity that does not trigger a requirement to disburse the normal 80% in a fiscal year. Such gifts include:

- a gift by way of bequest or inheritance;
- a gift which is subject to a trust that it, or property substituted for it, be held for at least ten years; or
- a gift from another registered charity.

Exempt Gifts form part of a charitable organization's capital, but no disbursement is required to be made in respect of such gifts. Charitable foundations only have to expend 4.5% of the prescribed value of such capital annually, rather than 80% of such amounts. Therefore, these gifts are particularly valuable for charities as they can be retained and form an endowment. To the extent that any such gifts generate income, this would not be receipted income, and therefore the disbursement quota would not apply to that income.

Gifts that do not form part of the disbursement quota when received because they were by way of bequest or inheritance or were subject to a ten-year trust form part of the disbursement quota in the year they are spent.

Most charitable organizations receive funds from a variety of sources including those set out above. Therefore, it is necessary for the accounts to be sufficiently detailed to track exempt gifts and income generated therefrom. Clearly if a charitable organization can raise funds through exempt gifts or through activities for which no charitable receipt is given, it will be able to accumulate wealth without an offsetting obligation to disburse the funds. This will provide a charitable organization with some flexibility in terms of its financial obligations under the Act.

#### 4. Eligible and Ineligible Expenses

It is helpful to identify those expenses that are non-charitable and, therefore, not included in meeting the disbursement quota. Although the CRA's guidelines in this area are vague, the following lists (which are not exhaustive) should assist in categorizing expenditures.

Ineligible Expenses Include:

- salaries for accounting and clerical staff,
- rent,
- offices supplies and equipment,
- general legal and accounting fees,
- fund raising expenses,
- expenditures made on political activities,<sup>15</sup> and
- any gifts of capital to another charity.

Eligible Expenses Include:

- any portion of staff salary allocable to carrying out the charity's charitable activities (such as preparing for and making presentations at educational conferences, meeting with potential donors, etc.) and
- other expenses incurred directly to carry out the charity's charitable purposes (e.g. travel expenses, professional fees (legal, tax, valuation) directly related

---

<sup>15</sup> Subsection 149.1(1.1). See also IC-87-1.

to obtaining a donation, and promotional expenses) that are not ineligible expenses.

Staff of the Pallium Project should keep track of time spent on eligible and ineligible activities in a daily journal to provide evidence of the allocation of salary for these purposes. Any other expenditures that are directly related to the charity's charitable purposes should also be identified as such in the charity's accounts.

If a charity buys assets specifically for its own use (such as computers or furniture), such assets should be recorded as assets of the charity and would not qualify as an eligible expense for purposes of determining whether its disbursement quota has been met.

#### **E. Filing Requirements for Registered Charities**

Every registered charity must file Form T3010, Registered Charity Information Return, and financial statements within six months from the end of each fiscal period. The CRA usually sends out reminder notices to each charity prior to the date on which filing is required, as well as one reminder notice after that date. Still, the most common reason for deregistration of a registered charity in Canada is failure to file Form T3010.

If a corporation was a registered charity throughout the taxation year, it does not have to file a corporate tax return.<sup>16</sup>

#### **F. Consequences of Not Registering as a Charity**

If Pallium Project is not a “charity” in the opinion of CRA, then it may be non-taxable as an NPO if it meets all of the NPO requirements. However, based on our preliminary review (which should be investigated further) it appears that there is a reasonably good chance that it is a “charity”. Further, before undertaking fundraising efforts, Pallium Project should consider registering as a charity so that it can issue tax receipts entitling the donor to an income tax deduction.

#### ***RECOMMENDATION 4***

***It is our recommendation that the Pallium Project review in more detail its eligibility to secure registration and operate as a registered charity.***

#### ***RECOMMENDATION 5***

***It is our recommendation that the Pallium Project consider seeking to register either the legacy management vehicle and/or a second fundraising entity (e.g. a Pallium Foundation) it may seek to establish as registered charities.***

---

<sup>16</sup> Subsection 150(1.1).

#### **IV. GST MATTERS**

Depending on the nature of the activities that Pallium Project will be undertaking, it may be required to collect and remit Goods and Services Tax (“GST”). You should review a guide published by CRA, entitled, *GST/HST Information for Non-Profit Organizations*, which should help you to determine whether Pallium Project must collect and remit GST. Note that donations and gifts are not generally subject to GST unless the donor receives goods or services of value in return.

#### **G. ROLE OF THE STAKEHOLDERS**

If the Pallium Project proceeds with the recommendation for incorporation, then in our view the role of the Stakeholders would be to become the initial members (or shareholders) of that corporation. As a result the Stakeholders would have the right to approve certain major transactions, changes to the objects of the organization, changes to the name or certain other fundamental changes.

This role for Stakeholders would provide a sense of ownership and ultimate accountability for the actions of the corporation.

The corporation would be governed by a Board of Directors elected by the Stakeholders (members). If required by the Stakeholders, there could be rules set in the by-laws or other incorporating documents specifying representational criteria for members of the Board of Directors.

The Board of Directors would appoint management, who would be the officers responsible for the day-to-day operations of the Pallium Project.

In addition to the above corporate roles, of course, each individual Stakeholder may well have other relationships or interests with the Pallium Project. Some of these additional relationships could be:

1. as a supplier or developer of educational content or materials for dissemination through the Pallium Project;
2. as a recipient of educational materials, programs or information disseminated by the Pallium Project;
3. as a research performer in respect of specific research conducted by the Pallium Project;
4. as a contributor of other resources, facilities or materials for the benefit of the Pallium Project;
5. as a recipient of resources materials or information facilitated through the Pallium Project;
6. as a source of standard setting, consensus building or identification of best practices in the field of palliative care; and

7. as otherwise is consistent with the objects of the Pallium Project.

It may be, for example, that in respect of major policy research conducted by the Pallium Project, that one or more committees including representatives of Stakeholder organizations, would conduct such directed activities.

### **RECOMMENDATION 6**

***It is recommended that each of the above and all other relationships between the Stakeholders and the Pallium Project should be clear, well understood by all parties and documented in order to avoid misunderstanding and to support the accountability framework desired by the Stakeholders.***

## **H. FUNDRAISING AND SUSTAINABILITY**

An important early decision for the Pallium Project will be to determine the basis on which the materials developed through the Pallium Project are made available both to Stakeholders and to third parties. In order for the Pallium Project to be sustainable long term, there will need to be consideration for funding sources other than government assistance. Some of those funding sources that the Pallium Project might consider may include:

1. donations from individuals, corporations or charitable foundations<sup>17</sup> including the development of bequest gifting and other gifting programs<sup>18</sup>;
2. the use of other applicable federal, provincial or local assistance<sup>19</sup>;
3. fees charged for services provided by the Pallium Project (such as for example, course fees for educational programs put on or facilitated by the Pallium Project, sales of educational or informational materials, etc.);
4. licence fees or royalties charged in respect of use of intellectual property developed by the Pallium Project (for example, in a situation where tools may be developed and licencing is preferred option to sale of the applicable material);
5. affiliation payments of third parties who wish to associate their products or services with the Pallium Project (such as for example, if a Stakeholder or other third party developed

---

<sup>17</sup> In order to provide tax deductibility for individuals and to facilitate the receipt of transfers from charitable foundations the Pallium Project should be a registered charity or have equivalent status. It is noted that contributions by businesses may be deductible either as business expenses, if appropriate, or as charitable donations. Note also the comments above regarding charitable fundraising. The Pallium Project will need to comply with applicable fundraising legislation in each jurisdiction in which it operates.

<sup>18</sup> As noted above, it may be that the Pallium Project contemplates at some stage the incorporation of a second focused fundraising vehicle in order to carry out these fundraising objectives. We have alluded that such a Pallium Foundation, above. A more comprehensive examination of this option is beyond of the scope of this report.

<sup>19</sup> See notes above regarding use of SRED tax programs, NRC IRAP and other assistance.

materials in which to use the trademarks or otherwise associate themselves with the reputation and goodwill of the Pallium Project, a licence or a royalty fee may be appropriate); and

6. a possibility of periodic or ongoing contributions by professionals in the palliative care field (such as, for example, contributions by applicable professional organizations<sup>20</sup> in respect of support of the development and maintenance of a body of knowledge or standard of care applicable to the palliative care industry.

As is apparent from the above list of alternatives, a key early decision for the Pallium Project will be to consider the actual cost of producing materials which benefit the palliative care sector and then making a decision whether or not Stakeholders should receive any discount or preferential access to such material and the impact on long term sustainability of such programs or the development of such materials.

### ***RECOMMENDATION 7***

***It is recommended that the Stakeholders and the Pallium Project should have a candid discussion about and establish a viable economic basis for the development of educational, research and practice materials that are made available to the Stakeholders.***

### **I. RELATED BUSINESS**

Among its considerations the Pallium Project would need to be clear on what its “business” would be. If charitable status is sought then there are limitations. A private foundation may not carry on a business. A charitable organization may carry on certain limited business activities. Section 149.1(2) of the Act provides, in part, as follows:

**(2) Revocation of registration of charitable organization** – The Minister may, in the manner described in section 168, revoke the registration of a charitable organization.

(a) carries on a business that is not a related business of that charity; or

...

"Related business" is defined in subsection 149.1(1) as follows:

**"related business"**, in relation to a charity, includes a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment;

---

<sup>20</sup> Such fees would ultimately be passed on as additional fees to the professionals themselves.

This definition and paragraph 149.1(2) (a) provide, in effect, permission for charitable organizations to operate a business and includes a business unrelated to the charity that is substantially all operated by volunteers. The CRA takes the position that "substantially all" means 90% or more.

For many years, charities have been concerned about the vagueness of the term "related". Many charities relied on the Federal Court of Appeal decision in *Alberta Institute on Mental Retardation*<sup>21</sup> where the Court appeared to accept the "destination test", which provides that if the funds generated by an unrelated business are used for charitable purposes, the business is treated as being related for purposes of the Act. Leave to appeal to the Supreme Court of Canada was denied in that case. However, a recent judgment of the Federal Court of Appeal in the *Earth Fund v MNR*<sup>22</sup> was released December 16, 2002. Earth Fund appealed from a refusal to be registered as a charity. One of its objects was to start an environmental lottery with proceeds funding environmental work of other Canadian charities. Earth Fund relied on the *Alberta Institute* decision. The Court held:

I do not accept the argument of Counsel for the appellant that the Alberta Institute case is authority for the proposition that any business is a "related business" of a charitable fund action if all of the profits of the business are dedicated to the foundation's charitable objects." [at para 30].

...

By contrast, the appellant proposes to do nothing except market and sell lottery tickets in a manifestly commercial arrangement that will, if all goes as planned, result in a profit that will be donated, I assume, to qualified donees. The appellant is in exactly the same position as any commercial enterprise that commits itself to apply its profits to charitable causes. Such a commitment, by itself, does not derogate from the commercial nature of the activity that generates the profit. Given the particular facts of this case, the Minister was justified in concluding that the appellant's proposed lottery operation would be a business of the appellant that is not a "related business", and thus would not qualify as a charitable activity. [at para 31].

As a result of the *Earth Fund* decision; our understanding of the meaning of the term "related business" is significantly more limited. The risk to a charity of falling offside the "related business" test is potential deregistration by the Minister.

Policy Statement CPS-019, *What is a Related Business?* (the "Guidelines") are intended to set out the administrative position of the CRA on the meaning of the term "related business". Their position is not necessarily conclusive on the law. However, with only two cases to provide guidance and the threat of deregistration as the consequence, Canadian registered charities should consider this administrative position as having great weight.

---

<sup>21</sup> [1987] 2 C.T.C. 70

<sup>22</sup> [2002] F.C.J. No. 1769

The Guidelines indicate that CRA considers a "business" to mean "commercial activity, or more precisely, the seeking of revenue by providing goods and services to people in exchange for a fee".<sup>23</sup> The Guidelines, a copy of which is appended to this letter, discuss five activities that they do not generally consider to be business activities: donations, converting donations to cash, fundraising events, occasional business transactions (i.e. a sponsorship) and managing investments.

If an activity is a "business", the CRA states that a "related" business will satisfy a two-part test:

- (a) the business is linked to the charity's purpose, and
- (b) the business is subordinate to that purpose.

The first part of the two-part test, "linked to the charity's purpose", is further broken down into three parts:

- "a necessary and concomitant of core programs", such as hospital parking lots, gift shops at an art gallery or dining halls at Stakeholders residences;
- "an off-shoot of a core program", which means a by-product of the charity's core programs. Examples include grain grown as part of an educational component of a historical village sold to a mill or sale of a CD recording of a church choir's Christmas service.
- "a use of excess capacity", such as rental of a parking lot when not required for church services.

Note that these examples are of a small-scale related business, i.e. they would not generate much revenue compared to the charity's total budget.

The phrase "subordinate to the charity's purpose" is described as having several components and the more strongly the answer to these questions below is "no", the more likely the Guidelines postulate that the CRA will conclude the business activity is not "related business" but a separate non-charitable purpose in its own right:

- Relative to the charity's operations as a whole, does the business activity receive a minor portion of the charity's attention and resources?
- Is the business integrated into the charity's operations, rather than acting as a self-contained unit?
- Do the organization's charitable goals continue to dominate its decision-making?

---

<sup>23</sup> A distinction should be made between making an investment in a business and carrying on a business. As an example, the Guidelines state that running an apartment business on a commercial basis would be carrying on a business while investing in shares of a business that carried on the same business would be an investment and income from property.

- Does the organization continue to operate exclusively charitable purposes by, among other things, permitting no element of private benefit to enter in its operations?

Further review is required to consider the impact of the related business issues on Pallium's plans for a proposed charity if applicable. There are structures available which would permit a charity to own or benefit from another entity that carries on business.

### **RECOMMENDATION 8**

*It is recommended that Pallium review the scope of its proposed activities and consider the extent to which "other business" it may wish to carry on might affect its desire for registered charitable status.*

## **J. INTELLECTUAL PROPERTY CONSIDERATIONS**

Essential to the long-term viability of a legacy management vehicle is that there will be some assets to be accumulated for the benefit of the Stakeholders and the general public. Among those assets are intellectual property rights.

In the discussion, below on intellectual property matters, we have assumed that the principles of equality and the desire to create a legacy will mediate against self interest of any particular Stakeholder and the desire of all Stakeholders will be to cooperate in good faith to further establish the Pallium Project so that it holds the intellectual property rights relating to the programs it has and will develop and operate.

It is anticipated that the Stakeholders and the Pallium Project will wish to develop an intellectual property management strategy and implement such strategy with an intellectual property management agreement addressing terms as discussed below. A concept involved with such a strategy might include: "Program Intellectual Property" meaning all Intellectual Property that may be made, conceived, created or developed in carrying out the work of Pallium..

Elements of such an intellectual property strategy are likely to include terms as described below.

### **Ownership of Program Intellectual Property**

Each of the Stakeholders would disclose to Pallium all Program Intellectual Property, promptly following such Program Intellectual Property being made, conceived, created, developed or first reduced to practice.

Pallium would own all Program Intellectual Property.

Stakeholders would transfer and assign all Program Intellectual Property to the Pallium Project and the Stakeholders would ensure that all of their employees, contractors and consultants who work on the Pallium activities:

Assign and transfer all rights in the Program Intellectual Property to the Pallium Project;

waive any moral rights as authors of Program Intellectual Property in favour of the Pallium Project; and

are subject to confidentiality obligations.

In addition to Program Intellectual Property, there may be Stakeholders who have previously developed materials that they wish to make available to the Pallium Project or even assign to the Pallium Project. In each such case we recommend that a specific agreement set out the terms and conditions of such arrangements.

### **Management, Protection and Responsible Use of Program Intellectual Property**

The Pallium Project would be responsible for and shall take all reasonable steps to manage and protect the Program Intellectual Property. The Stakeholders would cooperate with and assist the Pallium Project in managing and protecting the Program Intellectual Property.

The Pallium Project would have a process to consult with the Stakeholders on the steps to be taken for the purpose of protecting the Program Intellectual Property, including whether or not to file patent applications and the countries in which to file such patent applications (where applicable).

If the Pallium Project decides not to take any particular step or steps to protect any Program Intellectual Property, and if one or more of the other Stakeholders wishes such step or steps to be taken, there would be a process to address the applicable protection activity and associated costs.

If any Stakeholder believes that the Program Intellectual Property or any part thereof is being infringed by any other person, they would promptly advise the Pallium Project and provide any evidence of infringement that is reasonably available.

The Stakeholders would cooperate, including rendering all reasonable assistance by providing documents in their possession and making witnesses available as are or may be required in the conduct of any proceeding.

Pallium would likely be required to agree not dispose of or encumber their rights and interest in the Program Intellectual Property without consent of the Stakeholders.

Pallium would have the exclusive right to grant licences of the Program Intellectual Property, or any portions thereof, including associations with and purposes for which licenses can extended and IP used, in the interest of protecting the Pallium brand. All such licences shall be on reasonable commercial terms. All revenue earned from such licences shall be applied to the programs of the Pallium Project.

The issue of the basis (including economic terms) on which Stakeholders obtain access to and use Program Intellectual Property would be subject to the considerations of the Stakeholders as defined, above, under the topic of fundraising and sustainability<sup>24</sup>.

### **Use Rights**

It would need to be determined whether or not the Stakeholders shall be entitled to a non-exclusive, royalty-free licence to use the Program Intellectual Property. We understand that there is a culture of sharing among the Stakeholders – it will be important to discuss how this might work as exploitation of the Program Intellectual Property is likely to be an important ongoing revenue or “in kind” currency exchange source of Pallium.

The Pallium Project would need to develop internal policies to support the decisions made by the Stakeholders on these intellectual property issues as well as to reduce liability exposure for third party claims.

### **RECOMMENDATION 9**

*It is recommended that the Pallium Project should establish an intellectual property strategy that supports the long-term economic basis for the continued development of educational, research and practice materials that are made available to the Stakeholders.*

### **RECOMMENDATION 10**

*It is recommended that the Stakeholders and the Pallium Project should have a candid discussion about Stakeholder use and access of Program Intellectual Property and document that agreement among all Stakeholders.*

### **RECOMMENDATION 11**

*It is recommended that the Pallium Project should develop internal policies and practice to:*

- (a) *maximize its ability to recognize and protect program Intellectual Property,*
- (b) *identify and address third party infringement and*
- (c) *reduce the risks of violation or infringement of the rights of others.*

### **RECOMMENDATION 12**

*It is recommended that the Pallium Project put in place agreements, policies and other documentation in order to clearly, effectively and efficiently manage and control Program Intellectual Property.*

---

<sup>24</sup> Item H above.

## **K. TRANSITIONAL AND OPERATIONAL ISSUES**

### **1. Establishing Basic Terms**

The terms upon which the new legal entity is created might well need to be developed with the Stakeholders. Subject to the consensus of the Stakeholder, they may include:

The Pallium Project shall be a not-for-profit entity;

The Pallium Project shall seek to be registered as a registered charity;

if the Pallium Project becomes bankrupt or insolvent; or if any steps are taken or proceedings commenced for the dissolution, winding up or termination of Pallium Project's existence or the liquidation of its assets; or a trustee, receiver, receiver-manager or like person is appointed with respect to the business or assets of Pallium Project; or Pallium Project purports to assign or transfer ownership of all or any part of the Program Intellectual Property; the Stakeholders may require the assignment and transfer of the Program Intellectual Property back to the Stakeholders<sup>25</sup> jointly and equally to again be administered in accordance with the terms of the incorporating or other applicable fundamental document; and

all revenues earned from the use or licensing of the Program Intellectual Property shall be retained by Pallium Project and used for the further development of the Program Intellectual Property.

There must be a process under which a Stakeholder may be added or may withdraw from the Pallium Project.

There should be agreement among the Stakeholders upon the use rights and economic basis upon which they obtain access to and use of Program Intellectual property.

Arrangements should be made to assume the liability of existing commitments and agreements from the members of the Pallium Project who have undertaken these actions for the Stakeholders.

2. Specific changes may need to be considered by the Executive Management Committee, and made regarding the arrangements with the current hosting authority for the Pallium Project. It is our recommendation that the current (and if applicable past) agreements held for the benefit of the Pallium Project by the hosting Authority be assigned post incorporation to the newly established Pallium project entity.

3. Some bridging or facilitated assistance that reconciles the robustly established shared and voluntary partnership approach in Phase 1 with the now integrated formalized entity approach will

---

<sup>25</sup> Or assignment to some other party, as agreed by the Stakeholders.

likely be required. While transparency and inclusiveness require this, the real opportunity is to put into perspective the extent to which the LMVI, if successful, frees or liberates the Stakeholder network to continue its *Community of Practice* development focus. In keeping with the financial and results accountability all partners have already committed as Stakeholders to Phase 2, from a management perspective, Stakeholders might consider Pallium 11 like the “Umbrella Results-based Management and Accountability Framework”) increasingly appearing in multiple stakeholder arrangements in the public and third sectors, and by the Treasury Board of Canada.

4. While not necessarily disagreeing with the incorporated establishment of Pallium, some Stakeholders may wish to not formally become shareholders in the incorporated Pallium Project. The Executive Management Committee should anticipate how this may manifest, if at all, and be prepared to facilitate options that retain an agreed level of inclusiveness that facilitates collaborative and relational aspects of the intended Pallium legacy.

5. Upon incorporation of the Pallium Project there would be a number of important steps to be taken. These would include:

1. the adoption of all pre-incorporation contracts and activities by the Pallium Project;

(a) An important matter would be the assignment of the existing rights and obligations under the current and, if applicable, past funding agreements. In addition the newly incorporated entity should consider assumption of the liabilities incurred by applicable Stakeholders under such pre-existing agreements and commitments;

(b) Assignment of the tangible and intangible works and materials developed by Stakeholders for the Pallium Project;

(c) Acceptance and confirmation of the pre-incorporation acts taken by the Stakeholders and other individuals (such as the Executive Management Committee and the current hosting Authority);

(d) The Pallium Project shall assume and become responsible for all of pre-existing obligations related to the Pallium Project that have been assumed by certain of the Stakeholders and other individuals (such as the Executive Management Committee and the current hosting authority );

2. the adoption of operational policies in respect of the governance and day-to-day operations of the Pallium Project including development of policies in respect of:

(a) mission, vision and values of the Pallium Project

(b) compliance with applicable privacy legislation;

(c) intellectual property policies in respect of both the development and use of materials;

- (d) an audit and fiscal review process in respect of decision making and budgeting by the Pallium Project;
  - (e) a governance committee or process to review issues surrounding governance and supervision of management;
  - (f) establishment of banking arrangements, signing authorities and other fiscal arrangements;
  - (g) the registration for income tax and GST purposes;
  - (h) the establishment of a review and recommendation process in respect of management compensation;
  - (i) conflict of interest policies consistent with the by-laws or incorporating documents of the Pallium Project;
  - (j) other applicable ethical research policies or standards;
  - (k) if desired, an application for registration as a registered charity; and
  - (l) like matters;
3. formulation and ultimately execution of the forms of agreement to facilitate engagement of Stakeholders or other third parties carrying out research, educational or other tasks by or on behalf of the Pallium Project.

6. Timing. The Pallium Management Committee must give careful consideration to the appropriate timing for incorporation. Factors that should be considered include:

- current legal and financial exposure
- the urgency of the need for the clarity and administrative pathways associated with hiring, insurance, asset protection and other arrangements
- the presence of signs of confusion or unintended misunderstanding or misrepresentation about asset development, procurement, ownership, rights, and legacies
- indicators of relational strain that are manifesting the need for clarity and more explicit understanding of the relationship between individual Stakeholders in the Pallium Project, and with the Pallium Project
- a sense or identification of opportunity costs of delay in not moving soon enough to a legacy management vehicle

- the sheer time and financial costs of managing many “one off” interventions that could be reduced or avoided if the incorporated Pallium Project were established now.
- the overall strategic judgment about how far the Pallium Project can continue in its present arrangement before getting to legacy is no longer a feasible option.

In our view overcoming the inertia of the status quo and moving toward a real legacy management vehicle is a critical step in establishing a lasting legacy for the Pallium Project.

## L. NEXT STEPS

In our view, if the Executive Management Committee of the Pallium Project finds favour with this analysis and decides go forward directly, next steps would appear to consist of the following:

1. review this recommendation for a legacy management vehicle with the Stakeholders and refresh and renew the consensus in support of the Stakeholders moving forward;
2. obtain Stakeholder input on and make decisions upon key operational tasks such as the structure for the board of directors, and the policies regarding how the Stakeholders will interact with the Pallium Project, and a name change, if desired;
3. instruct counsel in the drafting of documents reflecting the Stakeholder consensus;
4. circulate such documents for approval with the Stakeholders;
5. upon approval, facilitate arrangements for incorporation;
6. if desired, make application for registration as a registered charity.

We note that it is possible that in seeking to achieve its objectives the Pallium Project make seek to establish several entities. For example, it may be that there is an operational entity that carries out the research and educational activities and a second entity (perhaps in the style of a foundation), which is used specifically to raise funds in support of the Pallium Project and its initiatives as well as complementary initiative among the applicable Stakeholders.<sup>26</sup>

## M. SUMMARY

The Pallium Project is obviously evolving into the *community of practice* the Stakeholders intended it to be. In order to achieve its mission, and establish future sustainability, Pallium Stakeholders must address the formal structural requirements that will enable the various processes and resources to secure its ongoing capacity development.

---

<sup>26</sup> If such a Pallium Foundation were a registered charity then it would not be able to disburse funds except to Stakeholders that were also registered charities or had equivalent status.

Pallium Stakeholders committed themselves to a legacy management vehicle initiative (the LMVI) for Phase2. As a principal source of advice to the LMVI, the above report has set out viable options to be considered by the Pallium Stakeholders, identified strategic issues that arise from the Pallium LMVI commitment and the status quo, and suggested next steps for going forward.

The LMVI is now substantively and strategically informed. If the Pallium legacy is to be adequately potentiated, we respectfully suggest, time is of the essence!

## **APPENDIX A: BACKGROUND TO THE PALLIUM PROJECT**

The Pallium Project is by nature a capacity building project. The culture of hospice palliative care as a subset of health care, the context within which the legacy management vehicle must be rooted and the ethical, legal and financial challenges inherent in assuming a legacy impact will all significantly affect the approach to the assignment.

As a subset of health care, palliative care does not enjoy automatic acceptance or secure status at the primary, secondary or tertiary levels. It is not a natural offshoot of the biomedical or curative model. It does not enjoy the influential profile of the promises of high tech or genetic innovations in health care. With its roots in the community and indeed the volunteer sector and especially hospice care, palliative care is often late to be considered or resourced at the policy, organizational or individual care level. Given its cultural standing, without enduring support and promotion for palliative care, and in particular for research and education to drive its continued development, the potential impact of the Pallium Project will soon be lost.

The context for the eventual Pallium legacy management vehicle is by necessity relational as well as educational and research-based. As the project leaders have noted at page 43 of the RRHII Project Report, “A relational partnership acknowledges the growing importance of “relational capital” as a form of “intellectual capital” in seeing things get done.” Pallium was deliberately derived from a variety of organizational entities with different mandates from different jurisdictions. At the operational level, it involves many professions, programs, volunteers and activities. The coordination, collaboration and communication required among the three streams in Phase 2 required for the intended functional partnership of the Pallium project will not continue without established support at the management level, and continued sponsorship at the governance level.

The Pallium Project faces enduring structural challenges that arise from the very strength of the model that was so necessary and appropriate for its birth. The clearly established and supported network partnership that makes up the oversight infrastructure for Phase 2 suits the intent and furnishes the developmental flexibility the project requires in this Phase. However, as assets are developed and contracts are let and the system takes up Pallium products and services, asset development and protection, liability exposure and indemnification of certain parties, asset and innovation benefit accrual issues and issues of accountability will predictably arise. Developing palliative care capacity in this era of intellectual property explosion, fair information practices, increasing litigation and proactive dispute resolution mechanisms requires serious and early attention to such matters. The challenge for the Pallium Project is to affect a legacy structure that allows the required diversity, flexibility and ongoing development of education and research capacity begun by the project and yet is sufficiently prescribed with major Stakeholders and in a legally viable infrastructure that continued capacity development is supported and indeed may be leveraged in the future.

## **APPENDIX B: STAKEHOLDERS OF THE PALLIUM PROJECT**

For the purposes of fairness and practical engagement, Stakeholders have status with respect to Pallium Project Legacy Management Vehicle Initiative (LMVI) if they have actively participated in Phase I as a founding collaborator, or if they have tabled a letter of support and prospective participation in the April 2003 application to Health Canada's, Primary Health Care Transition Fund (PHCTF). Those organizations are:

Alberta Cancer Board, Division of Medical Affairs & Community Oncology  
Alberta Cancer Board, Palliative Care Research Initiative  
BC Cancer Agency, Pain & Symptom Management/Palliative Care services  
British Columbia Hospice Palliative Care Association  
Calgary Health Region, Regional Palliative and Hospice Care Service  
Capital Health Authority (Edmonton), Regional Palliative Care Program  
Canadian Hospice Palliative Care Association  
Canadian Virtual Hospice Project  
Cancer Care Manitoba  
Centre for Distance Learning in Palliative Care, Tom Baker Cancer Centre  
Grant MacEwan College, Palliative Care Program  
Health Canada, Secretariat on Palliative & End-of-Life Care  
Hospice & Palliative Care Manitoba  
Inuvik Regional Health and Social Services Authority  
Manitoba Provincial Palliative Care Coordinators Network  
Palliative Care Association of Alberta  
Regina Qu'Appelle Health Region, Regional Palliative Care Services  
Saskatchewan Hospice Palliative Care Association  
University of Alberta, Department of Oncology, Division of Palliative Medicine  
University of Alberta, Division of Continuing Medical Education  
University of Alberta, Institute for Professional Development  
University of British Columbia, Division of Palliative Care, Department of Family Practice  
University of Calgary, Division of Palliative Medicine  
University of Calgary, Office of Continuing Medical Education & Professional Development  
University of Manitoba, Continuing Education Division  
University of Manitoba, Section of Palliative Medicine, Department of Family Medicine  
University of Saskatchewan, College of Nursing  
University of Saskatchewan, Extension Division  
Saskatoon Health Region, Regional Palliative Care Program  
Victoria Hospice Society  
Winnipeg Regional Health Authority, Palliative Care Sub Program

## APPENDIX C: GLOSSARY

**Community of Practice** – A self-organized, deliberate collaboration of people who share common practices, interests or aims and want to advance their specific domain of knowledge. When the community proves useful to its members over time, they may formalize their status by adopting a group name and a regular system of interchange (Wenger, 1998).

**Executive Management Committee** – An ad hoc management committee formed to manage the early implementation of the Pallium Integrated Care Capacity Building Initiative. The EMC is comprised of the Pallium Project Leader, the Pallium Director of Initiative Development & Oversight, and the Alberta Cancer Board, Executive Sponsor.

**Hospice palliative care** – Aims to relieve suffering and improve the quality of living and dying. It is the combination of active and compassionate therapies intended to comfort and support individuals and families who are living with or dying from a life-threatening illness. Care is provided by an interdisciplinary team that supports the patient in their physical, emotional, spiritual, and relational life. It is whole person care. The unit of care is the patient and their circle of loved ones. Support continues during the illness and throughout bereavement (Quality End-of-Life Care Coalition Information Kit).

**Intellectual property** – Knowledge, almost exclusively explicit knowledge that has been expressed in words and numbers and shared in the form of data, scientific formulae, specifications, manuals, electronic media, or through other means. It is easy to distribute and it is "slippery". It can be recognized and protected under law through copyright, patents, trademarks, and trade secrets. It is further characterized by being amenable to valuation which permits pricing and contractual agreements such as licensing (U. C. Berkeley knowledge management resource site).

**Legacy management** – The active and deliberate process of planning for, and engaging in, the responsible development and shared use of intellectual properties, as well as the longer-term strategic development of processes and vehicles to support the continued development, use and renewal of Pallium intellectual properties.

**Primary Health Care Transition Fund (PHCTF)** – An \$800 million envelope agreed to by the First Ministers in 2000 intended as a catalyst to support primary health care renewal in Canada.

**Rural and Remote Health Innovations Initiative (RRHII)** – A one-time Health Canada, Contribution Agreement funding initiative of the Office of Rural Health. The Pallium Project was founded and undertook its early foundation building activities through a Contribution Agreement received under the National Projects envelope of the RRHII.

**Stakeholders** – For the purposes of Legacy Management those entities identified in Appendix B who are founding collaborators of the Pallium Project, or those entities whose leaders expressed their commitment to further development through Pallium Phase 2 in an identifiable letter of support to the April 2003 application to the Primary Health Care Transition Fund (PHCTF) application.

## APPENDIX D: REFERENCES

- Drucker, Peter. (1999). *Management Challenges for the 21<sup>st</sup> Century*. New York: Harper Business.
- Naisbitt, John. (1994). *Global Paradox*. New York: Wm. Morrow and Co.
- Prahalad, K.C. & Ramaswamy, V. (2004). *The Future of Competition*. Boston: Harvard Business School Press.
- Treasury Board of Canada Secretariat. (2002). *Guidance for Strategic Approaches to Results-based Accountability Frameworks*. Ottawa.
- Wenger, Etienne (2004). *Knowledge Management as a Doughnut: Shaping Your Knowledge Strategy through Communities of Practice*. Ivey Business Journal. January/February. Available [www.iveybusinessjournal.com/ view\\_article.asp? intArticle\\_ID=465](http://www.iveybusinessjournal.com/view_article.asp?intArticle_ID=465).
- Wenger, Etienne (1998). *Communities of practice: Learning, meaning and identity*. New York: Cambridge University Press.