
# New CRA Foreign Activities Guidance:

## Charities Circumnavigating the World Without Falling Off the Edge[1]

By Mark Blumberg[2] (May 7, 2009)

In this increasingly globalized world we cannot afford to ignore issues just because they occur beyond our national borders. Thousands of Canadian charities are in the forefront are addressing these important global issues and trying to make our world a better place.

The CRA will be releasing shortly a public consultation paper on foreign activities by Canadian charities. The paper will ultimately, once revised and issued, replace Guide RC4106, *Registered Charities: Operating Outside Canada* ("RC4106")[3] and will become CRA's updated guidance on foreign activities. It is anticipated that the public consultation paper will be released in May or June 2009 and then charities will be given the opportunity to provide CRA with feedback and comments on the consultation version before CRA further revises and finalizes it.

To prepare this paper, I was provided with a draft of the consultation paper dated March 30, 2009 (the "draft" or "draft guidance"). In this brief paper, I will summarize what I consider to be some of the new or interesting points in the draft guidance compared to the original RC4106. I have italicized the wording from the CRA draft.

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[1] This paper is prepared for the 2009 National Charity Law Symposium presented by the Canadian Bar Association (CBA) and the Ontario Bar Association (OBA) Charity and Not-for-Profit Law Sections and the Continuing Legal Education Committee.

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[3] http://www.cra-arc.gc.ca/E/pub/tg/rc4106/

1. **Policy Applies to Dealings between registered Charity and non-qualified donee, whether non-qualified donee in Canada or abroad**

   *This policy assumes that a charity working with an intermediary is doing so in order to carry on charitable activities outside of Canada. Please note, however, that the requirements in this policy also apply to all charitable activities carried out within Canada as well. This policy updates and replaces Guide RC4106, Registered Charities: Operating Outside Canada, and any previous policies regarding transfers to non-qualified donees.*

   Registered charities can use their resources in Canada or outside of Canada in one of two ways: 1) to support their own charitable activities; or 2) by gifts to qualified donees. CRA is making it more explicit that essentially the same rules apply to a Canadian charity dealing with an organization in Canada that is a non-qualified donee as the rules for a Canadian charity dealing with a foreign organization that is not a qualified donee. Canadian charities are often unaware that they are prohibited from gifting resources to non-qualified donees, whether or not they are a Canadian or foreign organization.

2. **Guidance Applies to Non-Profits Applying for Charitable Status**

   *Applicants for charitable status that intend to carry on activities outside Canada are also subject to this policy.*

   Organizations applying for registered charitable status must operate according to these guidelines from the date of their application and this is more clearly stated in the draft guidance.

3. **Applications for Charitable Status Should Include Written Agreement**

   *On occasion, applicants for charitable status intend to carry on activities through an intermediary. In these situations, a copy of a written agreement included with the application is often a good way to demonstrate to the CRA that the relationship the applicant will enter into with its intermediary will enable the applicant to meet all requirements for registration.*

   A couple of years ago, CRA began insisting that applications for charitable status that involved the use of intermediaries have an executed or draft written agreement attached to the application showing that the Canadian charity will have direction and control over its resources. This just makes it more explicit in the document that inclusion of such a written agreement is a "good way" to do it, which really means your application for charitable status will probably be refused unless you include or can produce an appropriate agreement for the structured arrangement. Any activity involving transfers of resources, except perhaps negligible amounts on a one time basis or inherently charitable goods like penicillin, should include the agreement.

**4. CRA affirms the importance of Canadian charities and their foreign activities.**

*Canadian registered charities make important and valuable contributions throughout the world.*

CRA is regularly dealing with thousands of Canadian charities that operate abroad. They understand and value the importance of those charities and their charitable work conducted outside of Canada. It is important that CRA does in fact recognize in their draft the importance of foreign activities in the mix of charitable activities carried out by the charitable sector. There is a lot of misinformation about foreign activities swirling around. There is not a week that goes by that I don't hear an ill-informed comment such as CRA 'does not approve of foreign activities' or 'Canadian charities are not allowed to conduct foreign activities' or 'private foundations are not allowed to conduct foreign activities'.

**5. There have been three cases on foreign activities and they are referred to frequently in the draft**

***C.3 Federal Court of Appeal decisions***

*The Federal Court of Appeal has made three decisions concerning charities using intermediaries to carry out foreign activities. Each case was an appeal of a revocation of charitable status by the CRA, and the Federal Court of Appeal dismissed each appeal. In short, the Federal Court of Appeal's decisions each confirmed that a charity working with an intermediary must always maintain control of the charitable activities carried out on its behalf, and over the use of its resources. Charities or applicants for charitable status may find it useful to review these decisions, which are as follows:*

- *The Canadian Committee for the Tel Aviv Foundation v. Canada* (2002 FCA 72), 2002-03-01 (http://decisions.fca-caf.gc.ca/en/2002/2002fca72/2002fca72.html)
- *Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)* (2002 FCA 323), 2002-09-13 *(http://decisions.fca-caf.gc.ca/en/2002/2002fca323/2002fca323.html)*
- *Bayit Lepletot v. Canada (Minister of National Revenue)* (2006 FCA 128), 2006-03-28 (http://decisions.fca-caf.gc.ca/en/2006/2006fca128/2006fca128.html)

CRA suggests that charities interested in carrying out charitable activities outside of Canada "*may find it useful to review these decisions*". I very much agree with that advice. The Tel Aviv Foundation case, Magen David Adom and Bayit Lepletot[4] go a long way to showing the

[4] For a summary of the three cases see my note *Canadian Cases dealing with Canadian Registered Charities operating outside of Canada* http://www.globalphilanthropy.ca/index.php/articles/canadian_cases_dealing_with_canadian_registered_charities_operating_outside/

importance of following the rules rather than hiring a litigator afterwards to argue that you did not need to follow the rules.

**6. CRA reminds charities that foreign activities are difficult and that working with existing charities may be preferable to creating your own charity or using your charity to conduct direct foreign activities**

*... carrying on 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 are unable to maintain the effort needed to meet their objectives and fulfil their obligations under the Act. Before carrying on activities outside Canada, the CRA recommends that a charity or applicant for registration consider working with existing charities or other qualified donees that have the experience and capacity to carry on activities in a way that meets the requirements set out in this policy. You can search a list of all Canadian registered charities, by name, category code, and other keywords, through the CRA's Charities Listings. The Canadian International Development Agency (CIDA) also provides a list of voluntary sector organizations that work in cooperation with CIDA on its Web site. While charities may find it useful to support or partner with these organizations, not all of them are qualified donees. Since charities may only make gifts of money or other resources to qualified donees, charities must take care in deciding which organization to support and how to provide that support.*

In my article: "Has the regulation of Canadian charities operating outside of Canada become increasingly burdensome?"[5], I argue that it is not the CRA's minimum standards that have resulted in greater burden but the increasingly complicated world we live in including:

a) people trying to take advantage of charities for non-charitable ends such as tax evasion, fraud, money laundering, terrorism and the necessity that charities take basic steps to protect themselves from being abused;[6]
b) some foreign governments (eg. Zimbabwe) view independent and active charities as a threat and they frequently try to undermine their own civil society.

I don't think that looking at the CRA database by category code is going to yield much. But the suggestion of looking at the CIDA site is a good one.

**7. CRA provides more explicit guidance on importance of understanding and complying with foreign law**

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[5] **http://www.globalphilanthropy.ca/index.php/blog/has_the_regulation_of_canadian_charities_operating_outside_of_canada_become/**

[6] Canada has one of the worst reputations for charity abuse. See *OECD Report on Abuse of Charities for Money Laundering and Tax Evasion - Canada does very poorly*
http://www.globalphilanthropy.ca/index.php/blog/oecd_report_on_abuse_of_charities_for_money_laundering_and_tax_evasion_-_ca/

A.1 Local laws

*It is well established that when a charity operates within Canada, it must comply with Canadian laws, including the Act and the common law.*[7] *However, a charity that carries on activities outside Canada may operate in areas where the legal framework and laws are very different. While the Income Tax Act does not require that registered charities comply with laws in foreign jurisdictions, being registered in Canada does not exempt a charity from the laws in the jurisdiction where they operate.The CRA strongly suggests that all charities make themselves aware of local laws, and how they are applied, prior to carrying out their charitable programs abroad. Being aware of local laws and their application will help ensure that the public benefit provided by a charity's activities is not offset by harm that may result to those carrying on the activities, to the charity's beneficiaries, or to anyone else. For more information on public benefit, please see Policy Statement CPS-024, Guidelines for Registering a Charity: Meeting the Public Benefit Test.*

There are a number of complicated issues at stake here and CRA has done a very good job of navigating them. It is very important that CRA is not saying that in order for Canadian charities to be registered as Canadian charities, they must follow foreign laws which would make CRA the enforcer of certain repressive foreign laws. However, a Canadian charity is not exempt from complying with the laws in the jurisdiction in which they operate. Canadian charities that do not comply with foreign laws can face serious criminal and civil penalties. Canadian charities should be first and foremost aware of local laws. Many are not. They simply do not even think of the issue. Perhaps others just assume that the law in a foreign country is probably similar to the law in Canada or perhaps there is no law on a particular point in the foreign country. This "awareness" should take place ideally before operations are started in the foreign country. "Being aware of local laws and their application will help ensure that the public benefit provided by a charity's activities is not offset by harm that may result to those carrying on the activities, to the charity's beneficiaries, or to anyone else". Many Canadian charities operating outside of Canada for a number of reasons probably do more damage than good. This is a very important point often lost on well meaning Canadians who think as long as they are doing something well-meaning that others will benefit from the well meaning initiative. Not only can such thinking cause more damage than good, but also it will undermine the work of other charities or Canadian charities that may be tarred with the same brush.

[7] *Everywoman's Health Care Society (1988) v. Canada (Minister of National Revenue - M.N.R.) (C.A.),* [1992] 2 F.C. 52, at paragraph 14

## 8. Reference to Terrorism in new policy

*In reading this policy, charities must also bear in mind their obligations under Canada's anti-terrorism legislation. In particular, nothing should be construed as diminishing a charity's responsibility to ensure that it does not operate in association with individuals or groups that are engaged in terrorist activities, or activities in support of such activities. Specifically, under the Charities Registration (Security Information) Act (CRSIA),[8] a charity's status may be revoked if it operates in such a way as to make its resources available, either directly or indirectly, to an entity that is a "listed entity" (as defined in subsection 83.01(1) of the Criminal Code of Canada[9]), or to any other entity (person, group, trust, partnership or fund or an unincorporated association or organization) that engages in terrorist activities or activities in support of them. Please see the Charities Directorate's Web page Charities in the International Context[10] for more information about these provisions.*

The old policy was pre-911 and the new policy refers to terrorism and the *Charities Registration (Security Information) Act (CRSIA).* CRA also in April 2009 released a "Checklist for Charities on Avoiding Terrorist Abuse" which is very helpful.[11] For those interested in practical steps to avoid involvement in terrorism, you may wish to read my article *16 Steps for Canadian charities and non-profits to avoid involvement with Terrorism.*[12]

## 9. Clarification on Public Policy

*The courts have also established that a charity's purposes and activities must not violate officially declared and implemented Canadian public policy.*[13]

In RC4106, it was stated: "… the law has recognized that charitable purposes and activities must not violate public policy. Thus a program carried on in a foreign setting that runs counter to Canadian public policy would not be considered charitable by Canadian courts." In the *Canadian Magen David Adom for Israel* case, the Federal Court of Appeal found that there needs to be a "definite and somehow officially declared and implemented policy" to violate public policy and this is reflected in the draft.

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[8] Part VI of the *Anti-terrorism Act*, S.C. 2001, c. 41.

[9] *Criminal Code* R.S., c. C-34, s. 1.

[10] http://www.cra-arc.gc.ca/tx/chrts/ntrntnl-eng.html

[11] The checklist can be found at: http://www.cra-arc.gc.ca/tx/chrts/chcklsts/vtb-eng.html

[12] http://www.globalphilanthropy.ca/images/uploads/Terrorism_and_Canadian_charities_and_Non_Profit_organizations.pdf

[13] See Charities Directorate policy Summary Policy CSP - P13, Public Policy and *Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)* (2002 FCA 323), 2002-09-13 at paragraph 14.

## 10. Reminder Note re: PGT in Ontario

***Note***
*Charities that are constituted in or a resident of Ontario should contact the Office of the Public Guardian and Trustee of Ontario to see if they have any restrictions on which qualified donees they can gift their funds to.*

In the draft, CRA is reminding Canadian charities that the Public Guardian and Trustee (PGT) in Ontario has a slightly different view of which organizations a charity can gift to.

Under the *Income Tax Act*, a qualified donee includes:
1. registered charities;
2. registered Canadian amateur athletic associations;
3. registered national arts service organizations;
4. housing corporations in Canada set up exclusively to provide low-cost housing for the aged;
5. municipalities in Canada;
6. the United Nations and its agencies;
7. universities outside Canada with a student body that ordinarily includes students from Canada (these universities are listed in Schedule VIII of the *Income Tax Act Regulations*);
8. 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
9. the Government of Canada, a province, or a territory.

There are differences between a 'qualified donee', which is defined under the *Income Tax Act* and a charity in Ontario, which is defined under the common law. The definition of a qualified donee encompasses organizations that are not considered charities under the laws of Ontario. And, in Ontario, charities exist that are not qualified donees simply because the charity has not registered with CRA. For example, many small organizations have charitable objects and carry on exclusively charitable work, but have not registered with the CRA.

Numbers 1, 3, 5, and 9 would qualify as charities in Ontario for the purposes of receiving gifts from other Ontario charities. Any organization falling into one of the other categories would need to be evaluated by the Ontario-based charity to ensure that it falls within the common law definition of charity as per the Vancouver Society case[14] i.e., objects that are exclusively charitable and for the benefit of an appreciable section of the population. The most common example of a qualified donee that is not a charity is an amateur athletic association, and it would not be acceptable for an Ontario based non-profit to simply grant funds to such an amateur

[14] Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue - M.N.R.), [1999] 1 S.C.R. 10, at paragraphs 38 - 41. Also at http://csc.lexum.umontreal.ca/en/1999/1999rcs1-10/1999rcs1-10.html

athletic association. Ontario, unlike the other PGTs, is quite involved with regulation of charities, whether they are registered with CRA or not.

**11. The CRA does not recommend using one type of intermediary over another.**

*The type of intermediary that a charity needs to carry out an activity will depend on the facts of any given situation. The CRA does not recommend using one type of intermediary over another.*

Although CRA has never expressly preferred an agency agreement over a cooperative partnership, joint venture or contractor agreement in the past, it might have appeared that they were more favourably disposed to and more familiar with the agency agreement.

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 and capacity building context, that the foreign charity is the "agent" of the Canadian charity. The relationship does not seem equal or fair. After all, it is not a more egalitarian sounding partnership or joint venture (those models are discussed below). 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. Furthermore, another concern with the agency agreement structure is the requirement for the agent to segregate the agent's Canadian funds from its other funds. For these and other reasons many Canadian charities are now using a contractor agreement model rather than an agency model and CRA has no problem with that approach.

**12. Concern About Conduits**

*A charity may not act as a passive funding body for a non-qualified donee's own activities, even if the non-qualified donee's activities are charitable under Canadian law. If a charity passively funds a non-qualified donee's programs, that charity is acting as a conduit. In the context of this policy, a conduit is an organization whose primary purpose is to raise funds in Canada for the benefit of a foreign non-qualified donee, and does not control all activities supposedly carried out on its behalf. Acting as a conduit violates the Act, and could jeopardize a charity's status. Charities typically seek to act as conduits in order to accept donations from Canadians, issue tax deductible receipts, and then channel the funds to other organizations to which a Canadian taxpayer could not directly make a gift and acquire some tax relief.*

***Example***

*A charity is registered to protect the environment. A foreign non-qualified donee approaches the charity, seeking funding for its activity of preserving the rainforest. The charity approves of the non-qualified donee's activity, and agrees to provide funding. The two organizations put a written agreement in place, and the non-qualified donee commits to use the charity's resources only for purposes considered charitable in Canada. However, the charity has no real say in where, when or how the activity is carried out. The charity is simply funding the non-qualified*

*donee's own activities, and therefore, even though the activity itself is charitable, the charity is acting as a conduit. To avoid acting as a conduit, the charity must have real and demonstrable control over all the elements of the activity, so that the carrying out of that activity by the intermediary amounts to the charity carrying on its own activity itself. The non-qualified donee must be merely an instrument by which the charity accomplishes its goals.*

Many charities have trouble understanding the difference between a conduit and a structured arrangement. The word conduit does not ever appear in RC4106. In this draft, CRA attempts to differentiate a conduit from a structured arrangement. For a discussion of the difference you may want to review my article: *Structured Arrangement versus Conduit for Canadian Charities and Foreign Activities.*[15]

## 13. CRA Discusses Tithes and Royalty Payment to Foreign Entities

Tithes, Royalties
*The own activities test applies to charities that are offshoots of other non-qualified donees, such as a charity that is subordinate to a head body organization located outside Canada. Charities may not simply send tithes, royalties, membership fees, or similar payments to head bodies, affiliates, or other member organizations without receiving goods or services of equivalent value in return.*

CRA reminds charities that if you are paying tithes, royalties, membership fees, or similar payments to head bodies, affiliates, or other member organizations you need to receive goods or services of equivalent value in return.

## 14. Charitable Goods and More Explicit Requirements for Control Over Funds

*Generally speaking, an agreement will need the fewest measures of control when **both** of the following conditions are true:*

- *The resources transferred can, because of their nature, likely only be used for charitable purposes; and*
- *Based on an investigation into the status and activities of the intermediary, there is a reasonable expectation the intermediary will use the resources solely for charitable purposes.*

*...*

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15 http://www.globalphilanthropy.ca/images/uploads/Structured_Arrangement_versus_Conduit_for_Canadian_Charities_and_Foreign_Activities.pdf

> *If either or both of the above conditions are not met, then a charity must structure its agreement so that it retains sufficient direction and control over the use of its resources to ensure they are used solely to further its own charitable purposes. In such a situation, the CRA recommends a charity use as many of the measures of control found in sections E.2 to E.7, below, as possible.*
>
> ***Note***
>
> *If a charity intends to transfer money to an intermediary, the CRA strongly recommends putting in place as many measures of control as possible.*

CRA does not use the term 'charitable goods policy', which others use to describe certain limited types of goods to be transferred to a foreign organization that is not a qualified donee or given away, in some cases without the need for a written agreement. Frequently cited examples include food in a famine situation or prayer books. CRA has always been 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.

The basis of the 'charitable goods policy' is a CRA Staff Memo produced in 1985 and cited in the Canadian Magen David Adom case (hereafter "CMDA"), which provides:

> 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.

In Registered Charities Newsletter #20, 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.

In my view the charitable goods policy in the CMDA case or Newsletter #20 is anything but a foundation upon which to base charitable operations abroad. When could the charitable goods policy be useful? Perhaps it may be appropriate in the provision of 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 charity's representative in distributing the food. Keep in mind that the nature of goods may be important but it far more important who you are providing the goods to and what will they do with the goods.

**15. A Written Agreement is essential, but not enough by itself**

*..., simply entering into an agreement is not enough to prove that a charity meets the own activities test. The charity must also be able to demonstrate to the CRA it has a real, ongoing, active relationship with its intermediary, whereby it actually directs and controls the use of its resources by that intermediary.*

Some people were apparently left with the impression in RC4106 that having a written agreement was a major aspect of direction and control. While it is almost always needed it is in fact "a real, ongoing, active relationship with its intermediary", that demonstrates direction and control over the use of its resources by that intermediary." that will protect Canadian charities, their partners and the ultimate beneficiaries. Having a written agreement that is ignored is no better than having no agreement.

**16. No De Minimis Requirement but relaxed rules for one time transfers under a $1000**

*While entering into a written agreement and implementing the terms of that agreement is usually an effective way to meet the "own activities" test, the CRA also acknowledges that in situations where the amount of resources involved is relatively 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 does not exceed roughly $1,000, other forms of communication might be used to show direction and control over the use of resources by intermediaries.*

***Example***

*A charity registered to relieve poverty decides it wishes to support a food bank in India. It plans to send a one-time transfer of $1,000 to the food bank to buy supplies. In this situation, the importance of a full, formal written agency agreement is reduced. While having a written agreement is still preferable, as long as the charity can demonstrate through other records that it carried on its own activities, and maintained direction and control over the use of its funds, it should be in compliance with the Act. The charity could, for example, keep confirmation of delivery of faxed or written instructions to the food bank, records of bank transfers, and minutes of meetings showing decisions made and instructions sent. In turn, the food bank could send back receipts and invoices, written reports, photographs, confirmation it purchased the food, and*

*so on. If, however, the activity is expected to be repeated on an ongoing basis, annually for example, it is recommended that a written agreement be in place to ensure a clear understanding of the agreement over time.*

Remember this is for one time transfers of under $1000 and not for amounts above that are for ongoing transfers. Charities still must be able to show that direction and control, but the standard will be lower. This will facilitate charities providing some modest amount of one-time support to a project outside of Canada. There is always a balance needed between efficiency and accountability and this makes some sense. But remember that as a director of a charity you have a high level of responsibility for the conduct of the charity. If the funds are used for an improper purpose, such as terrorism, it can be devastating to the reputation of the charity and the sector and you can be held accountable.

## 17. Description of Activities

*To show it is actually carrying on its own activity, a charity should be able to provide a clear, complete, and detailed description of that activity. The charity should be able to document its exact nature, scope, and complexity.*
*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;*
- *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 those that carry 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 charity so decides;*
- *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[16]); and,*
- *the contributions that other organizations or bodies are expected to make to the activity, if any.*

[16] Guide RC4143, Registered Charities: Community Economic Development Programs

The CRA is being far more explicit about the importance of having a detailed description of activities. They are also providing guidance on what expectations they have. Any organization that has dealt with a foundation or government funder in the last decade understands this requirement and often has descriptions of activities that are far greater than anything CRA would require. CRA does not expect that you use a rigid 'results based management' system or incorporate 'cross cutting themes' – just a responsible and proportionate description of activities. However, some charities think that having a five line description of what their agent is going to do with $500,000 per year over a ten year period is adequate. It is not. Don't get caught up on the exact questions as some may not be relevant to a particular project or program but after reading the list you get the idea of the sort of detail required. Do yourselves a favour and save lots of stress and managerial time and tens of thousands in legal fees if you are in that situation and have a "clear, complete, and detailed description" of your activities. Furthermore, it presumably helps to accomplish a project if everyone knows what the project is. The preparation of such a description of activities provides the Canadian charity and the intermediary an opportunity to fully understand what each wants out of the project.

**18. Don't Use An Agency Agreement if you don't want an agency relationship**

*For certain types of arrangements (for example, an agency agreement) the charity's funds for the activity should be maintained in a separate bank account, drawn upon only after appropriate authorizations are made by the charity or performance benchmarks are met by the intermediary.*

Agency agreements are the most commonly used type of relationship but they have many limitations. There is no limited liability and the principal may be on the hook for any of the actions of the agent especially if the agency agreement is not very firm on the limits of the agent's role. In an agency relationship, unlike for example a contractor arrangement, there is a need for segregation of funds. Receipts accumulated by the agent should be provided to the principal. If you don't want to use a separate bank, or you want limited liability, or you want the intermediary to keep original receipts, then don't use an agency agreement.

**19. Not Good Enough to Do Something Charitable – You Need Books and Records**

Whether it is understanding the details of an activity, monitoring ongoing involvement it is not good enough that you do it – you need to have records to show that you are doing it. For example, with ongoing involvement keep copies of e-mails, make some notes on telephone conversations etc. By the way, the likelihood that such documents will be useful for your organization is greater than that you will need them for an audit by CRA. Too many organizations or projects are structured to be an individual's brainchild or it is assumed that if Joe knows the details that is good enough. What if Joe is hit by a Humvee (notice I did not say "bus" because too often public transit is maligned and they have much better safety records than the rest of us). What if Joe is away on vacation and yes Joe deserves to also have vacations?

**20. Concession on Original Receipts in Agency Section**

*If local laws prohibit the transfer of source documentation to Canada, copies should be forwarded regularly to the charity, and the original documentation should be available for inspection at the place the books and records are kept. Upon completion of each activity, the charity should obtain a final comprehensive report detailing all the work that has been done on its behalf, along with supporting documentary evidence, such as invoices and receipts, as well as photographs and other documenting media.*

In an agency relationship charities are required to have the original receipts unless *"local laws prohibit"* such transfer. CRA has not provided a blanket exception and as the intermediary is your agent and spending your money it makes sense you get the receipt. CRA for foreign operations may want to consider having a broader exception so that copies are acceptable – but as I said above better if you don't want an agency relationship to not have an agency relationship.

**21. Canadian government funding does not mean exemption from rules**

*Funding from CIDA and other government programs*

*The Canadian International Development Agency (CIDA) and other government programs fund many activities outside Canada. Not all of these activities are charitable under the common law. A charity must ensure that all activities it carries on further its charitable purposes, regardless of the source of funding. In addition, a charity must still satisfy all its monitoring and reporting requirements. If a charity has concerns about charitable status and participation in CIDA funded projects, it should contact the Charities Directorate for advice.*

Previously RC4106 noted that "CIDA has a number of requirements calling for the active involvement of an organization in the projects it funds. Thus, provided the CIDA-funded project is charitable at law, we may consider a charity to be carrying on its own activities with regard to that particular project. …Also, although CIDA's current funding criteria may be sufficient to secure the charity's active involvement in a project, the charity still must ensure that it is indeed exercising a sufficient degree of direction and control." Some charities and professional advisors have mistakenly taken this quote to mean that CRA exempts CIDA projects from the RC4106 rule and this is not correct. CIDA projects are required to have the same directions and control, although in some cases CIDA requires the Canadian charity to have extensive direction, control and reporting and this may then be adequate.

**22. Disaster Relief by new and inexperienced charities can be a "disaster"**

***Appendix A: Applications for charitable registration to provide disaster relief***

*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 Act.*

*Since the situation is usually urgent, priority is typically assigned to these files. However, before they can be registered as charities, disaster relief organizations must still meet the same requirements as all other applicants. Applicants must therefore be able to show how they will ensure they are carrying on their own activities as required by the Act, and also direct and control the use of their resources. Applicants should also be aware that in the immediate aftermath of a disaster, the affected area can be quite volatile and dangerous. Additionally, 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 often faster and more effective for applicants to support existing qualified donees that have the experience, resources, and infrastructure already in place to respond to disasters.*

CRA is being more emphatic that a major disaster is not the time to create a new charity and to start learning about the difficulties of international operations.

**Summary**

The draft guidance that I reviewed consolidates in one place CRA's views on Canadian charities and their dealings with foreign charities and non-qualified donees. It is a very important and useful revision to RC4106. It is a recognition of the importance that foreign activities play for the Canadian charitable sector. It is updated to reflect recent case law, CRA newsletters and policies, as well as other changes over the last decade. It is written in a more easily understandable style and provides helpful advice and guidance to charities that conduct foreign activities. It provides a lot more detail on different areas of concern to Canadian charities. Although the draft guidance in terms of content is similar to RC4106 there has been some flexibility introduced, for example with small one-time transfers of funds. Most importantly there have been a number of clarifications to RC4106 to prevent misinterpretation of some of the sections. Hopefully the draft guidance will receive greater attention than RC4106 ever did as there is greater awareness of the importance of foreign activities and the draft guidance more explicitly applies to Canadian charities and their relationships with non-qualified donees, whether local or foreign.

Hopefully the distribution of the draft guidance in the next month or two will encourage Canadian charities to review the rules surrounding their foreign activities. On my website at www.globalphilanthropy.ca I have placed a large amount of publicly available information on Canadian charities and foreign activities for those interested in Canadian charities understanding the legal and ethical issues in conducting foreign operations. I will continue to update the website with developments relating to foreign activities and the draft guidance.