Canadian Charities Conducting International Activities (2015)

By Mark Blumberg[1] (May 23, 2015)

We live in a world where many have a lot, some have even more, and most have practically nothing. We can choose to ignore this reality or to do something about it. Canadian charities are often at the forefront in the struggle to alleviate the most difficult global problems, including extreme poverty, HIV/AIDS, Ebola, human rights abuses, access to education, clean water and sanitation.

We also live in a more connected world than ever with many donors having lived or travelled abroad. Some donors have substantial attachments to causes and communities outside of Canada, and many consider themselves "global citizens". Some donors are motivated by the enormity of global problems and are impressed with the huge effect that their donation can have in a developing country.

---

[1] Mark Blumberg is a partner at the law firm of Blumberg Segal LLP in Toronto and works almost exclusively in the area of nonprofit and charity law. Mark can be contacted at mark@blumbergs.ca or at 416-361-1982. Mark has a B.A. in Political Science from the University of Toronto, a LL.B. degree from the University of British Columbia, and a LL.M. from Osgoode Hall Law School in Tax Law. Mark is also the editor of at www.CanadianCharityLaw.ca – a Canadian charity law website and www.globalphilanthropy.ca ™ – a Canadian website dedicated to news about the Canadian charitable sector as well as legal and ethical issues for Canadian charities operating in Canada or abroad. This paper is based in part on my article in 2008 in The Philanthropist entitled "Canadian Charities and Foreign Activities". Thank you to Lize-Mari Swanepoel, Yi-Mei Ting and Kate Robertson for assisting with this article.

Presently, there are a large number of Canadian charities operating to some degree outside of Canada. The latest information from the 2012 T3010 Registered Charity Information Returns indicates that of the approximately 86,000 registered charities about 5,500 of them carried out foreign activities including through employees, volunteers, and intermediaries.[2] The amount spent by these charities outside of Canada has risen from $1.4 billion in 2002[3] to almost $3 billion in 2012[4].

These organizations operating abroad are not just those focused on international development or humanitarian assistance. Today, organizations that are often perceived as operating locally such as universities, hospitals and religious organizations are often actively involved with some foreign activities.

International charitable activities are exciting and important. Not only can they fulfill the objects of a Canadian charity and help many deserving beneficiaries but they can help the Canadian charity learn about different approaches to tackling problems, and improve morale and retention of staff and volunteers in Canadian charities. In other words, international activities while ostensibly aimed at benefiting foreign beneficiaries can often have huge positive impacts on the Canadian charity. Furthermore, international philanthropy is not a one-way street with funds flowing from Canada to the rest of the world. In 2012, foreign donors provided over $1.2 billion to Canadian charities such as universities and

---

[2] See Blumbergs' Snapshot of the Canadian Charity Sector 2012 at http://www.globalphilanthropy.ca/images/uploads/Blumbergs_Canadian_Charity_Sector_Snapshot_2012.pdf

[3] See *Canadian Charities Spent More Abroad in 2006 Compared to Previous Years* at http://www.globalphilanthropy.ca/index.php/articles/canadian_charities_spent_more_abroad_in_2006_compared_to_previous_year/

[4] Blumbergs' Snapshot 2012. Also see a detailed article entitled "Which Canadian charities spent money on foreign activities and how much did they spend?" at http://www.globalphilanthropy.ca/images/uploads/Which_Canadian_Charities_Spent_Money_on_foreign_activities_and_how_much_did_they_spend_2011_T3010_-for_web.pdf

hospitals. These foreign sources of funds have been important for Canadian charities.

This article will focus on some of the legal issues for Canadian charities who are conducting or are interested in conducting programs outside of Canada. It will address the following topics:

I. Statutory and regulatory framework for Canadian charities operating abroad;
II. Permissible structured relationships and agreements for Canadian Charities operating abroad;
III. Case law on Canadian charities operating abroad;
IV. Interaction between Canadian charities and CRA;
V. Challenges facing Canadian charities operating abroad; and
VI. Fiduciary duties when handling charitable property.

Good Work Outside the Registered Charity Realm

Before giving a detailed review of the legal issues facing Canadian charities that operate abroad, I would be remiss in not mentioning that there are many ways to perform good work outside of Canada that are outside the charitable sector and the scope of this article.

Some examples include:

1. make personal donations of cash or in-kind items to foreign charities, with no tax receipt from a Canadian charity;
2. have your business make a donation to a foreign charity or cause with no tax receipt received, provide sponsorship to a foreign charity, or advertise in the publication of a foreign charity;

3. invest in developing countries or set up a branch of your business in a developing country;
4. encourage Canadian companies operating outside of Canada to do so legally and ethically;
5. establish a for-profit "nonprofit," which is a for-profit corporation set up with the intention of helping people rather than making a profit (for example for-profits involved with micro-loans or other social finance initiatives);
6. establish and utilize a Canadian nonprofit corporation without charitable status – this is particularly useful if your donor, such as the Canadian government, does not need a tax receipt;[5]
7. encourage the Canadian government to increase development assistance and fulfill its commitment of 0.7% of Gross National Income;
8. encourage greater transparency in tax matters and less use of tax havens so that tax evasion is avoided and developing countries will be able to collect the necessary taxes to provide for their citizens; and
9. volunteer at home or abroad.

In addition, many Canadians remit funds to their families, friends, former employees in other countries, but they do not receive any tax benefit from it.[6]

It is always important to keep in mind that there are alternatives to being a registered Canadian charity. If a group wishes to avoid any of the restrictions that apply to Canadian charities conducting foreign operations or other activities, then they should seriously consider operating as a for-profit or nonprofit entity, not as a registered charity.

---

[5] Although pursuant to s. 149.1(1) and s. 149(1)(l) of the *Income Tax Act* you cannot qualify as a nonprofit if you meet the definition of charity in s. 149.1. However, CRA rarely deems a nonprofit to be a charity. It is relatively easy for a nonprofit to ensure that it will not be considered a charity by having any object that is not charitable (such as a political object), or by having the nonprofit carry on prohibited activities such as partisan political activities, or by having the nonprofit gift assets to a non-qualified donee. All three of those activities would disqualify such organization under s.149.1 from being a charity.

[6] In fact, remittances to developing countries from Canada are approximately $15.7 billion, which is more than five times the $3 billion that Canadian registered charities spent abroad. Ironically, there are no tax incentives for people who make remittances.

http://www.globalphilanthropy.ca/blog/understanding_remittances_from_canada_the_24_billion_question

I. Statutory And Regulatory Framework for Canadian Charities Operating Abroad

The Charities Directorate of the Canada Revenue Agency (CRA), the federal government department tasked with approving and regulating registered charities in Canada, has always considered compliance with the rules around foreign activities to be a priority.

CRA Publications

In July 2010, CRA released an important guidance *Canadian Registered Charities Carrying Out Activities Outside Canada*[7] ("CRA Guidance 2010") in which the Charities Directorate provided detailed guidance for Canadian charities interested in conducting foreign activities.

CRA Guidance 2010 replaced CRA's previous guidance "Registered Charities: Operating Outside Canada (RC4106)" and "Registered Charities Newsletter No. 20." It consolidated, to a large extent, CRA's position on legal rules around foreign activities and incorporated a number of cases dealing with foreign activities.

CRA Guidance 2010 emphasized the importance and value of Canadian charities operating outside of Canada but also cautioned that "activities outside Canada often presents significant challenges and requires substantial ongoing effort. Many charities have launched well-intentioned international activities only to learn that they cannot maintain the effort needed to meet their objectives and fulfil their obligations under the *Income Tax Act*."

---

[7] http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html

General Restrictions Similar to Other Registered Charities

Some of the requirements imposed on Canadian charities operating abroad are similar to those imposed on Canadian charities operating in Canada.[8] These requirements include:

- a prohibition on partisan political activities;
- a limitation on non-partisan political activities to generally less than 10% of the charity's resources;
- a prohibition on violating Canadian public policy;
- a requirement to operate within the objects of the charity;
- an obligation to avoid any support for terrorism;
- a requirement to accurately prepare and file the T3010 Registered Charity Information Return within six months after the charity's year-end; and
- a requirement to comply with disbursement quota obligations.

Canadian charities that conduct foreign operations not only have to comply with the same rules that apply to Canadian charities that only operate in Canada but also have additional obligations, as discussed below.

Corporate Objects and Trust Agreement

If a Canadian charity is incorporated, it should ensure that its objects or legal purposes allow for activities outside of Canada before embarking on such activities abroad. These objects can be found in documents such as Articles of Incorporation, Letters Patents, Articles of Continuance or Articles of Amendment.

---

[8] For a general checklist of compliance issues for Canadian registered charities see: Blumbergs Canadian Charity Legal Checklist at http://www.globalphilanthropy.ca/blog/updated_canadian_registered_charity_legal_checklist_by_mark_blumberg

A charity wants to avoid operating outside the scope of its objects; otherwise, such actions would be outside the charity's legal authority (*ultra vires*). The consequences of acting *ultra vires* can result in the actions undertaken or decisions made being null and void, the revocation of charitable status, and, potentially, personal liability for the directors of such a charity.

Examples of model object clauses can be found on the CRA website.[9] In July 2013, CRA released a detailed Guidance *How to Draft Purposes for Charitable Registration.*[10]

For example, one of the model objects is "To relieve poverty in developing nations by providing food and other basic necessities of life to individuals or families in need." An example of an object clause that would require modification in order to allow foreign operations is "To relieve poverty by helping homeless people in Mississauga, Ontario." An example of a broad or vague object cited by CRA would be "Advancing religion in third-world countries".

A 'standard' foundation clause might have the following wording: "To receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to qualified donees as defined in subsection 149.1(1) of the *Income Tax Act* (Canada)." This clause allows for the transfer of funds to Canadian registered charities and to send funds to listed qualified donees such as foreign prescribed universities[11]. Such a narrow object clause does not allow a charity to carry out work directly abroad or have an agreement with a non-qualified donee to transfer funds.

The type of objects that are defined as charitable fall into one of four categories accepted by CRA and by the courts, namely to relieve poverty, advance education, advance religion, or benefit the community in a way that the law regards as charitable. In addition to fitting under one or more of the four

---

[9] http://www.cra-arc.gc.ca/chrts-gvng/chrts/pplyng/mdl/mdl-bjcts-eng.html

[10] http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/drftprpss-eng.html

[11] Here is a CRA page http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/prscrbdnvrsts-eng.html which lists each of the foreign prescribed universities.

categories, the charity must also be established for the benefit of the public or a sufficiently large segment of the public. CRA will examine issues such as whether the benefit is tangible, whether the beneficiaries are either the public-at-large or a sufficiently large segment of the public, and whether there are benefits to private individuals except under certain limited conditions.

If the objects of the corporation are too broad and could include non-charitable activities or could have significant private benefit, then the corporation may not be successful in obtaining registered charity status. On the other hand, if the objects are too narrow, the charity will have trouble conducting its activities effectively.

If the charity is set up as a trust, then the charity should ensure that the Trust Agreement does not preclude operations outside of Canada. I generally discourage international charitable activities through a trust or unincorporated association for liability and other reasons.

If a charity has objects that preclude foreign activities or are too narrow, the charity can propose broader objects to CRA. Once CRA has approved the changes the charity can modify its objects knowing that CRA accepts such a change.

As well, if there are specific restrictions attached to a donation, the restrictions could preclude the funds from being spent outside of Canada, and will need to be observed. Other restrictions may be imposed on the activities of a charity either in the Notification of Registration received from CRA when the charity first received registered status or if the charity before or after registration provided to CRA an undertaking or entered into a compliance agreement. These restrictions, undertakings, or agreements can affect what operations can be conducted by the charity and how they are conducted.

What Are Charitable Foreign Activities Under Canadian Law?

Although what is considered charitable under Canadian law for operations in Canada is very similar to what is considered charitable for operations outside of Canada, it is not identical. Canadian charities operating in Canada are allowed to undertake certain activities that Canadian charities operating abroad may not be allowed to do. While it may be charitable for a Canadian charity in Canada to help the Canadian government reduce its debt, it is neither charitable nor permissible under Canadian law for a Canadian charity to reduce a foreign country's debt. While promoting the efficiency of the Canadian armed forces may be charitable, providing material support for a foreign military would not.

General Rule for Foreign Activities by Canadian Charities

The ITA allows charities to conduct their charitable purposes by:

1) making gifts of resources to a "qualified donee" (as defined below);

2) using staff or volunteers to conduct their "own activities" (at home or abroad)

3) using intermediaries with appropriate "direction and control" as part of a structured arrangement (at home or abroad).

1) Gifts to Another Qualified Donee

Qualified donees are organizations that can, under the ITA, issue official donation receipts for gifts that individuals or corporations make to them. While

most are registered charities, there are a number of other categories of qualified donees.

Qualified donees are:

- a registered charity (including a registered national arts service organization)[12];
- a registered Canadian amateur athletic association[13];
- a listed housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged;
- a listed Canadian municipality[14];
- a listed municipal or public body performing a function of government in Canada[15];
- a listed university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada[16];
- a listed charitable organization outside Canada to which Her Majesty in right of Canada has made a gift[17];
- the Government of Canada, a province, or a territory; and
- the United Nations and its agencies.

A Canadian charity can transfer funds or assets to another qualified donee. For example, a Canadian charitable organization with no experience in foreign operations that wishes to aid people in Darfur may decide to support Doctors

---

[12] Here is a list of the approximately 86,000 Canadian registered charities: http://www.cra-arc.gc.ca/ebci/haip/srch/advancedsearch-eng.action

[13] James M. Parks wrote an interesting article entitled "RCAAA's and Other Qualified Donees" for the 2008 National Charity Law Symposium which discusses in detail each of the lesser known categories of qualified donees.

[14] Here is a link to the CRA database of listed Canadian municipalities: http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/mncplts-eng.html#List

[15] The listed 'municipal or public body performing a function of government in Canada' are primarily aboriginal bands and the list is at: http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/mncplpblcbds-eng.html

[16] See Blumbergs article on Schedule VIII Universities at http://www.globalphilanthropy.ca/images/uploads/Foreign_Universities_Fundraising_In_Canada.pdf

As well, see CRA the bulletins "Donations by Canadians to Prescribed Universities Outside Canada" (RC191-07) and "Information for Educational Institutions Outside Canada" (RC190-07).

[17] At the time of writing three organizations are listed.

Without Borders Canada, a Canadian qualified donee. There is no need from a CRA point of view to have an agreement between the donor charity and Doctors Without Borders Canada. If the donor charity wishes to restrict the gift to Darfur, then it may wish to have a direction or agreement to that effect. Similarly, if a donor requested that his or her donation to a community foundation (qualified donee) should be applied toward dealing with the issue of AIDS in sub-Saharan Africa, the foundation could transfer the funds to the Stephen Lewis Foundation or Canadian Crossroads International, both qualified donees, without the need for an agreement or monitoring. For many Canadian charities that do not have experience in direct charitable activities outside of Canada, a donation to another qualified donee is the simplest and safest way to have a global impact.

A Canadian charity is not allowed to make a "gift" to a foreign charity, except for the small number that are qualified donees. In general, the same notion applies to operations within Canada[18]. A Canadian charity cannot just give funds to another Canadian organization that is not a qualified donee.

There is one category of qualified donees outside of Canada that is quite important. This category comprises foreign universities that are a "listed university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada[19]. This category includes at the moment 484 U.S. universities, 43 universities from the UK and Ireland, and 68 from all other countries. For foreign universities that ordinarily have Canadian students, obtaining qualified donee status can facilitate fundraising as a Canadian individual or Canadian charity may be able to simply make a gift to the prescribed foreign university.

---

[18] See CRA's Guidance CG-004, Using an Intermediary to Carry out a Charity's Activities within Canada.

[19] See Blumbergs article on Schedule VIII Universities at http://www.globalphilanthropy.ca/images/uploads/Foreign_Universities_Fundraising_In_Canada.pdf

As well, see CRA the bulletins "Donations by Canadians to Prescribed Universities Outside Canada" (RC191-07) and "Information for Educational Institutions Outside Canada" (RC190-07).

2) Using Staff and Volunteers to Carry out Foreign Activities

Some Canadian charities send their own employees or volunteers abroad in order to conduct the Canadian charity's activities. For example, a medical relief organization in Canada may send a Canadian doctor to a developing country to provide medical help to those who cannot afford it or to assist with a natural disaster. A Canadian church may send a missionary abroad to conduct religious activities. There are many advantages of sending your own employees abroad, including using the skill and knowledge of Canadians, using your employees' or volunteers' understanding of your organization and its belief/philosophy, having control over the employee or volunteer, and having the ability to harness the experience of the employee or volunteer on their return to Canada.

Although CRA does not require a written employment or volunteer agreements, charities should always have an employment or volunteer agreements with employees or volunteers, respectively, whether or not they are working in Canada.

3) Using Foreign Intermediaries to Carry out Foreign Activities

Many Canadian charities operating abroad find that it is not always possible or effective to send Canadian employees or volunteers abroad. Sometimes, because of logistical reasons, costs, language, culture, security, or other reasons, Canadian charities prefer to contract with reputable foreign intermediaries to conduct the activities.

"Own Activities" and Intermediaries

Foreign charities and non-governmental organizations ("NGOs") are rarely qualified donees. Therefore, as a general rule, a Canadian charity cannot transfer funds or assets to them except in furtherance of the Canadian charity's "own activities" in a structured arrangement with direction and control, as discussed below.

But how can sending money to an intermediary to do a similar type of activity that the intermediary is already doing be considered to be part of the "own activities" of the Canadian charity? The short answer is that a Canadian charity when transferring funds abroad to an intermediary to carry out certain charitable activities of the Canadian charity is either acting appropriately with a "structured arrangement" with "direction and control" or the funds are inappropriately being transferred as part of a "conduit" [20].

The CRA has identified in CRA Guidance 2010 certain elements that are required in order for the foreign activities of a Canadian charity to be considered its "own activities" and for there to be sufficient direction and control by the Canadian charity over the activities. CRA notes that each circumstance is different and that "the nature and the number of measures a charity adopts to direct and control the use of its resources should correspond to the circumstances of the activity" and lists certain factors:

- the amount of resources involved;
- the complexity and location of the activity;
- the nature of the resources being transferred;
- any previous experience working with a particular intermediary; and
- the capacity and experience of the intermediary.

---

[20] For a discussion of the difference between a conduit and a structured arrangement see my article: Structured Arrangement versus Conduit for Canadian Charities and Foreign Activities at: http://www.globalphilanthropy.ca/articles/structured_arrangement_versus_conduit_for_canadian_charities_and_foreign_ac

Additionally, CRA notes “a conduit is a registered charity that receives donations from Canadians, issues tax-deductible receipts, and funnels money without direction or control to an organization to which a Canadian taxpayer could not make a gift and acquire tax relief.” Sometimes a conduit is described as a flow-through.

If there is a continuum then on the one hand there is a “conduit” and on the other is an appropriate structured arrangement. Generally, it is not going to be obvious to the public whether a charity has appropriate direction and control or it is a conduit.

Due Diligence

The first step in potentially dealing with an intermediary is that a “charity should investigate its status and activities to assure itself of the following conditions:

- The intermediary has the capacity (for example—personnel, experience, equipment) to carry out the charity's activity.
- There is a strong expectation the intermediary will use the charity's resources as directed by the charity.”

I would compare the type of due diligence in selecting an intermediary to the type of due diligence one would undertake for a builder when building a house or a business when purchasing it. If you are going to transfer large amounts of money to a contractor to undertake your charity’s “own activities”, you need to satisfy yourself that they have the capacity, skills, interest, honesty, etc., to carry out the work. This step is vital – without the right intermediary (i.e., individual or organization), there is little likelihood that any of the other measures of control will be successful and the Canadian charity will probably cause more harm than good.

Some questions that should be asked as part of the due diligence process are:

- Have you or other trusted charities ever worked before with this organization?
- Have you met the intermediary in person?
- Have you visited the site of their activities?

- Can the intermediary carry out all the Canadian charity's work or will some have to be subcontracted out?
- Are there conflicts of interests?
- Has the intermediary or any of its principles ever been involved with illegal or nefarious activities?
- Have you received a number of positive references?

Measures to Direct and Control the Resources of a Canadian Registered Charity

The CRA recommends the following types of measures to ensure there is direction and control:

1) **Create a written agreement, and implement its terms and provisions.**

CRA 'recommends' that any agreement must be in writing and must contain the minimum elements outlined below. Practically, without a written agreement the charity will have significant problems demonstrating direction and control. CRA also requires that new applications for charity registration that involve foreign activities using intermediaries include at a minimum a draft intermediary agreement. A written agreement should, while containing the minimum elements required, be tailored to the particular circumstances of the charitable activities. An agreement for a $5,000 well is probably going to be very different than a $2 million Department of Foreign Affairs, Trade and Development ("DFATD") funded program dealing with preventing violence against women.

CRA recognizes that in some cases involving minimal resources less formal arrangements may be appropriate. In CRA Guidance 2010, CRA notes, "the CRA acknowledges that in situations where the amount of resources involved is minor, and is a one-time activity, the complications of developing a full, formal, written agreement may outweigh the benefits. In situations where the money spent on a one-time activity is $1,000 or less, other forms of communication might be used to show direction and control over the use of resources by intermediaries." Keep in mind that this exception is for "one-time" activities in which the resources are less than $1,000. If either it is an ongoing activity or the amount is over $1,000 then this exception does not apply.

CRA has identified certain minimum requirements with respect to the written agreements between a Canadian charity and a foreign entity in CRA Guidance 2010. However CRA warns charities that "charities should be mindful that their relationship with their intermediaries is not only judged on how well their agreements are written, but more importantly on their ability to show that they direct and control the use of their resources through active, ongoing, sustained relationships." In other words having a long and complicated written agreement drafted by a law firm is not enough to show direction and control – you need to actually follow the agreement and have an active and ongoing relationship with the intermediary. Without the ongoing involvement and reporting, a charity would not know if a project is being implemented appropriately and if necessary whether it should withhold funds if the intermediary is not carrying out the project according to the written agreement. In this increasingly competitive area of international philanthropy, few charities are going to excel by following only the minimum standards. In fact, many stakeholders like government funders or foundation funders may have significantly more stringent or just different requirements that also need to be met.

According to CRA Guidance 2010 the basic elements CRA expects in a written agreement are:

- exact legal names and physical addresses of all parties;
- a clear, complete, and detailed description of the activities to be carried out by the intermediary, and an explanation of how the activities further the charity's purposes;
- the location(s) where the activity will be carried on (for example, physical address, town or city);
- all time frames and deadlines;
- any provision for regular written financial and progress reports to prove the receipt and disbursement of funds, as well as the progress of the activity;
- a statement of the right to inspect the activity, and the related books and records, on reasonably short notice;
- provision for funding in instalments based on satisfactory performance, and for the withdrawing or withholding of funds or other resources if required (funding includes the transfers of all resources);
- provision for issuing ongoing instructions as required;
- provision for the charity's funds to be segregated from those of the intermediary, as well as for the intermediary to keep separate books and records;

- If any of the charity's funds or property are to be used in the acquisition, construction, or improvement of immovable property, the title of the property will vest in the name of the charity. If not, there will be:
    - provision indicating how legal title to that property shall be held (in the name of a local charity, government agency, municipality, or non-profit organization established to provide benefits to the community at large);
    - provision for the intermediary to get reasonable assurances from the property holder, owner, or landlord, as the case may be, that the property will continue to be used for charitable purposes for the benefit of the public;
- for joint ventures, provisions that enable the charity to be an active partner, with a proportionate degree of direction and control in the venture as a whole, as well as assurances of the following: effective date and termination provisions; and
    - the charity's resources are devoted to activities that further its purposes; and
    - the charity maintains and receives financial statements and records for the entire project on a regular basis;
    - signature of all parties, and the date.

I have in the past prepared a sample agreement for a relatively straightforward foreign activity and it is available online. [21]

2) Communicate a clear, complete, and detailed description of the activity to the intermediary.

Charities should have a detailed description of the activity that they are doing with the intermediary. Such description should be arrived at before the project starts and have sufficient detail in the circumstances.

CRA notes in CRA Guidance 2010 that:

> Depending on the type, complexity, duration, and expense of an activity, the charity should be able to provide documentary evidence that shows:
>
> - exactly what the activity involves, its purpose, and the charitable benefit it provides;

---

[21] http://www.globalphilanthropy.ca/blog/sample_contractor_agreement_for_a_canadian_registered_charity_carrying_out

- who benefits from the activity;
- the precise location(s) where the activity is carried on;
- a comprehensive budget for the activity, including payment schedules;
- the expected start-up and completion dates for the activity, as well as other pertinent timelines;
- a description of the deliverables, milestones, and performance benchmarks that are measured and reported;
- the specific details concerning how the charity monitors the activity, the use of its resources, and the intermediary carrying on the activity;
- the mechanisms that enable the charity to modify the nature or scope of the activity, including discontinuance of the activity if the situation requires (for example, the intermediary begins misusing funds);
- the nature, amount, sources, and destination of income that the activity generates, if any (for example, tuition fees from operating a school, or sales from goods produced by poor artisans in third-world countries); and
- any contributions that other organizations or bodies are expected to make to the activity.

I would argue that a clear and detailed description of the activity is probably the most vital measure of control. Without such a description of the activity agreed to by the parties put in place before the commencement of a project, the intermediary may not know what the funds of the Canadian charity are supposed to be used for. In addition, the Canadian charity will not be able to determine whether the funds were appropriately spent and a CRA auditor may conclude that there was not appropriate direction and control. It is important to note that depending on the circumstance a "clear, complete, and detailed description of the activity" may be a few pages and is nothing like the requirements sometimes imposed by DFATD or some other funders that require voluminous descriptions when applying for funding.

3) Monitor and supervise the activity.

Charities need to receive "timely and accurate reports, which allows a charity to make sure that its resources are being used for its own activities." Needless to say, depending on the size and complexity of a project the reporting could be very different. CRA suggests various options that may be appropriate including but not limited to:

- progress reports;
- receipts for expenses and financial statements;
- informal communication via telephone or email;
- photographs;
- audit reports; and/or
- on-site inspections by the charity's staff members.

With respect to regular monitoring, although required by CRA, I would argue that no donor should contribute to a charity that does not regularly monitor its activities. The monitoring could take place on the ground by the Canadian charity, or by a third party, or by the foreign NGO reporting on the progress with the Canadian charity reviewing the reports and requesting further information or clarifications when necessary. Part of monitoring is keeping sufficient books and records to show that the resources were spent appropriately. Satisfactory evidence will depend on the circumstances. Having a site visit by a director or employee of the Canadian charity is a good idea, especially with larger projects. However, if no detailed written report is provided by the director or employee to the Canadian charity the visit is of little use in showing satisfactory evidence. As well, although it may be useful to have a Canadian representative on the board of the intermediary, or an intermediary representative on the board of the charity, one needs to manage potential conflicts of interest. Board representation alone is far from adequate in showing direction and control. (See the section on Books and Records below.)

4) Provide clear, complete, and detailed instructions to the intermediary on an ongoing basis.

The world is changing on a regular basis and charitable activities will need to evolve accordingly. Whether it is changes in exchange rates, security on the ground, efficacy of certain programs or changing needs of beneficiaries, it is important that the Canadian charity is aware of its activities, that the intermediary advises the Canadian charity of significant potential changes to the program and its budget, and that the Canadian charity consents to such changes.

The Canadian charity should keep records of the changes including modifying agreements if necessary, keeping minutes of meetings approving the changes or email exchanges documenting the consent.

5) Arrange for the intermediary to keep the charity’s funds separate from its own, and to keep separate books and records.

In terms of funds and books and records, CRA wants it to be clear what is the Canadian charity's funds and what activities and books and records relate to the activity of the Canadian charity.

If funds are provided to an intermediary to pay for a project after the work has been completed then those funds belong to the intermediary and do not have to be kept separate. If funds are provided to the intermediary for work that has yet to be completed then those funds need to be kept separate from the funds of the intermediary. Does keeping funds separate mean in a separate bank account or is it enough if the funds are kept separate in the accounting system of the intermediary? CRA has vacillated on this point. CRA current position is:

> *When carrying on an activity through an intermediary, a charity has to make sure that it can distinguish its activities from those of the intermediary. A charity cannot simply pay the expenses an intermediary incurs to carry on the intermediary's own programs and activities. Doing so draws into question whether the activity is truly that of the charity.*
>
> *In any situation where an intermediary is managing an ongoing activity on the charity's behalf, the money received from the charity should be kept in a separate bank account. It should be withdrawn only after receiving authorization from the charity, or after the intermediary meets certain performance benchmarks. The charity's funds should also be reported in books and records separately from those of the intermediary.*
>
> *Some regions have rudimentary banking systems or none at all, or a charity's staff or an intermediary may not be able to access a banking system. If it is impossible to keep funds separate, then a charity must provide other evidence to distinguish its own resources and activities from the intermediary's, and the charity's direction and control over them.*

Elsewhere in the guidance dealing with basic elements of a written agreement it state that there should be a "provision for the charity's funds to be segregated from those of the intermediary, as well as for the intermediary to keep separate books and records".

What is clear is that if you have a long term relationship with an intermediary and sometimes funds will be provided before the work is completed then the CRA expectation is greater that the funds will be kept in a separate bank account and only removed by the intermediary once certain work has been completed. Also if you are using an agency form of intermediary arrangement CRA has in the past insisted that a separate bank account be set up. In many circumstances having a separate bank account will help in making sure that the funds are only spent on

the Canadian charity's activities and the scope of the bank records that the Canadian charity will need to keep in Canada will be restricted to the Canadian account and not all financial transaction of the intermediary.

We discuss books and records in greater detail below.

6) **Make periodic transfers of resources, based on demonstrated performance.**

CRA wants Canadian charities to make periodic transfers, especially if large amounts of resources are to be provided, so that further funds will only be provided after the Canadian charity receives reports that demonstrate work has been completed on the project. Furthermore, "when appropriate, a charity should keep the right to discontinue the transfer of money and have unused funds returned if it is not satisfied with the reporting, progress, or outcome of an activity. This will allow the charity to stop funding an activity if the charity's resources are being misused or for any other valid reason."

If you have a $10,000 budget, you may not need periodic payments, especially if it is a long-term relationship. In the event that a Canadian charity is funding the building of twenty schools, each costing $50,000 for a total budget of $1 million, the Canadian Charity should send funds for five schools at a time. After the Canadian Charity has received reports showing that those schools are satisfactorily completed, it can then send along the next payment. The periodic payments need to be based on monitoring and on demonstrated performance by the intermediary; otherwise, the periodic payments serve little use in ensuring that there is direction and control. I think it would be generally not be prudent for the Canadian charity to wire transfer $1 million in the example above and hope for a detailed report at the end. Many charities also retain a hold back, which will be sent once reporting is completed.

II. Permissible Structured Relationships and Arrangements for Canadian Charities

There are a number of different structured arrangements through which a Canadian charity can operate abroad, including:

1) Agency Agreements;
2) Contractor Agreements;
3) Joint Venture Agreements/Joint Ministry Agreements; or
4) Cooperative Participant Agreements.

1) Agency Agreement

The most commonly used method of operating abroad historically is through an agency agreement. The Canadian charity appoints an agent to conduct the Canadian charity's activities on behalf of the Canadian charity. The Canadian charity provides all of the funding and is in control of the relationship pursuant to a written agency agreement.

An example would be a Canadian development organization entering into an agency agreement with an organization in Bolivia to provide food to needy children. The activities carried out by the Bolivian agent would be on behalf of the Canadian charity. The project would be a project of the Canadian charity. Either the Bolivian agent, who is on the ground and knows more about local conditions, or the Canadian charity, could suggest projects. However, all projects and budgets need to be approved by the Canadian charity. The Bolivian agent must report, pursuant to the requirements of the agency agreement, to the Canadian charity on the project.

The concern with agency agreements is that the Canadian charity, as principal, is liable for the actions of the agent. As well, in the international development context, many foreign charities do not want to be viewed as acting as agents for

a Canadian charity. Another concern with agency agreements is that the funds are considered to have been used by the Canadian charity for financial statement/accounting and disbursement quota purposes only after they have been expended by the foreign agent and not when the funds are transferred.

2) Contractor Agreement

A Canadian charity can also retain a foreign intermediary to conduct certain work as a contractor. For example, a Canadian charity that is interested in providing clean drinking water could, by written agreement, employ a contractor in a developing country to dig a well. This type of agreement would have many similar features to an agreement between a Canadian charity and a non-qualified donee in Canada. The contractor could be either a for-profit entity or a non-profit organization. Contractor agreements are the most popular in relationships between Canadian charities and foreign charities and non-profit organizations.

The advantage of this type of independent contractor relationship is that of limited liability. The contractor is an independent entity responsible for its own actions. This is not to say that the Canadian charity could not be pulled into litigation if there was a problem, but it is less likely to be held responsible for the actions or inactions of the contractor. Also, once funds are transferred from the Canadian charity to the foreign contractor, the funds have been spent and are no longer on the books of the Canadian charity and can be used to meet the Canadian charity's disbursement quota obligations. As well, charities are generally more familiar and comfortable with a contractual relationship rather than an agency relationship. A clear written agreement as to exactly what the contractor's obligations are, remuneration, ownership of work, etc., is required.

3) Joint Venture/Joint Ministry Agreement

A Canadian charity can work jointly with a foreign person or entity pursuant to a joint venture agreement, and they can pool their resources to carry out certain

charitable work. The Canadian charity would need to have control over the charitable work at least in proportion to the funds that the Canadian charity is contributing. This type of agreement is seemingly attractive because it can be used when two or more entities are pooling their resources with respect to a particular project – in many cases with international charities there could be ten or twenty parties to the joint venture, which can also make the agreement complicated and cumbersome.

An example of a joint venture is a Canadian charity and a U.S. charity working together on an educational project in India. The Canadian charity contributes 15% to the cost and the U.S. charity contributes 85%. The Canadian charity will have at least 15% representation on the management committee of the joint venture and must have input on all of the decisions of the joint venture. Therefore, the Canadian charity will have control over the project that is proportionate to the amount it contributed. Some joint venture agreements are for a particular project and others relate to a number of projects. Some joint ventures have a mechanism for adjusting the amounts that each party contributes, with a consequential adjustment in representation on the management committee.

Additional Joint Venture Requirements

The CRA also has identified in Appendix E of the CRA Guidance 2010 various factors that CRA looks to determine with a joint venture whether appropriate direction and control is in place:

- presence of members of the Canadian charity on the governing body of the joint venture;
- presence of the Canadian charity's personnel in the field;
- joint control by the Canadian charity over the hiring and firing of personnel involved in the venture;
- joint ownership by the Canadian charity of foreign assets and property;
- input by the Canadian charity into the venture's initiation and follow-through, including the charity's ability to direct or modify the venture and to establish deadlines or other performance benchmarks;

- signature of the Canadian charity on loans, contracts, and other agreements arising from the venture;
- review and approval of the venture's budget by the Canadian charity, availability of an independent audit of the venture, and the option to discontinue funding when appropriate;
- authorship by the Canadian charity of such things as procedures manuals, training guides, and standards of conduct; and
- on-site identification of the venture as being the work, at least in part, of the Canadian charity.

For joint ventures, the charity should make sure that it regularly receives full and complete financial information for the whole venture. It should also have enough documentation to show how its contribution fits into the overall undertaking, and how its resources have been devoted to activities that further its charitable purposes.

The concern with a joint venture agreement is the liability that the Canadian charity may face from the actions of their joint venture partners. It is possible to reduce the risk by separately incorporating the joint venture and by actively managing the joint venture risk by being very involved with the management of the joint venture.

Although joint ventures may sound good in most cases the amount of involvement of the Canadian charity in all aspects of the joint venture makes in undesirable for both the Canadian charity and other foreign charities.

4) Cooperative Participant Agreement

In the cooperative participant model, a Canadian charity works with a foreign entity and each contributes different resources and undertakes a different part of the project. This arrangement is different from a joint venture in which the parties pool their resources together. In the cooperative participant model there is no pooling of funds.

An example of a cooperative participant model would be a Canadian charity providing an x-ray machine to a clinic in Malawi. The clinic provides the space and the technicians to use the equipment. Both parties are working together to achieve a charitable end; however, they are each contributing something different to the relationship. The cooperative participant model is used frequently when the Canadian charity is contributing something to the project, but not paying for the whole project.

Summary of International Arrangements

The simple way to conceive of the five arrangements a Canadian charity can use to conduct foreign activities is as follows:

- If a Canadian charity is providing funds to a qualified donee abroad such as a prescribed foreign university or the United Nations then that is a *gift to a qualified donee*.
- If a Canadian charity is sending employees or volunteers outside of Canada and no funds are being transferred to any foreign organization, then a volunteer agreement or *employment* agreement would probably be used between the Canadian charity and the employee/volunteer.
- If a Canadian charity is contributing 100% of the money to a charitable project being carried out abroad by a foreign NGO that is not a qualified donee, then the agreement would probably be a *contractor* agreement, but traditionally was an *agency* agreement.
- If a Canadian charity and a foreign organization that is not a qualified donee are contributing money to a project and putting that money together in a joint account ("pooling resources"), then it will probably be a *joint venture* agreement.
- If a Canadian charity and a foreign organization that is not a qualified donee are contributing different resources to the project, i.e., money, material, staff, etc., then it will probably be a *cooperative participant agreement*.

Misuse of direction and control

I have seen Canadian charities try to use what they claim to be CRA 'requirements' to try to take advantage of foreign organizations by imposing additional onerous conditions and restrictions in their agreements beyond those required by CRA and claiming that they are necessary for direction and control.[22]

The relationship between a Canadian charity and an intermediary should be balanced. On the one end, there are some Canadian charities that are completely deferential for religious, ideological, or other reasons to the foreign organization. The Canadian charity view the intermediaries as something between a saint and a deity and they have no interest in controlling or questioning any of the activities. On the other extreme, there are Canadian charities that, in many cases who know little about implementing a program in a foreign country, are prepared to micromanage every aspect of the program, want to completely dominate the relationship, distrust people in foreign countries and end up causing more harm than good. There is an appropriate middle ground in the relationships between Canadian charities and foreign intermediaries. When and if the relationship involves the transfers of assets and funds, then the CRA Guidance 2010 should be followed.

III. Case Law on Canadian Charities Operating Abroad

[22] The most egregious terms I reviewed was a Canadian charity requiring the foreign charity to agree that, upon signing the agreement, if there was to be a termination the foreign charity would be required to transfer a certain portion of all of its capital property built up over decades to the Canadian charity, even though the Canadian charity could stop providing the partial funding to the foreign charity at any point in time and still own the capital property.

Recent Canadian cases such the *Tel-Aviv Foundation* case[23], the *Canadian Magen David Adom* case[24], the *Bayit Leplitot* case[25], all decided in the last thirteen years, should be of particular interest to Canadian charities that operate outside of Canada. I discuss these three cases below.

The Canadian Committee for the Tel Aviv Foundation v. Canada **(2002 FCA 72)**

The *Tel Aviv Foundation* case involves a Canadian charity established to promote education and the relief of poverty in Tel-Aviv, Israel. The Canadian charity had an agency agreement with the Tel Aviv Foundation. In 1990, CRA conducted an audit in which it noted its concern that the Canadian charity`s overseas expenditures were not properly documented. In 1993, there was another audit in which it was revealed that, apparently, the new Israeli management of the Tel Aviv Foundation was not aware of the agency agreement. In 1996, the Canadian charity made undertakings to CRA to "conform strictly to the requirements of Revenue Canada, including the specific provisions of the Agency Agreement."

In 1997, there was a further CRA audit in which CRA expressed concern with the following:

- violation of the agency agreement – there was little control over funds disbursed to the agent (the Canadian charity is acting as a 'conduit' and is not controlling the funds and activities),
- the Canadian charity could not show reporting of transactions,
- the funds of the Canadian Charity were not kept separate from the agent (Tel Aviv Foundation),
- receipting, T3010 and T4 irregularities,

---

[23] http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/32013/index.do

[24] http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/32395/index.do

[25] http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/33140/index.do

- the Canadian charity did not authorize projects,
- no evidence of alleged oral arrangements that superseded the agency agreement,
- a $20,000 grant to an Air Force Museum in Beersheva, another city in Israel, which was outside of the objects of the Canadian charity and therefore *ultra vires*.

In 2000, CRA advised the Canadian charity of its intention to revoke its charitable status. In 2002, the Canadian Federal Court of Appeal found in favour of CRA and against the Canadian charity and revoked the Canadian charity's charitable registration.

This case illustrates the importance of not only having the correct agreement with a foreign non-profit or charity but also the importance of complying with the agreement. In order to follow the agreement, both the Canadian charity and the foreign agent must be aware of the agreement, understand it, and be committed to implementing it.

Furthermore, if there are going to be changes in the manner in which an operation or relationship is going to be carried out, then the changes to the agreement must be documented in writing. One of the greatest challenges that Canadian charities face in operating abroad is in direction, control, and supervision of agents abroad.

The case also reminds Canadian charities of the importance of operating within the charity's objects.

***Canadian Magen David Adom for Israel v. MNR* (2002 FCA 323)**

The Canadian Magen David Adom (hereafter “CMDA”) was set up to donate emergency medical supplies and ambulances to the people of Israel. CMDA appointed a Canadian representative in Israel to implement the program. In 1986, there was a CRA audit of CMDA. In that audit, CRA raised two concerns: first, CMDA was giving funds to the U.S. MDA for purchasing ambulances and that CMDA was not directly using the funds to purchase the ambulances from General Motors; and, second, there was no written agency agreement between the CMDA and a similarly named Israeli organization (Magen David Adom) and no control over how the ambulances were used once they were sent to Israel.

CMDA was arguing that the transfer of the ambulances and equipment to Israel fell within the charitable goods policy, discussed later in this article. CRA was concerned that some of the expenditures, such as purchasing bullet proof vests, were more remote and therefore subject to being used for non-charitable purposes.

CMDA acknowledged at one point that there was probably a need for an agency agreement, but did not enter into one with its agent in Israel, as the agent was not interested.

CRA undertook further audits for the 1993, 1995, and 1996 years, and again raised concerns about the lack of any agency agreement, persistent disbursement quota problems, and potentially non-charitable expenditures, like bulletproof vests and telecom equipment. In fact, in one instance a CMDA-purchased ambulance was transferred over to the Israel Defence Forces for their use.

CRA also later raised a public policy concern. As the ambulances were being used in Israel and the West Bank, CRA was of the view that to some extent they were being used to support the permanence of Israeli settlements in West Bank. CRA argued that such actions were contrary to Canadian foreign policy that opposed settlement activity as an impediment to creating peace in the region.

In 2001, CRA issued a notice of revocation to CMDA. The Federal Court of Appeal ultimately dismissed the CMDA appeal and CMDA lost its status as a registered charity in Canada.

The Federal Court of Appeal agreed with the charity with respect to the public policy argument. The FCA found that there is no “definite and somehow officially declared and implemented policy” with respect to Israeli organizations operating in the West Bank and Gaza Strip.

However, the Federal Court of Appeal found that:

1) the agent in Israel was “not effectively authorized, controlled and monitored by the charity”; and

2) equipment was not used only for charitable purposes and the court was concerned about the involvement by the agent with Israeli military operations.

CMDA’s charitable registration was revoked in 2003. CMDA and CRA worked out an agreement whereby CMDA would need to have greater controls and CMDA would regain its charitable status! What lessons can be drawn from this case, which reads more like a saga from 1986 to 2003? What was the financial and emotional cost and distraction caused by the decision by CMDA to operate as it did? Could the CMDA not have just agreed in 1986 to buy the ambulances from GM directly and to have a proper written agreement and follow through with the agreement?

The lessons we can learn from the CMDA case are that:

1) it is important to have a written agreement that authorizes, controls, and monitors the agent;
2) transfers of equipment to a foreign military are not charitable;
3) there are limitations on the charitable goods policy; and
4) even high-profile charities such as CMDA can be targets for deregistration.

***Bayit Lepletot v. MNR* (2006 FCA 128)**

This case deals with a Canadian charity that had an agency relationship with a Rabbi in Israel who "presumably" exercised some control over an Israeli charity with a similar name to the Canadian charity. The Israeli charity ran three orphanages but, according to the Federal Court of Appeal, there was no evidence of the Rabbi's control over the charitable works of the Israeli charity, and the status of the Canadian charity was revoked.

This case demonstrates the importance of having a written agreement with the correct party. An agent can carry on charitable work, but it must be shown that the agent is actually carrying out the work. It is not sufficient for an agent to be part of another organization that does the actual charitable work. Although it is possible for an agent in certain circumstances to sub-delegate their authority, in this case the Court found that there was no factual basis for arguing that the Rabbi had delegated his authority.

A final point: as illustrated in the *Tel-Aviv Foundation* and *Canadian Magen David Adom* cases discussed above, CRA provided several warnings regarding their concerns with the Canadian charities' operations abroad. It was only after those warnings were not heeded over a protracted period of time that CRA went to the extraordinary step of revoking their charitable registration. As we will discuss later, CRA is less patient today with Canadian charities that are non-compliant with their obligations when operating abroad compared to 10 to 15 years ago. As well, when a charity signs a compliance agreement with CRA that it will 'clean up its act', presumably to avoid revocation of their charitable status, that charity will be held by the Courts to a higher standard than another charity who has not been warned and has not provided such undertaking.

IV. Interaction Between Canadian Charities and CRA

CRA tries to encourage Canadian charities to be compliant with the legal requirements in CRA Guidance 2010. They do this by publishing materials such as the guidance, providing webinars and seminars, answering written requests for information and answering calls on their 1-800 number.

The CRA Guidance 2010 is not a comprehensive user manual that describes every possible issue that a Canadian charity could face in dealing with foreign activities. Nor do I think that it is helpful to expect or suggest that CRA provide such detailed guidance. On a number of occasions in the CRA Guidance 2010, CRA suggests that Canadian charities contact them to discuss particular issues in more detail. Certainly if your objects require changes then you will need to send CRA the proposed objects and a detailed description of activities covering the new objects. However, a charity can also contact CRA if it has a question about foreign activities or provide a proposed agreement and description of a project to CRA and request approval of the agreement and project.

In some cases, a Canadian charity may wish to use a charity lawyer to assist with compliance issues in addition to discussing issues with CRA or in lieu of it. It will very much depend on the Canadian charity, its activities and resources and attitudes to professional assistance as well as the charity's concerns in dealing with CRA.

Some Canadian charities from certain groups within society have the suspicion that CRA will not 'support' their organization, activity, or ethnic group, and they are afraid to deal with CRA. Although this suspicion is not well founded I often see professional advisors claiming that a charity application was not successful etc. because CRA does not like a particular group. Certainly it would not be because the application was poorly prepared in a manner that CRA clearly could not accept.

Another more real concern is the long waiting times for written responses to questions posed to CRA, often from six to eight months, makes it less likely that Canadian charities or professional advisors will obtain advice from CRA, which reduces the likelihood of the Canadian charity being compliant with Canadian laws and rules relating to operations abroad.

Also one should remember that CRA provides its view views with respect to the ITA. It is not providing legal advice. As well, CRA is not, and should not be expected to always be, focused on or knowledgeable about many other legal and liability issues for Canadian charities.[26]

Anytime one is providing material to a regulator it is important that it is within the ball park of acceptability under charity law – otherwise it would be a poor reflection on the charity and may result in further scrutiny of the charity.

There are approximately 250 Canadian registered charities that spend more than $1 million per year abroad. If you are a charity spending more than a $1 million outside of Canada you are part of a select group and one can expect more scrutiny than the average Canadian charity. As with other legal compliance issues it is better to be prepared and fix problems before you are start dealing with CRA. I have been involved with a number of informal legal audits of foreign activity charities to try and determine if there are significant issues before a CRA audit and also during an audit. The cost and anxiety of dealing with former is much lower.

[26] CRA is not responsible for enforcement of environmental statutes, corporate law, criminal law, labour and employment law, human rights legislation, etc.

CRA Audits and "Education-First" Approach

If CRA is auditing a Canadian charity, it uses what it calls an "education-first" approach[27]. Depending on the seriousness of the issue and the response of the Canadian charity, CRA tries first to use education letters, then compliance agreements, and, only if necessary, sanctions or the revocation of a Canadian charity's registration.

We can see from the Canadian Magen David Adom and the Tel Aviv Foundation cases that in the past, typically numerous warnings have been given and only after many years of non-compliance will CRA move to deregister a charity for cause unless the Canadian charity has been very uncooperative. CRA is moving more quickly today with compliance actions and deregistrations when there is serious non-compliance than in previous years. In the last few years, there has been greater audit focus on Canadian charities that operate abroad and a larger number of deregistrations relating to foreign activities have taken place. We have place on the www.globalphilanthropy.ca website many of the letters from CRA to charities that have been revoked for cause.

V. Challenges facing Canadian Charities Operating Abroad

[27] See T4118 Auditing Charities at http://www.cra-arc.gc.ca/E/pub/tg/t4118/t4118-08-e.html and my article Canadian Charities and Canada Revenue Agency (CRA) Audits http://www.globalphilanthropy.ca/images/uploads/Canadian_Charities_and_Audits_by_the_Canada_Revenue_Agency.pdf

When dealing with Canadian charities operating abroad, the requirements of CRA's Guidance is only part of the legal picture. Some of the other issues[28] of legal concern to charities that operate abroad include:[29]

- money laundering;
- bribery and corruption;
- fraud;
- private benefits;
- protecting valuable intellectual property (IP) such as trademarks, copyrights, patents, and trade secrets when much of the protection is national in scope, and protections put in place in Canada may not afford protection in another country;
- legal constraints on individuals and charities under laws of other countries, including but not limited to registration requirements, criminal law, restrictions on certain occupations/professionals practicing, foreign currency restrictions, restrictions on ownership of land, and restrictions on activities such as financial services (microfinances);
- donor restrictions and DFATD (formerly CIDA) constraints that must be observed in addition to CRA requirements and the fact that not all activities funded by DFATD are necessarily charitable under Canadian law;
- ethical issues;[30]

---

[28] For a more detailed discussion of these other legal issues see "Canadian Charities and Foreign Activities" at www.globalphilanthropy.ca/images/uploads/Canadian_Charities_and_Foreign_Activities_by_Mark_Blumberg_October_2007.pdf

[29] See my article "Canadian Charities and Terrorism: Preventing Abuse of Your Favourite Canadian Charity"

http://www.globalphilanthropy.ca/articles/canadian_charities_and_terrorism_preventing_abuse_of_your_favourite_canadia/

[30] There are many ethical issues affecting Canadian charities operating abroad, including but not limited to:

- concerns about cooperation versus control by Canadian charities, especially when the Canadian charity is trying to empower foreign partners;
- carrying out long-term commitments in foreign countries versus, in some situations, withdrawing over concern for the security of a charity's employees or sustainability of the projects when there is conflict or political uncertainty;
- operating in countries that do not treat women and minorities fairly;

- security of staff abroad;
- employment issues;
- insurance;
- foreign currency fluctuations;
- sanctions; and
- import tariffs and duties.

Canadian charities need to carefully consider these and other issues before operating abroad in order to minimize problems and avoid subsequent legal liabilities.

Concern over local ownership

There is a best practice concept when undertaking international development projects called "local ownership". Local ownership[31] can be defined as when:

> i. intended beneficiaries substantially influence the conception, design, implementation, and review of development strategies;
>
> ii. implementing agencies are rooted in the recipient country and represent the interests of ordinary citizens;
>
> iii. there is transparency and accountability among the various stakeholders.

The CRA Guidance 2010 can be implemented in a number of ways – which may or may not be respectful of local ownership. It very much depends on the Canadian charity and its perspectives and attitudes to international development. For example, it is usually a good practice to have the "intended beneficiaries substantially influence the conception, design, implementation, and review of

---

- sexual coercion by aid workers or recipients of aid;
- the proliferation of development projects by military forces that, in some circumstances, create confusion about the role and impartiality of a charitable organization;
- the truthfulness of fundraising solicitations and advertising in Canada; and
- cultural sensitivity versus uncritical acceptance.

[31] See "In Local ownership and development co-operation – the role of Northern civil society: An Issues Paper" by John Saxby at http://www.ccic.ca/_files/en/what_we_do/002_aid_the_role_of_northern_civil_society.pdf

development strategies". In most cases it will be the intermediary on the ground that will prepare the initial description of activity as they are aware of details of the project. It is more likely that the intermediary will care about the project being delivered if they have been very involved with creating the project and its goals. However, the Canadian charity must consider whether the proposal complies with the Canadian charity's mission/objects, restrictions on funding that Canadian charity received from donor or funder, and the priorities, legal obligations and ethical constraints of the Canadian charity. A Canadian charity cannot send funds to an intermediary without knowing how it will be spent or maintaining direction and control.

The CRA Guidance 2010 largely discusses the use of intermediaries in foreign activities. Does a Canadian charity need to use an intermediary that is rooted in the recipient country and represents the interests of ordinary citizens? No they do not but most Canadian charities will use such organizations. In the past, the charity model was sending Canadian humanitarian workers or missionaries to developing countries. The whole notion of a structured arrangement, direction and control, and intermediaries is really focused on the idea of using for example a contractor who is typically located in the recipient country. That the intermediary is not a fly by night operator is consistent with due diligence requirements that CRA suggests. The notion of representing the interests of ordinary citizens is consistent with the public benefit requirement that Canadian charities need to be mindful of.

In terms of transparency and accountability the CRA Guidance 2010 encourages transparency and accountability from the intermediary to the Canadian charity. Whether the Canadian charity wishes to be transparent and accountable to the intermediary is a choice for the Canadian charity and the CRA Guidance 2010 does not preclude it. Canadian charities are also required to file the T3010 Registered Charity Information Return every year, which is available to all, including the intermediaries outside of Canada. The T3010 has significant information on the finances and foreign activities of charities. Some have argued that it provides too much disclosure, although I do not share that view.

Although transparency sounds like a universally accepted aspiration there are many special interest groups that for various reasons do not want transparency as it relates to their own organization. Transparency is not helpful if you want to have a lock on information, conduct illegal activities, allow unethical activities to take place, have excessive private benefits or activities in which there are no public benefit or conduct very ineffectual or ineffective activities. The ultimate goal of the ITA requirements is to ensure that resources are well spent and transparency is one of the mechanisms for ensuring that.

Although direction and control as described by the CRA Guidance 2010 largely relates to accountability by the intermediary to the Canadian charity, the CRA Guidance 2010 does not prevent multiple accountabilities. In other words if the Canadian charity wishes to have an affiliation in which the Canadian charity also holds itself accountable to the intermediary for the Canadian charity's actions then it can do so. Most good relationships are going to involve several accountabilities to different stakeholders and this includes both the intermediaries and the ultimate beneficiaries.

Specific Issues

Risk

In light of the increasing risk that Canadian charities face when conducting foreign activities CRA has cautioned Canadian charities to balance the risk with public benefit or it may affect their charitable status.

CRA notes in its Guidance:

> On a practical level, the CRA recognizes that many situations and activities involve some element of risk. Sometimes it is not possible to predict all outcomes and hazards of certain activities, particularly in quickly changing international environments. However, a charity or applicant should be able to show an awareness of the level of risk an activity poses versus the benefit that can be provided. If the charity intends to proceed with the activity, the charity should have an appropriate plan to mitigate significant risks to an acceptable level.

CRA suggests various factors for a charity to take into account:

- the likelihood and nature of harm to anyone delivering the activity, receiving the benefit, or otherwise affected;
- the urgency of the need for charitable assistance (for example, an activity that helps desperate people in regions affected by a disaster, or in war zones);
- the experience of the charity or applicant operating in situations with significant risk; and
- the charity's proposed measures to mitigate any significant risks.

It is vital that Canadian charities conducting foreign activities are carefully paying attention to risks, otherwise the implementation of the important humanitarian or other program could be jeopardized. Violence against aid workers has been increasing exponentially. Kidnapping, extortion, unlawful detention, civil unrest, random criminal violence, and workplace violence, are a reality. Still travel accidents in certain places seem to claim the highest number of fatalities. In today's world, neutrality and good intentions are no guarantee of safety.

Boards, employees and volunteers are increasing paying attention to security. As well, funders are refusing to fund activities unless a Canadian charity has the appropriate training, resources and policies dealing with security. Canadian charities need to be aware of security risks, plan for them and provide necessary education to staff to deal with them.

Charitable Goods Policy

CRA has a charitable goods policy, which allows certain limited types of goods to be transferred to an intermediary with a lesser degree of direction and control than generally set out in CRA Guidance 2010.

The CRA gives some examples:

- transfers, by a Canadian research charity, of books and scientific reports to a reputable foreign library or school;
- transfers of food and blankets to a foreign charity coping with a natural disaster, and that has a long history of successful operations; and
- transfers of drugs or medical equipment to a poorly equipped foreign hospital with an excellent record of serving its community.

The CRA requires that at a minimum:

> The nature of the property being transferred is such that it can reasonably be used only for charitable purposes (for example, medical supplies like antibiotics and instruments, which will likely only be used to treat the sick, or school supplies like textbooks, which will likely only be used to advance education); **please note that transfers of money are not acceptable, and always require ongoing direction and control**. [emphasis ours]
>
> Both parties understand and agree the property is to be used only for the specified charitable activities.
>
> Based on an investigation into the status and activities of the non-qualified donee receiving the property (including the outcome of any previous transfers by the charity), it is reasonable for the charity to have a strong expectation that the organization will use the property only for the intended charitable activities.

If one of the three conditions above is not met then the charity must maintain sufficient direction and control as set out in the rest of CRA Guidance 2010.

The charitable goods policy is anything but a foundation upon which to base charitable operations abroad. It might be appropriate to rely on it if you are providing a small amount of a clearly charitable product such as food in a country experiencing a famine, where it is an emergency, and the charity involved is dealing with a reputable agency that is non-political, non-sectarian, and the agency is acting as the Canadian charity's representative in distributing the food. Otherwise the Canadian charity is better off having an written agreement with the intermediary to protect its resources and reputation and to ensure clarity on how the resources should be used.

If a charity is providing certain resources directly to a 'proper beneficiary' then it does not need to maintain direction and control over the resources. CRA cites the example "a charity could give school supplies, such as books or writing

instruments, to impoverished students without having to direct and control how the students use those resources."

Transfer of Assets to Foreign NGOs and Charities and Others

Canadian charities operating abroad should maintain ownership and control over all of their assets. In general, the Canadian charity can only sell these assets at fair market value or transfer them to another Canadian qualified donee. Except as provided below, a Canadian charity cannot just transfer assets to a foreign charity or NGO that is not a qualified donee.

The CRA describes 3 scenarios in which a Canadian charity might transfer ownership to a non-qualified without necessarily obtaining fair market value for the asset:

- the country in which the charity is operating does not permit foreign ownership of capital property; or
- the capital property is transferred only as part of a development project to relieve poverty by helping a community to become self-sufficient; or
- the charity can show that it has made every reasonable effort to gift the capital property to another qualified donee, **and** has made every reasonable effort to sell the capital property for its fair market value, but has not been successful.

CRA cautions with the third scenario above "Before transferring ownership of any capital property, and particularly in the case of the third scenario in the above list, we recommend contacting the Charities Directorate to consider the available options."

According to CRA, "a development project is generally one where turning over the property to a local organization is integral to giving a deprived community the means to break free of the cycle of poverty and disease. This may include, for example, projects such as schools and hospital buildings."

Even if one of the three scenarios above applies then a Canadian charity should still:

1) Determine that the foreign charity has charitable objects or mandate;
2) Receive a commitment from the foreign charity that they will only use the property for charitable purposes;
3) Receive "reasonable assurances that the property will, for its expected useful life, benefit the whole community"; and
4) Do a risk assessment of whether of the benefit of transfer versus the possibility of inappropriate use of the asset.

Tithes, Membership, or Other Fees to Related Foreign NGO

In Appendix C of the CRA Guidance 2010, CRA discusses payments by Canadian charities to foreign charities for tithes, royalties, memberships, or other similar types of transfers to a head body.

CRA acknowledges that Canadian charities benefit from services, resources, materials and intellectual property from foreign charities. Therefore, CRA accepts that if a Canadian charity receives benefits from the head body then the Canadian charity can transfer "small amounts" each year to such head body to pay for those benefits. CRA notes "we will probably consider a small amount to be whichever amount is less—5% of the charity's total expenditures in the year or $5,000." So the most that a Canadian charity can transfer if it expends over $100,000 on charitable activities, is $5000 to a head body without having to show direction and control over the funds or the receipt of goods or services at least equal to the amount provided.

Disaster Relief

With such a connected world natural or man-made disasters that are halfway around the world can be brought immediately into the living rooms of Canadians. Some Canadians may even be from the affected area. As CRA notes: "Following a natural disaster such as an earthquake or flood, many organizations want to provide immediate assistance and relief to those affected. As a result, the CRA

often receives applications from such organizations seeking to be registered under the *Income Tax Act*." CRA cautions that although they may deal with such applications in a priority manner the new Canadian charity has to meet all the other legal requirements.

CRA cautions against groups just setting up Canadian charities and encourages groups to support existing Canadian charities that have appropriate experience.

> Applicants should also be aware that in the immediate aftermath of a disaster, the affected area can be quite volatile and dangerous. Local authorities may limit access to an affected area to well-established, experienced, relief organizations. Rather than establishing a new charity to respond to disasters, it is almost always faster and more effective for applicants to raise funds and support existing qualified donees that have the experience, resources, and infrastructure already in place to respond to disasters.

Canadian Affiliate Organizations

Sometimes a Canadian charity will be established with a name that is similar to a foreign organization's name. These groups are sometimes called "Canadian Friends of" organizations.

CRA notes that:

> it is not possible to register an organization solely to support a non-qualified donee's activities. If however the non-qualified donee's activities are charitable in whole or in part, an applicant could apply to carry out that portion of the work of the non-qualified donee, and then have that non-qualified donee act as an intermediary in carrying out the applicant's activity. However, the applicant would have to show real and ongoing direction and control over the use of its resources, which the non-qualified donee would have to agree to.

Supporting Terrorism[32]

CRA reminds Canadian charities of the importance, whether in Canada or abroad, of not having their resources used to support terrorism. CRA has prepared a separate "Checklist for charities on avoiding terrorist abuse"[33] The Charity Commission of England and Wales has cautioned charities that there are many ways that terrorists may want to misuse the resources of charities[34] including:

- raising funds in the name of a charity or charitable purposes, which are then used by the fundraisers for supporting terrorist purposes, with or without the knowledge of the charity
- using charity vehicles to transport/smuggle illegally into countries people, cash, weapons or terrorist propaganda and using charity premises to store them or arrange distribution
- using residential schools as military recruitment and training centres
- using charities set up for providing facilities for young people for terrorist organisation and recruitment
- claiming to work for a charity and trade on its good name and legitimacy in order to gain access to a region or community for terrorist purposes
- using charities for money laundering purposes or as a legitimate front for transporting cash or other financial support from one place to another
- exploiting the communications network of a charity to allow terrorists to contact or meet each other. Sometimes a charity may simply provide the opportunity for terrorists to meet. These activities may well take place without the knowledge of the charity or the trustees
- people within a charity arranging for or allowing charity premises to be used to promote terrorist activity or extremist ideology

---

[32] Charities operating in difficult regions may wish to review my article "Canadian Charities and Terrorism: Preventing Abuse of Your Favourite Canadian Charity" located at: http://www.globalphilanthropy.ca/index.php/articles/canadian_charities_and_terrorism_preventing_abuse_of_your_favourite_canadia/

[33] http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/vtb-eng.html

[34] http://ogs.charitycommission.gov.uk/g410a001.aspx

- in extreme cases, terrorists may try to set up an organisation as a sham, promoted as charitable but whose sole purpose is really to raise funds or use its facilities or name to promote or co-ordinate inappropriate and unlawful activities

CRA has deregistered a number of Canadian charities for allegations that include terrorism.[35]

Other

VI. Fiduciary Duties when Handling Charitable Property

The CRA's view of the law is based on the ITA and numerous court decisions interpreting the ITA. However, directors and trustees of Canadian charities must remember that they have fiduciary duties to the Canadian charity including safeguarding its resources and protecting its reputation and this may in some cases require that Canadian charity operate at a higher standard than what CRA requires. Other regulators such the Ontario Public Guardian and Trustee, and the Charity Commission of England and Wales place an emphasis on fiduciary duties of charities and not just compliance with income tax legislation.

As the Charity Commission of England and Wales noted in a recent Inquiry Report[36] on a particular charity conducting foreign activities:

---

[35] One of the most extensively covered charity revocation relates to the organization International Relief Fund for the Afflicted and Needy Canada (IRFAN-Canada). Here are copies of the CRA letters setting out in details CRA's concerns with the organization. See http://www.canadiancharitylaw.ca/blog/international_relief_fund_for_the_afflicted_and_needy_canada_irfan-canada_h and also http://www.globalphilanthropy.ca/blog/irfan_canada_court_documents_shed_light_on_different_parties_positions

[36] Inquiry Report: Crescent Relief (London). For the full document and a very useful discussion of trustees obligations see http://www.globalphilanthropy.ca/images/uploads/Inquiry_Report_-_Crescent_Relief_(London)_from_the_Charity_Commission.pdf

19. The Inquiry appreciated that collaborative working can be an effective way to maximise the impact of charitable work, especially in an emergency response situation, including, where properly managed, work with non-charitable organisations. Working in collaboration does not, however, relieve trustees of their legal duties and responsibilities towards their charity. Trustees have ultimate responsibility for running a charity, its finances and property. They must always act to protect property owned by their charity and ensure its finances are used appropriately, prudently and in accordance with its charitable purposes.

20. Where charities give money to partners and beneficiaries, especially large amounts of money or in high risk situations, making sure that adequate monitoring takes place is crucial. This means verifying that charity funds or property reach their proper destinations and are used as the charity intended.

21. Partners who are funded to implement a project or deliver aid are in a position to abuse these funds unless:

- the charity is sure they are bona fide organisations;
- the charity has evidence that the partner can implement the programme in the way expected; and
- the partner's internal management and financial control systems enable them to identify and report losses or abuses back to the charity.

…

33. Despite their reliance on the local partner to act on the Charity's behalf, and their transfer to him of significant sums of Charity money for this purpose, the trustees did not provide the Inquiry with any documentation to evidence the existence a partnership agreement between the Charity and the local partner to formalise the terms of the arrangement between them. Nor were the trustees able to satisfy the Commission that adequate due

diligence checks had been undertaken before the partner had been selected.

34. Charity trustees are all equally responsible for the management of their charity. It is acceptable for trustees to delegate aspects of the day to day management of their charity to one trustee, staff or others. However, charity trustees must always retain the ultimate responsibility for running the charity.

35. When delegating tasks it is vital that adequate safeguards are in place. Trustees are under a duty to manage and supervise the activities carried out in the charity's name and should ensure they monitor and oversee the way in which their delegated powers are exercised. …

42. All charities must have, as a minimum:

- some form of appropriate internal financial controls in place to ensure that all funds are fully accounted for and are spent in a manner that is consistent with the purpose of the charity. What controls and measures and what is appropriate will depend on the risks and the charity;
- proper and adequate financial records for both the receipt and use of all funds together with audit trails of decisions made. Records of both domestic and international transactions must be sufficiently detailed to verify that funds have been spent properly as intended and in a manner consistent with the purpose and objectives of the organisation;
- given careful consideration to what due diligence, monitoring and verification of use of funds they need to carry out to meet their legal duties; and
- take reasonable and appropriate steps to know who their beneficiaries are, at least in broad terms, carry out appropriate checks where the risks are high and have clear beneficiary criteria which are consistently applied.

Conclusion

The rules governing Canadian charities operating abroad, while somewhat complicated, are not too onerous, and it is important that Canadian charities understand these rules and comply with them.

Although some commentators have criticized CRA's requirements for charities operating abroad as silly or artificial, it appears that the totality of what the CRA requires is not unreasonable in light of the importance of the funds transferred abroad being used for appropriate charitable activities and the substantial contribution of the Canadian government by way of tax credits. When funds are transferred abroad, a large part of every dollar is actually coming from the Canadian taxpayers. Many "major donors" who put in only a small percentage of a project would require far greater controls than those required by CRA.

From a corporate governance perspective, many of the CRA requirements are simply good corporate governance. As discussed, directors and officers of charities have a fiduciary duty, irrespective of the ITA or CRA guidance, to ensure that the funds of the charity are well spent. Canadian charities should always receive reports on activities they are undertaking whether in Canada or abroad. When an organization is conducting a large or ongoing project, it makes sense to have progress payments. Keeping Canadian charities' funds separate simplifies the accounting and auditing process. Canadian charities who receive donations from the public or other sources need to ensure that their funds are being spent wisely or the consequence to the charity's reputation could be severe.

In my experience, Canadian charities are often more concerned with a local newspaper writing an unflattering article that will undermine the Canadian charity's fundraising or goodwill than they are with CRA audits and deregistration. As well, the Canadian charity may be concerned that a faction may publicly complain or go to court over non-compliance or illegal conduct by others in the Canadian charity. Furthermore, the chair or chief executive officer may be concerned that they will end up being replaced or fired or have their reputations

ruined. As many Canadian charities have discovered, it may be easier to ask for forgiveness from CRA than to deal with disgruntled donors and the public.

The world has become more complicated because of terrorism, money laundering, fraud, a desire to prevent corruption and bribery, sensitivity to human rights concerns, and a number of other challenges. Funders are no longer just writing out cheques and hoping that their money will save millions of lives. Increasingly, they are looking not only for accountability but also for results that are measurable and programs that are effective, which is more than CRA is requiring in its CRA Guidance 2010.

Canadian charities operating outside of Canada have to increasingly be aware that certain foreign governments are imposing restrictions on the work of foreign charities. For example, restricting funds coming into their countries, restricting involvement of charities in human rights work, placing burdensome registration requirements or expelling foreign organizations. These requirements are making it more difficult for charities around the world to do their work. It is interesting to note that one recent international study concluded that Canada was the second best country to operate a non-governmental organization.[37]

As Canadian charities increasingly operate outside of Canada, it is important for them to realize that there are restrictions with respect to Canadian registered charities conducting foreign activities and the transfer of funds to foreign NGOs and charities. While failure to comply with the rules can result in deregistration and other penalties, I would hope that this article will encourage compliance with the rules which will not only protect the reputation of the Canadian charity but also that of the whole sector. Unfortunately, Canadian charities that conduct international development work have the lowest level of trust of any part of the charitable sector.[38] It is in the interest of all Canadian charities working abroad to

---

[37] See a discussion of CIVICUS' Enabling Environment Index at http://www.globalphilanthropy.ca/blog/canada_scores_2_on_civicus_enabling_environment_index_eei_-conditions_for_c

[38] See my article entitled "Why Canadian Donors Have Low Levels of Trust for Canadian International Development Charities?" at

raise the level of trust for all charities. Certainly complying with the CRA requirements is a significant step in the right direction. Avoiding many of the other common legal and ethical pitfalls discussed in this article is another.

It is perfectly reasonable for donors to be concerned with how their money is spent. When 40 to 60 cents of every dollar donated to a registered Canadian charity results in forgone tax revenue, CRA and taxpayers have a legitimate interest in how those funds are spent. Canadians realize that Canadian charities perform very important work in our country and beyond, but they also understand that when a person donates to a Canadian charity and then deducts the amount of such donation, the burden of paying the taxes shifts to another taxpayer. As long as the funds donated to the charitable sector are well spent, Canadians are prepared to subsidize the charitable system. Without rules and an active regulator, there would be no limits on how the funds could be spent and no way of knowing if the funds are being appropriately spent. I do not think in this age of terrorism, money laundering and expectations of greater accountability, that most Canadians would be comfortable with almost $3 billion being spent by Canadian charities outside of Canada per year without necessary controls and reporting.

This article is for information purposes only. It is not intended to be legal advice. You should not act or abstain from acting based upon such information without first consulting a legal professional.

---

http://www.globalphilanthropy.ca/index.php/articles/why_do_canadian_donors_not_trust_canadian_international_development_chariti/