CANADIAN CHARITIES AND FOREIGN ACTIVITIES

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Introduction

This article will attempt to assist Canadian charities who are conducting or interested in conducting programs outside of Canada with some of the legal issues that they may face. It will discuss the statutory and regulatory framework for Canadian charities operating abroad, describe the permissible structured relationship and agreements; review a number of cases dealing with Canadian charities operating abroad and highlight some challenges facing Canadian charities that have foreign activities.

The Canada Revenue Agency (CRA), the federal government department tasked with approving and regulating registered charities in Canada, is very concerned with the level of compliance of Canadian charities that conduct foreign activities. Recently the CRA, as part of their Charities Partnership and Outreach Program, identified "Conducting foreign activities in compliance with a charity's obligations under the Income Tax Act" as their number one concern.

There have been a number of good articles written over the years on the subject of foreign activities by Canadian charities.[FN1] The area of law is evolving and I welcome any comments or suggestions for improvement to this article.

Foreign charities wishing to operate in Canada, as opposed to Canadian charities wishing to operate abroad, may wish to review my article entitled Foreign Charities Operating in and from Canada at http://www.blumbergs.ca/articles_more.php?id=114_0_2_0

Increasing Global Philanthropy

A large number of Canadian charities operate to some degree outside of Canada. The latest statistics indicate that of the 78,893 charities that filed their T3010A Registered Charity Information Return in 2004, 11,969 Canadian registered charities carried on programs, directly or indirectly, outside of Canada. This number represents just over

15% of the 78,893 Canadian registered charities that filed their T3010A in 2004. These charities spent approximately $1.8 billion dollars on programs outside of Canada in 2004, a significant rise from $1.4 billion in 2002. (Canadian Charities Operating Outside of Canada – A Statistical View of an Important Part of the Canadian Charities Landscape - http://www.blumbergs.ca/articles_more.php?id=125_0_2_0)

Canadian charities that operate abroad are in the forefront of dealing with many of the most difficult global problems including HIV/AIDS, human rights, access to education, clean water and sanitation to name a few. While many donors have lived abroad and have a substantial attachment to causes and communities outside of Canada, many donors consider themselves "global citizens" and are motivated by the enormity of global problems. Others like venture philanthropists are impressed with the huge effect that their donation can have in a developing country – often many times greater than the same funds used at home. With the increasing value of the Canadian dollar the impact of spending Canadian dollars has dramatically increased.

Good Work outside the Registered Charity Realm

Before having a detailed discussion of Canadian charities that operate abroad I would be remiss not to mention 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. Personal donations of cash or in kind items to foreign charities, with no tax receipt from a Canadian charity;
2. Having your business make a donation to a foreign charity or cause with no tax receipt received, or your business can provide sponsorship to a foreign charity or advertise in their publications;
3. Invest in developing countries or set up a branch of your business there;
4. Establish a for-profit "non-profit" which is a for-profit corporation set up with the intention of helping people rather than making a profit. Examples include Google.org, or many for profits involved with micro-loans;
5. a Canadian non-profit corporation without charitable status –this is particularly useful if your donor, such as the Canadian government, does not need a tax receipt;
6. You can volunteer at home and abroad;
7. Many Canadians remit funds to their families, friends, former employees in other countries, and they do not receive any tax benefit from it. In fact, remittances account for more than three times the transfer of funds outside of Canada compared to all the Canadian registered charities operating abroad. You can see my article comparing remittances from Canada to global philanthropy from Canada at http://www.blumbergs.ca/non_profit.php.

It is always important to keep in mind that there are alternatives to being a registered Canadian charity. If a group wishes to avoid being constrained by the rules for Canadian

charities conducting foreign operation then they should consider operating as a for-profit or non-profit entity but not as a registered charity.

CRA Publications

CRA has prepared two useful publications on Canadian charities operating abroad, namely "Registered Charities: Operating Outside Canada (RC4106)" [FN2] and "Registered Charities Newsletter No. 20".[FN3]

In addition, the CRA has developed Policy Statements, Consultations on Proposed Policy and Information Letters that provide additional information on CRA views relating to charities operating abroad all of which are available on the CRA website. I have compiled some of the Information Letters, which deal with Canadian charities operating abroad and have placed them in one PDF file at http://www.blumbergs.ca/non_profit.php.

General Restrictions Similar to Other Registered Charities

Some of the restrictions on Canadian charities operating abroad are similar to restrictions imposed on Canadian charities operating in Canada such as a prohibition on partisan political activities, limited non-partisan political activities, needing to operate within the objects of the charity, only undertaking charitable activities, avoiding any support for terrorism, filing the T3010 Registered Charity Information Return within 6 months after the charities year-end, and complying with disbursement quota obligations. Registered Canadian charities that conduct foreign operations have to comply with the same rules that apply to charities that only operate in Canada, but also have additional obligations, as discussed below.

Appropriate Objects

Before a charity embarks on activities outside of Canada, if it is a corporation, it should ensure that its objects allow for the operations outside of Canada. The Letters Patent/Articles of Incorporation contain the objects and restrictions. A charity wants to avoid operating outside of its legal authority (ultra vires). The consequences of acting ultra vires can include that the actions undertaken or decisions made are null and void and there may be personal liability for directors of such a charity.

Examples of appropriate object clauses can be found in the Ontario Not-For Profit Incorporator’s Handbook at the Ontario Public Guardian and Trustee Website.

For example "To relieve poverty in developing nations by providing food and other basic supplies to persons in need", "To improve the quality of drinking water in developing nations by constructing wells and water treatment, irrigation and sewage treatment systems", or "To advance and teach the religious tenets, doctrines, observances and culture associated with the (specify faith or religion) faith." An example of an object

clause that would need to be modified in order to allow foreign operations is "To establish and maintain a hospital in Mississauga, Ontario."

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 charitable organizations that are also registered charities under the Income Tax Act (Canada)." This allows for transfer of funds to Canadian registered charities but would not allow a foundation to carry out directly work abroad or to 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 (4) categories accepted by CRA and the courts namely to relieve poverty, advance education, advance religion, or benefit the community as a whole. In addition to fitting under one or more of the four categories, the charity must also be established for the benefit of the public or a sufficient 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 charity is set up as a trust then the charity should ensure that the Trust Agreement does not preclude operations outside of Canada. As well if there are specific restrictions attached to a donation they could preclude the funds being spent outside of Canada.

Unique Restrictions on a Charity or Undertakings made by the Charity

When some charities are granted charitable status they have restrictions imposed on their activities in the Notification of Registration received from CRA. Other charities after registration may have provided to CRA an undertaking or may have entered into a compliance agreement. These restrictions or undertakings or agreements can affect what operations are carried on by the charity and how they are carried on.

Narrower Charitable Scope of Foreign Activities

Canadian charities operating in Canada are allowed to undertake certain activities that Canadian charities operating abroad may not be allowed to do. The example given in RC4106 is that while it may be charitable for a Canadian charity in Canada to help the Canadian government reduce its debt, however, for a Canadian charity to reduce a foreign countries debt is neither charitable nor permissible under Canadian law. As well, a Canadian charity offering technical assistance to registered Canadian charities in certain circumstances is considered charitable whereas a Canadian charity offering technical assistance to foreign charities may not be considered charitable.

General Rule

The *Income Tax Act* (Canada) allows charities to conduct their charitable purposes by 1) giving money or assets to another "**qualified donee**" (as defined below) or 2) by conducting their "**own activities**" (at home or abroad). There is no 'third option'. A Canadian charity cannot just transfer money over to a foreign NGO or charity. In general, the same notion applies to operations within Canada. A Canadian charity cannot just give funds to another Canadian organization that is not a registered charity (or qualified donee).

Transfers to Qualified Donees

Qualified donees are organizations that can, under the *Income Tax Act* (Canada), issue official tax receipts for gifts that individuals or corporations make to them.

They include:

- registered charities;
- registered Canadian amateur athletic associations;
- registered national arts service organizations;
- housing corporations in Canada set up exclusively to provide low-cost housing for the aged;
- municipalities in Canada;
- the United Nations and its agencies;
- universities outside Canada with a student body that ordinarily includes students from Canada (these universities are listed in Schedule VIII of the *Income Tax Regulations*);[see Blumbergs article on Schedule VII Universities at http://www.blumbergs.ca/non_profit.php]
- charitable organizations outside Canada to which the Government of Canada has made a gift during the donor's taxation year, or in the 12 months immediately before that period; and
- the Government of Canada, a province, or a territory.

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 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. If the donor wishes to restrict the gift to Darfur then they may wish to have a direction or agreement to that effect. Similarly, if a donor advised that his/her donation to a community foundation (qualified donee) should be applied towards 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.

Own Activities

Foreign charities and NGOs are almost never qualified donees. Therefore as a general rule Canadian charities cannot transfer funds or assets to them except in furtherance of the Canadian charity's "own activities" in a structured arrangement as we will discuss below.

There are a number of different structured arrangements in which a Canadian charity could operate abroad including 1) Canadian employees or volunteers of the Canadian charity directly work abroad 2) by Agency Agreement with an Agent, 3) a Contractor, 4) Joint Venture Agreement/Joint Ministry Agreement and 5) Cooperative Partnership Agreement.

1) Canadian Employees or Volunteers

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 in a disaster situation. A Canadian church may send a missionary abroad to conduct religious activities. There are many advantages of sending your own employees over including using the skill and knowledge of Canadians, using your employees' understanding of your organization and its belief/philosophy, control over the employee, and the ability to harness the experience of the employee on his or her return to Canada.

However, many Canadian charities operating abroad find that it is not always possible to send Canadian employees abroad. Sometimes because of logistical reasons, costs, language, culture, security or other reason Canadian charities often prefer to contract with foreign NGOs to conduct the activities.

2) Agency Agreement

The most commonly used method of operating abroad 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. This is one of the most popular methods of Canadian charities operating abroad.

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's board of directors. 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, there is sometimes legitimate resentment by the agent, especially in the international development context, that the Canadian charity is controlling the project and relationship. The relationship does not seem equal or fair. After all, it is not a partnership or joint venture (those models will be discussed below).

3) Contractor Agreement

A Canadian charity can also retain a foreign contractor to conduct certain work. 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 the well. This type of agreement would have many similar features to an agreement between a Canadian charity and a for-profit company in Canada. The contractor could be either a for-profit entity or a non-profit. The advantage of this type of independent contractor relationship is that of limited liability. The contractor is an independent entity and it is responsible for its own actions. This is not to say that the Canadian charity could not be dragged into litigation if there was a problem, but it is less likely to be successful.

4) Joint Venture/Joint Ministry Agreement

A Canadian charity can work with a foreign person or entity jointly pursuant to a joint venture agreement and pool their resources to carry out certain charitable work. The Canadian charity would need to have control of the charitable work at least in proportion to the funds that the Canadian charity is contributing. This type of agreement is popular because it can be used when 2 or more entities are contributing to a particular project – in many cases with international charities there could be 10 or 20 parties to the joint venture which can also make it 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 US 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 the decisions of the joint venture. Therefore, the Canadian charity will have proportional 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 and the consequential adjustment in representation on the management committee.

5) Cooperative Partnership Agreement

In the cooperative partnership model a Canadian charity works with a foreign entity and each contributes different resources and undertakes a different part of the project. This is different from a joint venture where the parties pool their resources together.

An example of a cooperative partnership would be a Canadian group providing an x-ray machine to a clinic in Malawi. The clinic provides the space and technicians to use the equipment. Both parties are working together to achieve a charitable end, however, they are each contributing something different.

The concern with a partnership is the liability that the Canadian charity may face for actions of its partner(s).

Summary of Structured Arrangements

The simple way of conceiving of the five structured arrangements is as follows:

- 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 will probably be an agency agreement.
- if a Canadian charity is hiring a foreign NGO or business to conduct a discrete project as an independent contractor then it may be a contractor 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 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, ie money, material, staff, then it probably will be a cooperative partnership agreement.

Elements of "Own Activities"

The Canada Revenue Agency has identified in RC4106 certain elements that are required in order for the foreign activities of a Canadian charity to be considered the "own activities" of the Canadian charity:

1) *the charity has obtained reasonable assurance before entering into agreements with individuals or other organizations that they are able to deliver the services required by the charity (by virtue of their reputation, expertise, years of experience, etc.)* [I would compare this to due diligence in the purchase of a business - if you are going to transfer

large amounts of money to an agent to undertake your charity's work you need to satisfy yourself that they have the capacity, skills, interest, honesty etc. to carry out the work. This step is particularly important if you have not had previous dealings with the organization.];

2) *all expenditures will further the Canadian charity's objects and constitute charitable activities that the Canadian charity carries on itself* [the objects or formal purposes of the charity are found in the Letters Patent of the charity. Charities are restricted to carrying out activities that are within their objects. What is 'charitable' under Canadian law is an evolving area but as discussed above what is charitable in Canada is broader than what is charitable abroad.];

3) *an adequate agreement is in place* [the CRA requires that any agreement must be in writing and must contain the minimum elements outlined below. As Robert Hayhoe points out, that as in the case of an agency relationship where the principal is potentially liable for the actions of the agent, it is important to set out the scope of the agency relationship and "If the relationship is not recorded in writing, it will be virtually impossible to argue that any particular activity is not within the scope of the agency relationship" (see "International Charitable Activities" cited in FN1).];

4) *the charity provides periodic, specific instructions to individuals or organizations when appropriate* [in Registered Charity Newsletter #20 CRA advises that "The amount of control will vary by the nature of the resources being used, and the characteristics of the foreign organization." I take this to mean that cash requires greater control than penicillin. As well the more established, reliable, and reputable the foreign organization less control is required.];

5) *the charity regularly monitors the progress of the project or program and can provide satisfactory evidence of this to the Canada Revenue Agency* [the two elements are regular monitoring and satisfactory evidence. With respect to regular monitoring, although the CRA requires this, 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 it could be by a third party, or the foreign NGO could report on the progress with the Canadian charity reviewing the reports and requesting further information or clarifications when necessary. Satisfactory evidence will depend on the circumstances. See the section on Books and Records below.]; and

6) *where appropriate, the charity makes periodic payments on the basis of this monitoring (as opposed to a single lump sum payment) and maintains the right to discontinue payments at any time if it is not satisfied* ["where appropriate" probably means that if you have a $10,000 budget you may not need periodic payments, especially if it is a long term relationship. However, foreign entities frequently balk, in my opinion unreasonably, at this requirement. In the event that a Canadian charity is funding the building of 20 schools, each costing $50,000 for a total budget of $1 million dollars I see nothing wrong with sending funds for 5 schools at a time and when they are satisfactorily completed sending along the next payment. I think it would be irresponsible for the

Canadian charity to just wire over $1 million dollars and hope for a nice report at the end.]

The CRA has identified certain minimum requirements with respect to the written agreements between the Canadian charity and the foreign entity in RC4106 which provides:

"Written agreements should typically include at least the following information:

1) names and addresses of all parties;
2) the duration of the agreement or the deadline by which the project must be completed;
3) a description of the specific activities for which funds or other resources have been transferred, in sufficient detail to outline clearly the limits of the authority given to the recipient to act for the Canadian charity or on its behalf;
4) provision for written progress reports from the recipient of the Canadian charity's funds or other resources, or provision for the charity's right to inspect the project on reasonably short notice, or both;
5) provision that the Canadian charity will make payments by instalments based on confirmation of reasonable progress and that the resources provided to date have been applied to the specific activities outlined in the agreement;
6) provision for withdrawing or withholding funds or other resources at the Canadian charity's discretion;
7) provision for maintaining adequate records at the charity's address in Canada;
8) in the case of agency agreements, provision for the Canadian charity's funds and property to be segregated from those of the agent and for the agent to keep separate books and records; and
9) the signature of all parties, along with the date."

The CRA is not just looking at the form of the agreement but also the actual implementation. In CIL - 1994 - 001 the CRA noted:

> Once the agreement is in place, the Canadian charity must in fact show a reasonable degree of on-going interest and control in the project carried out by the agent, to such an extent that it might, for example, be able to withhold funds if at any stage in the project, the agent's work is not satisfactory, or to the extent that it might require the agent to account for the project's progress so far. Vouchers, if any, or other documentation related to the carrying out of the project by the agent should be part of the charity's records, available in Canada. The charity's continuing eligibility for charitable registration will depend on whether or not it is in fact maintaining sufficient degree of ongoing control as required by the Act and provided for in the agreement.

In information letter CIL - 1998 - 027 the CRA noted that a predecessor draft of RC4106 "… essentially describes the minimum elements Revenue Canada requires for

arrangements that charities may use to show that they retain direction and control of their resources." In this increasingly competitive area of international philanthropy, few charities are going to excel by only following the minimum standards.

I spend a considerable amount of time working with parties outside of Canada who have agreements with Canadian charities to explain the requirements and rationale of those agreements. It is much easier to have compliance if the foreign party understands the meaning of a particular clause and, just as importantly, why particular clauses are in the agreement. I remember one head of a very large foundation that transferred many millions of dollars per year outside of Canada who said that she was blessed by the fact that the agents understood exactly what was needed by the CRA and why.

I also spend time advising foreign charities on negotiations with Canadian charities who in some cases take advantage of the requirement for a written agreement to impose additional onerous conditions and restrictions, beyond those required by the CRA. Some Canadian charities use or 'abuse' the CRA requirements as an excuse to impose unfair terms on the foreign agent or partner. The most egregious term I recently reviewed was a Canadian charity requiring the foreign charity to agree that upon signing the agreement the foreign charity would 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.

With respect to segregation of the agent's Canadian funds from its other funds, the CRA noted in an information letter (CIL - 1997 - 003):

> In general, the segregation of principal and agent funds should be respected. Where commingling takes place, we would require a complete and detailed accounting for every expenditure out of the mixed fund. The invoicing procedure you describe, if applied to all expenditures involving the Canadian charity's funds, would seem to satisfy this requirement. … We would point out that where the funds of several organizations are commingled, this will not necessarily be legitimized by the adoption of a joint ministry agreement.

Many organizations view segregation of funds as being cumbersome. However, one can flip the argument around pretty quickly. If you are monitoring the activities of your agent, would it be easier to review 100 transactions related to your project or 10,000 transactions related to all the projects of the agent? Additionally, if the CRA audits the Canadian charity, I doubt that the foreign charity will be excited to provide complete information of all banking they did. It would be a lot simpler if the Canadian funds are in a separate bank account and dealt with separately.

Additional Joint Venture Requirements

The CRA also has identified in RC4106 additional guidelines relevant to joint ventures to ensure proportionate ongoing control.

-presence of members of the Canadian charity on the governing body of the joint venture;
-presence in the field of members of the Canadian charity;
-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;
-authorship of procedures manuals, training guides, standards of conduct, etc., by the Canadian charity; and
-on-site identification of the venture as being the work, at least in part, of the Canadian charity.

The CRA tries to assist charities with their compliance requirements for operating abroad by publishing material and answering calls. A charity can always provide its agency agreement to the CRA and request approval from the CRA of the agency agreement. However, my experience is that many charities are reluctant to interact with CRA in such a fashion unless required, for example as part of an audit. Many charities operating abroad are concerned about dealing with the CRA because of its oversight responsibility. Furthermore, some charities from certain groups within society have the erroneous view that the CRA will not 'support' their organization, activity, or ethnic group and they are afraid to deal with the CRA. The length of time that it takes the CRA to respond to written questions - sometimes 4-6 months - undercuts the likelihood of Canadian charities requesting assistance from CRA and one can argue reduces the likelihood of the Canadian charity being compliant with Canadian laws and rules relating to operations abroad.

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.

Charitable Goods Policy

The CRA has accepted what is referred to as the "Charitable Goods Policy" namely that in certain limited circumstances a charity can give away or transfer assets to a foreign NGO if the goods or assets can only be used for charitable purposes - such as food in a

country facing famine, medical supplies, or prayer books. I will discuss this policy in detail later under the *Canadian Magen David Adom* case.

Prohibition on Foreign Ownership

The CRA has accepted that in certain countries there are prohibitions on a Canadian/outside charity owning real estate and it may be necessary for a local charity or government institution (which would not be a qualified donee) to hold the real estate. The local charity or government institution would have to give written assurances to the Canadian charity that the building or land will be used for charitable purposes.

In Registered Charities Newsletter #20 the CRA advised that:

> …if there are legal impediments to the Canadian charity constructing or holding title to real property in a foreign country, the Canadian charity should get a letter from the country's embassy or consulate to confirm the law in this matter. In such circumstances, the Charities Directorate will accept that title to the facility vests in a body other than the Canadian charity, if:
>
> - it can be demonstrated that the facility is being built and will be used indefinitely for exclusively charitable purposes; and
> - title to the facility vests either:
>   - in a locally recognized charity (proven by a letter from the appropriate authority that regulates charities in the foreign country); or
>   - in a government body.
>
> The written agreement implementing such a project should include a clause stipulating the title-holding arrangements for each capital property undertaking.

Development Work

The third exception deals with the transfer of assets as part of development work. A Canadian charity can turn over to local control bridges, roads, wells, etc. that are part of a development initiative as long as the charity receives written assurances that the structures or equipment will continue to benefit the community.

Repayment of Actual Debt

The CRA noted in CIL - 1999 - 009 that "…a registered charity, in particular a charitable organization, can repay a loan to a creditor regardless of whether or not the creditor is resident in Canada and a Canadian registered charity. However, the books and records of the Canadian charity must evidence that such a debt exists."

Tithes, Membership or Other Fees to Related Foreign NGO

In RC4106 the CRA acknowledged that many charities are affiliated or associated with foreign NGOs that are typically not qualified donees and that those organizations may confer goods and services on the Canadian charity in return for the payment of tithes, royalties, membership fees or other payments. The goods or services may include intellectual property rights such as a licence to use a trademark or copyrighted literature and materials. The services may also include consulting services or professional training.

CRA takes the position that "We are generally willing to accept that a Canadian charity is receiving value for its payments when only a small amount is involved. For these purposes, we will probably consider a small amount to be the lesser of 5% of the charity's total expenditures in the year and $5000." Alternatively, if the amount is greater the CRA advises that the "Payments to related organizations are only acceptable where the amount paid by the charity can reasonably be regarded as proportional to the benefit it receives."

The CRA cautions that "If the fees are excessive, we may regard the payment as a gift by the Canadian charity to a non-qualified donee." The CRA continues, "Payments made to related organizations outside the country should be clearly identified as such in the charity's books. Where the payments exceed a small amount, as described above, the charity should be able to document the actual goods and services it is receiving in exchange for the payments, or demonstrate that they were made under a properly structured arrangement."

Clients are sometimes confused as Canadian qualified donees affiliated with other qualified donees can transfer large amounts because of tithes, membership fees, royalties and other fees from one to the other. However, once the transfer is to a foreign entity and above the lesser of the de minimis percentage or amount then the Canadian charity needs to demonstrate that it received goods or services or have a structured arrangement in place.

As discussed above, there are CRA policies with respect to how a Canadian charity can conduct foreign operations. These policies must be adhered to in order to avoid penalties or revocation of charitable status. Although some commentators have criticized the 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 benefits that registered charities receive, 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 monies 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 the CRA.

From a corporate governance perspective, many of the CRA requirements are simply good corporate governance. 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.

Case Law on Canadian Charities Operating Abroad

Recent Canadian cases such the *Tel-Aviv Foundation* case, the *Canadian Magen David Adom* case, the *Bayit Leplitot* case, and the *Travel Just* case, all decided in the last few years, should be of particular interest to Canadian charities that operate outside of Canada. [FN4] I deal with the four cases below.

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

The *Tel Aviv Foundation* case deals with a Canadian charity set up 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, the CRA conducted an audit in which it noted its concern that the Tel Aviv Foundation's overseas expenditures were not properly documented. In 1993, there was another audit where apparently the new Israeli management of the Tel Aviv Foundation was not aware of the agency agreement. In 1996, the Tel-Aviv Foundation made undertakings to the 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 – the CRA was concerned 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 not controlling the funds and activities),
- Canadian Charity could not show reporting of transactions,
- the funds of the Foundation were not kept separate from agent,
- receipting and T3010 and T4 irregularities,
- concerns that the Canadian Charity did not authorize projects,
- no evidence of alleged oral arrangements that superceded the agency agreement,
- a $20,000 grant to an Air Force Museum in Beersheva, another city in Israel, and outside of the objects of the Tel Aviv Foundation and therefore ultra vires.

In 2000, the CRA advised the Tel-Aviv Foundation of its intention to revoke its charitable status. In 2002, the Canadian Federal Court of Appeal found in favour of the CRA and against the Tel-Aviv Foundation and revoked the Foundations 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 and understand it and be committed to implementing the agreement.

Furthermore, if there are going to be changes in the manner of how 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 charities face in operating abroad is in direction, control and supervision of agents abroad.

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

A final point, as illustrated in the *Tel-Aviv Foundation* case and the *Canadian Magen David Adom* case, discussed below, the CRA provides warnings about concerns with operations abroad and it is only after those warnings are not heeded over a protracted period of time that the CRA typically goes to the extraordinary step of deregistering a charity. As well, when a charity gives a written undertaking to 'clean up its act', presumably to avoid deregistration, then that charity will be held by the Courts to a higher standard, than another charity who has not been warned and not provided such undertaking.

***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 directly to the people of Israel. CMDA appointed a Canadian representative in Israel to implement the program. In 1986 there was a CRA audit. In that audit the CRA raised two concerns. First, that CMDA was giving funds to the US MDA for purchasing ambulances and that CMDA was not directly using the funds to purchase from General Motors the ambulances. Secondly, the CRA was concerned that 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.

The CRA has a charitable goods policy, in which it allows certain limited types of goods to be transferred to a foreign organization or given away without the need, in some cases, for a written agreement. Frequently cited examples include food in a famine situation, or prayer books. However, there are limits to the CRA's charitable goods policy and CRA is very concerned that the charitable goods may be used for non-charitable or private purposes. In those cases it is important that the charity impose controls on the use of the goods. CMDA was arguing that the transfer of the ambulances and equipment to Israel fell within the charitable goods policy. 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.

CRA was also concerned about expenditures funded by CMDA including setting up a new magnetic punch card system for employees of the Israeli charity, which ostensibly improved the operation of the Israeli charity. CRA was of the view that the punch card

system was an administrative expense in terms of the T3010 Registered Charity Information Return and not a charitable program. Depending on whether an expense is part of a charitable program or an administrative expense affects the disbursement quota requirements of the Canadian Charity and in this case would result in a shortfall in the disbursement quota.

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

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

The CRA also raised a public policy concern. As the ambulances were being used in Israel and the West Bank, the CRA was of the view that to some extent they were being used to support the permanence of Israeli settlements in West Bank. The 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, the 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 only used for charitable purposes and the court was concerned about the involvement by the agent with Israeli military operations.

A few weeks after the FCA decision CMDA and the CRA worked out an agreement whereby CMDA would not lose its charitable status! What can be drawn from this case which reads more like a saga from 1986 to 2002? 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, as it subsequently did, and to have a proper written agreement and follow through with the agreement, as it subsequently must have agreed to do?

The basis of the 'charitable goods policy' is a CRA Staff memo produced in 1985 and cited in the *Canadian Magen David Adom* case, which provides that:

> Equally acceptable are transfers of goods and services that are directed to a particular use by the very nature of the goods and services so transferred. Examples of such transfers include:
> -transfers, by a research organization, of books and scientific reports to anyone interested (including foreign governments, libraries, schools, etc.),
> -transfers of books -on a subject of particular interest to an educational charity,
> -to public libraries in major cities all over the world,
> -transfers of medical supplies to a refugee camp,
> -transfers of food, blankets, etc. to a charity coping with a natural disaster,
> -transfers of drugs, medical equipment, etc. to poorly equipped hospitals,
> -transfers of personnel to schools or hospitals (on loan).

The CRA Staff Memo also provides that:

> Transfers of goods or services can more easily be viewed as charitable activities per se. The transfer of a piece of equipment that is meant to be used only for charitable purposes to an organization that will clearly use it for such purposes is likely to be a charitable activity [emphasis added].

In Registered Charities Newsletter #20 the CRA advises:

> … the Charities Directorate will consider a transfer of property reasonable where the nature of the property means that it can only be used for a charitable purpose. For example, it is generally reasonable to assume that a copy of the Bible will be used for religious activities, that medical equipment will aid the sick, and that student books will be used for educational purposes in a school. In some cases, where the property could be used for something other than charitable purposes, it may none-the-less be unreasonable to expect the charity to maintain control of assets. The Charities Directorate will consider such situations on a case-by-case basis when requests are received in writing.

As you can see from the underlined parts of the above two quotes that the charitable goods policy in the CMDA case or Newsletter #20, is anything but a foundation to base charitable operations abroad upon, unless you have requested in writing consent from the CRA and they have agreed in writing to that request.

When could the charitable goods policy be useful? Perhaps it may be appropriate in the provision of a small amount of clearly charitable product such as food in a starvation situation and it is an emergency and you are dealing with a reputable agency that is non-political, non-sectarian, and the organization is acting as your representative in distributing the food.

The lessons we can learn from the CMDA case are:

1) the importance of having a written agreement that authorizes, controls and monitors the agent;
2) transfers of equipment to foreign militaries is not charitable;
3) the 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 3 orphanages. But, according to the Federal Court of Appeal, there was no evidence of the Rabbis' 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 also no factual basis for arguing that the Rabbi had delegated his authority.

***Travel Just* v. *Canada Revenue Agency* (2006 FCA 343)**

This recent Federal Court of Appeal case demonstrates the importance of properly drafted object clauses in the letters patent of a non-share capital corporation that will apply to become a registered Canadian charity.

The company "Travel Just" is a federal non-share capital corporation that applied for charitable status and was deemed to be refused by the CRA as the CRA did not dispose of the application within the required time period under the *Income Tax Act* (Canada).

The objects of Travel Just provide

> a. to work with key governmental authorities and grassroots communities of various tourism destination markets to create and develop model tourism development projects that contribute to the realization of international human rights and environmental norms and that achieve social and conservation aims that are in harmony with economic development aims for the particular region;
>
> b. to develop, fund, administer, operate and carry on activities, programs and facilities to produce and disseminate materials on a regular basis that will provide travelers and tourists with information on socially and environmentally responsible tourism in order to establish normative discourse around traveling with a social conscience.

Mr. Blake Bromley, legal counsel for Travel Just, argued that Travel Just should be registered as a charity because the objects fall within the fourth leg of the test in *Pemsel* v. *Special Commissioners of Income Tax* [1891] A.C. 531 (Eng. H.L.), in that it is "other purposes beneficial to the community".

The court was sympathetic to the idea of "ethical tourism", however, the court was concerned with two very important elements, namely, (1) the "vague and subjective" object provisions; and (2) what the court described as the "strong flavour of private benefit" that could flow from model tourist projects such as luxury resorts in the developing world.

The objects in this case were quite broad. In some people's mind a "model tourism development project" could be one in which the owners are running an ultra luxury resort only available to the very affluent that makes a very large profit for its owners and has occasional workshops on "international human rights and environmental norms" and will provide travelers and tourists with information on socially and environmentally responsible tourism such as little signs in the bathroom encouraging reuse of towels and conservation of water.

While "economic development aims for the particular region" could be charitable it could also be anything but charitable depending on the region and what its economic development aims are.

The FCA decided in favour of the CRA and in May 2007 the Supreme Court of Canada refused leave to appeal of the case.

The case illustrates the importance of properly drafting object clauses to ensure that the objects are completely charitable. This decision also highlights the Federal Court of Appeal's concern that registered charities can be used as vehicles for private benefit more than actually conducting charitable activities.

We can see from the *Canadian Magen David Adom* case and the *Tel Aviv Foundation* case that in the past numerous warnings have typically been given and only after many years of non-compliance will CRA typically move to deregister a charity for cause unless the charity has been very uncooperative. To put the deregistration issue into perspective, there is an interesting paper called “Frequency of Various Type of Non-Compliance by Registered Charities”. The paper was prepared by Diana Laing, John Skelton and Judy Torrance, for the Voluntary Sector Initiative and it reviewed the 58 revocations of Canadian charities from 1995-2001 (the report excludes those charities deregistered for non-filing of the T3010 form). First, they found then that about 10 charities were being deregistered per year - that is out of 82,000 thousand registered charities. Secondly, when revocation took place there were usually numerous problems, not just insufficient supervision of a foreign agent. In the case of lack of control over foreign activities they found that about 6 charities over the six year period lost their registration. In fact, of the 37 instances where lack of control over foreign activities was an audit issue, the results were as follows: the CRA issued educational letters in about 16% of the cases,

undertaking letters in 62% of the cases and revocation was the result in 21% of the 37 audits.

Concerns and Traps for Canadian Charities Conducting Foreign Activities

When dealing with Canadian charities operating abroad the requirements of RC4106 are only part of the legal picture. I will discuss below a number of areas of particular concern to charities that operate abroad, including:

1) terrorism and money laundering;
2) bribery and corruption;
3) fraud;
4) private benefits;
5) Intellectual Property (IP) issues (trademark, copyright, trade secrets, licences);
6) Legal constraints of foreign country (eg. Russia, foreign currency restrictions, land);
7) donor and Canadian International Development Agency (CIDA) constraints;
8) books and records (in Canada, official language, frequency, types);
9) ethical issues; and
10) security of staff abroad.

1) Terrorism and Money Laundering

Canadian charities cannot support terrorism at home or abroad. In 2001 the Canadian government passed the *Charities Registration (Security Information) Act* which disqualifies organizations that are involved with terrorism from having registered charity status in Canada. Charities should establish mechanisms and controls to ensure they are not duped or their funds used to support terrorism. Charities should be aware of schemes by foreign entities to deceive them. An example is when a foreign "donor" provides to a Canadian charity a loan in foreign funds that is without interest for a period of say 6 months or a year. The monies are converted into Canadian dollars and ostensibly the waiver of interest is a donation. However, the foreign "donor" is actually interested in using the good offices of the charities to launder the money and to evade attempts by certain governments to freeze assets. When the loan is paid back by the charity to the foreign donor the money is "clean". Canadian charities should be careful to conduct their due diligence to ensure that the supposed "legitimate entity" is not involved with terrorism and maintain adequate internal controls over the charity's operations. Although it is possible for a Canadian charity to be wholly controlled by a group of individuals who are intent on supporting terrorism, it is far more likely that a legitimate charity will be duped by a foreign agent or contractor or will have an individual employee abuse his/her position in the Canadian charity.

The CRA has suggested in its publication 'Charities in the International Context' that Canadian charities review the U.S. Department of the Treasury *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* and the UK *Operational*

Guidance: Charities and Terrorism (OG96) to consider ideas to avoid the charity's funds falling into the hands of terrorists. U.S. Treasury Best Practices covers issues such as Governance, Disclosure, Accountability and Financing Procedures. The U.S. Treasury Best Practices suggest that the charity know the name of the organization in English; the jurisdiction in which the foreign charity operates; that searches be conducted on the foreign charity (public filings, public databases and anti-terrorism lists); that no cash is ever provided; that the names and dates of birth of key employees of the foreign charity be recorded; that the foreign charity provide certifications with respect to terrorism, that bank references of the foreign charity be obtained and checked; that periodic reporting by the foreign charity be provided; and on-sight audits be conducted, if appropriate.

The UK *Operational Guidance: Charities and Terrorism* suggests reporting any concerns to the proper authorities; being aware of large donations from unknown individuals and verifying the situation; or donations conditional on certain organizations in the field being used as an agent or contractor; concern about informal money transfer such 'hawala' and the importance of a paper trail.

Charities should occasionally review international best practices, be aware of the risks, have policies in place to minimize the risk, including the performance of due diligence, and act decisively if there are concerns about an agent or partner or one of their employees or contractors.

2) **Bribery and Corruption**

It is important for Canadian charities to maintain a high standard of ethical and legal conduct abroad including avoiding bribery and corruption. Canada has recently passed the *Corruption of Foreign Public Officials Act* which has a broad definition of 'official' and 'bribe'. As well, CIDA also has the "Protocol for Dealing with Allegations of Corruption" which requires disclosure of previous offences and can lead to CIDA refusing to fund particular organizations.

3) **Fraud**

Whether it is fraudulent solicitations (advance fee fraud), more sophisticated internal fraud or fraud by an agent, it is important to have internal controls to prevent and detect fraud. The farther the foreign operations of the charity are from the charity in Canada the more difficult and more important it is to create adequate safeguards and to monitor the operations.

4) **Private Benefits**

For a Canadian charity to qualify for registration as a registered charity, it must meet a public benefit test. The charity must demonstrate that its objects and activities provide a tangible benefit to the public as a whole, or a significant section of it. When charities enter into a contractual relationship, whether it be an agency agreement, contractor agreement, or otherwise, CRA is concerned that the relationship provide the maximum

charitable benefit and is done in such a way as to minimize any private benefit. A private benefit would occur when there is a transfer of property or other resources of the Canadian charity to a person or entity who does not deal with the charity at arm's length or who is the beneficiary of a transfer because of a special relationship with either the donor or charity. If the agent or contractor is a private person or corporation, the concern is greater than if the agent or contractor is a foreign charity. The greatest concern is with capital assets such as land or buildings vesting in the Canadian charity, except in a few limited circumstances as discussed above. The CRA does not want large amounts of money spent on land and/or buildings, subsidized by Canadian taxpayers, only to have it handed over to private interests that use it for their own personal benefit.
The CRA notes in summary policy CSP - U02 that "A registered charity that confers on a person an undue benefit is liable to a penalty equal to 105% of the amount of the benefit. This penalty increases to 110% and the suspension of tax-receipting privileges for a repeat infraction within 5 years. A registered charity that contravenes or continues to contravene the Act could also have its registration revoked."

5) **Intellectual Property (IP) issues (trade-mark, copyright, trade secrets, licences)**

Intellectual Property includes trade-marks, copyright, patent, trade secrets, and industrial design. In many cases Canadian charities have spent years developing programs, materials and goodwill. Their good will can be extremely valuable. They need to carefully manage their corporate identity and be concerned about reputational issues. When operating abroad and working with an agent, joint venturer, partner or contractor, it is important to give some consideration to protecting the reputation, resources and goodwill of the Canadian charity by registering IP and using licensing agreements. Many charities fail to recognize that a large amount of IP protection is only national in scope and if they are operating in another country they may not have protection for the IP there. In fact, their operations may be violating another entity's IP. Protecting IP can be easy and cost effective. Often IP issues are given attention after a problem develops.

6) **Legal constraints of a foreign country**

Many countries place constraints on foreign charities operating in their country. For example, Russia has recently passed an NGO law which will affect many Canadian charities wishing to operate in Russia. Some countries require charities to register. Some countries restrict whether a foreign charity can own land. Other countries impose foreign currency restrictions and controls. Many countries place restrictions on occupations and professions (e.g. doctor, nurse, pharmacist, engineer). Some countries place restrictions on certain activities, for instance, in some countries microfinance is considered to be lending and financial services and appropriate permissions and licences may be required. It is important that charities understand the legal limitations they may face in operating in a particular country by speaking to other charities and obtaining local legal counsel.

7) **Donor and Canadian International Development Agency (CIDA) constraints**

If donors place restrictions on the use of their funds those restrictions need to be observed. In 2004/2005 CIDA allocated approximately $3.7 billion dollars for various programs. CIDA often provides matching funds to organizations and CIDA requires that recipients of its funds sign written agreements and keep to them. Also, CIDA's willingness to provide funds to a charity does not necessarily mean the activity in question is charitable under Canadian law. It is very important that, if a Canadian charity accepts funds from CIDA, the charity ensures that the operations are compliant with both CIDA requirements and CRA requirements. I have set up a number of non-profits who work with CIDA and they do not register as charities and are therefore not required to comply with the RC4106 rules, only with the CIDA requirements.

8) **Books and Records**

Books and Records for Canadian charities operating abroad need to be kept in either English or French and kept in Canada. From the CRA point of view, books and records are needed to be able to substantiate the qualification of the Canadian charity to registration, to permit verification of donations, and must also include source documents. In RC 4106 the CRA makes specific suggestions for recordkeeping with respect to Agents, Contractors, Joint Ventures, Cooperative Partnerships, and CIDA projects. RC4106 requires charities to monitor the structured arrangements and to obtain "reasonable reports on the progress of its projects and programs". What is reasonable in one circumstance may be unreasonable in another. These reports should be supported with backup evidence such as copies of written agreements, deeds, financial statements, invoices, photos, minutes of meetings, and any other materials that reflect the charity's ongoing participation and that show how the charity's funds are used. The CRA's publication IC78-10R4 has further details.

In terms of records retention charities are required to keep duplicates of receipts for at least two (2) years from the end of the calendar year in which the donations were made. Most other documents need to be kept for six (6) years from the end of a fiscal year. Some other records must be retained in perpetuity or until two (2) years after the charity is no longer a charity such as "ten year gifts", minutes of meetings and all governing documents such as letters patent.

Failure to keep adequate books and records is a ground for revocation. As well, without adequate books and records a charity will have a difficult time convincing a sophisticated or observant donor that the funds donated to the charity were properly spent.

9) **Ethical issues**

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;
-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;
-cultural sensitivity versus uncritical acceptance.

An interesting resource is the Canadian Council for International Cooperation (CCIC) Code of Ethics at ccic.org. Also you may wish to refer to CIDA's Questions About Culture, Gender Equality and Development Cooperation at http://www.acdi-cida.gc.ca/

10) **Security of Staff Abroad**

Charities should carefully assess risk to staff and agents and manage that risk. Charities should consider providing basic personal and team security training to volunteers and employees before their assignments. In certain circumstances, charities may have to coordinate with civil and military forces. Charities should consider security policies and crisis management. Charities may benefit from programs from organizations such as RedR.org.

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

Charitable Foundations that Promote Cross Border Philanthropy

There are organizations such as the Tides Canada Foundation, which is a Canadian registered charity and public foundation, which can assist with US/Canada cross-border giving, either by a donor or a charity. The Tides Canada Foundation has a sister charity which is registered in the US. A Canadian donor can donate to Tides Canada and receive a Canadian tax receipt or a Canadian charity can transfer funds to Tides Canada as it is a qualified donee. The money does not leave Canada but the recommendation of the donor is provided to the US entity who will consider making the gift to the recommended US charity in the amount of the donation to Tides Canada, minus a percentage for administration. The same procedure can be utilized by US donors or charities who wish to get a US tax receipt but have their funds spent in Canada. This program facilitates cross-border giving between Canada and the US. This may not be a solution for everybody, but it certainly is helpful for some donors and charities.

Improvements

Although the Canadian regulation of charitable activities outside of Canada is workable this is not to say that the Charities Directorate of the CRA could not improve on its regulation of this particular area. Some of the suggestions I have made to CRA include:

1. in working with thousands of charities operating abroad, the CRA has accumulated a large amount of experience and should provide greater operational guidance to charities to help them avoid the mistakes that others have made. The US IRS and UK government have done a lot in this area.

2. CRA should assign staff who are dedicated to exclusively assisting charities operating abroad and that are very familiar with the RC4106 rules and all the related technical and practical aspects.

3. The Charities Directorate Website should consolidate all information related specifically to Canadian charities operating abroad.

4. The CRA should share more of the information letters in the area of foreign operations.

5. The CRA needs to improve written response times. I have at times been dismayed that it may take 6 months or more to get a written response from CRA.

6. CRA should conduct educational initiatives, such as the Road Shows, dedicated exclusively to Canadian Charities Operating Abroad.

7. CRA should consider providing templates of agency, joint venture, cooperative partnership and other agreements as part of RC4106. This would be educational. Another idea would be to provide annotated agreements that, in addition to the agreement, would also hit home the points made in RC4106.

8. Pamphlet for the Agent, Joint Venturers and Partners. In my experience, one of the biggest challenges in compliance in this area has been that, even if the Canadian charity is committed to complying with Canadian charity law, certain foreign partners are reluctant to accept some of the agreements. Preparing a short pamphlet geared toward foreign agents may help in terms of explaining why these rules exist and the importance of complying. The alternative to complying with the CRA requirements for charities is for the supporters of the cause to directly donate to the foreign entity and receive no tax receipt for their donation. In some cases, this will mean that the entity will receive substantially less funds and in other cases, it will mean that the foreign entity will receive no funds.

9. I would note that the agreements that are generally being used are not always sensitive to international development issues. Most practitioners, including myself, are reluctant to move too far from precedents that have been submitted and approved by the CRA but I think that some thought should be given to how the CRA requirements can be upheld but at the same time be more sensitive to the development issues at hand. One of the major obstacles to having proper written agreements completed is the reluctance of the foreign parties to agree to sign an agreement that is often viewed as paternalistic, "colonialist" or one-sided.

10. Charity Scams. There are many charity tax schemes advertised or pushed by financial advisors and other professional advisors that promise with a donation of, for instance, $10,000, the individual will receive a tax receipt through some sort of circuitous means of $50,000. Many of these schemes talk about helping people with AIDS, feeding starving children, providing urgently needed medical supplies etc. In many cases very little actually makes it to those in need – certainly nothing close to the considerable amount of tax receipts issued. Canadian charities should scrupulously avoid any involvement or endorsement of fundraising schemes such as gifting trust arrangements, buy low, donate high arrangements, or leveraged cash donations. On September 29, 2007 Kevin Donovan of the Toronto Star reported in an article entitled "$1.4B tax scams nail donors", that 106,000 Canadian tax returns were being audited for "$3.55 billion in dubious or outright fake receipts" with a net tax loss of 1.4 billion to the Canadian government. It is vital that the CRA continues its strong crackdown on charity schemes as this sort of abusive activity threatens the Canadian public's trust in charities and, unfortunately, particularly those involved with international development. [See my article at http://www.blumbergs.ca/articles_more.php?id=110_0_2_0 on this subject.] Stronger legislation needs to be enacted to allow the CRA to publicly identify these schemes and to give the CRA the tools that it needs to shut them down.

11. Ethnic and Language Communities. The CRA should consider translating RC4106, or at least a summary of the publication, into various languages.

Conclusion

In my experience, Charities are often less concerned about CRA audits and deregistration than that a local paper will write an unflattering article that will undermine the charity's fundraising or goodwill. As well, the charity may be concerned that a faction may publicly complain or go to court over non-compliance or illegal conduct by others in the charity. Furthermore, the chair or chief executive officer may be concerned that they will end up being replaced or fired and having his/her reputation ruined. As many charities have discovered, it is easier to ask for forgiveness from CRA than to deal with disgruntled donors and the public. I am frequently called on by Canadian charities to conduct an informal legal audit of their legal compliance including, but not limited to, foreign operations.[FN5] The legal review can be either very basic or in-depth, depending on the client, and concerns can often be dealt with before they become a regulatory or public problem.

As Canadian charities increasingly operate outside of Canada, it is important for Canadian charities 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 charity but also the whole sector. Unfortunately, charities that conduct international development work have the lowest level of trust of any part of the charitable sector. It is in the interest of all Canadian charities working abroad to raise the level of trust for all charities. Certainly complying with CRA requirements will be a significant step in the right direction. Avoiding many of the other common legal and ethical pitfalls discussed in this article will be another.

It is perfectly reasonable for donors to be concerned with how their money is spent. When 40-60 cents of every dollar donated to a registered Canadian charity results in forgone tax revenue, the CRA and taxpayers have a legitimate interest in how those funds are being spent. Canadians realize that charities perform very important work in our society but they also understand that when a person donates to a charity and then deducts the amount of such donation that 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 don't think in this age of terrorism, money laundering and expectations of greater accountability, that most Canadians would be comfortable with almost $2 billion being spent by charities outside of Canada per year without necessary controls, rules and reporting.

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

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Footnotes:

FN1 Terrance Carter's paper "National and International Charitable Structures: Achieving Protection and Control" in the Law Society of Upper Canada's CLE program

Fit to be Tithed 2, November 26th, 1998. David Amy, wrote an article in the Philanthropist in 2000 entitled "Foreign Activities by Canadian Charities". Terrance Carter and Jacqueline M. Demczur 2006 article "Documenting Transfers of Funds Outside of Canada". Robert Hayhoe, a lawyer with Miller Thomson, wrote "Cross-Border Operations by Canadian Registered Charities (2004) 52 Can. Tax Journal, pages 941-967 among other articles. Robert Hayhoe also wrote "International Charitable Activities" (Chapter 12) in the loose-leaf "Charities Taxation, Policy and Practice" by Arthur Drache, Robert Hayhoe and David Stevens.

FN2 You can read the Canada Revenue Agency publication Registered Charities: Operating Outside Canada (RC4106) at the CRA website (http://www.cra-arc.gc.ca)
FN3 Registered Charities Newsletter #20 at the CRA website (http://www.cra-arc.gc.ca)

FN4 If you wish to read the full text of the above 4 Federal Court of Appeal cases dealing with Canadian charities conducting foreign activities then you can access them at http://www.blumbergs.ca/non_profit.php. As well, you may want to review the CRA Information Letters on Canadian charities operating abroad or conducting foreign activities at the Blumbergs website.

FN5 I recently wrote an article on the value of informal legal audits. It can be found at: http://www.blumbergs.ca/articles_more.php?id=137_0_2_0