

Planned Giving in a Global World:

What a Planned Giving professional needs to know to support planned gifts for charitable activities outside of Canada

A presentation to the
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www.blumbergs.ca

www.globalphilanthropy.ca

Theme

- There are rules for Canadian charities operating abroad – they are especially important for Canadian charities transferring funds or resources outside of Canada
- The rules are not too onerous and understanding their rationale will assist in compliance
- The rules focus on written agreements, control, monitoring and records
- CRA is as “silent” partner, protecting taxpayers



Overview

- Importance
- Good works outside Charitable realm
- Framework for Charities operating Abroad – Corporate, CRA views and documents, Ways to Carry on Own Activities, Cases
- Bequest Considerations
- Operational Issues

Disclaimer - presentation is information, not legal advice



Variety of Charities

- 82,000 Registered Charities in Canada
- every charity is different –
objects / areas of charitable work /
philosophy/ risk tolerance / public profile /
donors / level of government support /
independent versus international affiliations /
resources / knowledge
- legal compliance versus ethical standards



Variety of Charities (cont)

- 12,000 carried on 'programs' outside of Canada
- 70,000 did not
- of 12,000 some dedicated to humanitarian assistance, international development, international education, international religious
- many 'local' charities considering expansion of activities



Importance

Importance for our planet

- Great Challenge - 1.2 billion people live on less than a \$1 per day, 11 million children under 5 die each year, 1 billion people lack access to clean water, neglected diseases, HIV/AIDS etc
- World is getting smaller – SARs, Tsunami
- Effect – \$1 in Canada achieves \$40 in India, increasing value of Canadian \$



Importance for our organization

- fulfill objects of charity
- win/win (Canadian charity and foreign charity)
- staff morale and retention
- donor and stakeholder interest
- excellence



Overview of Planned Giving Vehicles

Planned giving vehicles

- bequests – gifts under will
- gifts of marketable securities
- life insurance
- certified cultural property
- gifts of real estate
- gifts of private company shares



Overview of Planned Giving Vehicles (cont)

- 'Charitable Remainder Trust' (CRT)
- gifts of residual interest
- interest free loan
- private foundation
- RRSP/RRIF
- charitable gift annuities
(self insured or reinsured)



Introduction - Why are bequests important to understand

- 90% of planned giving in \$ is bequests
- biggest donor concern is admin/fundraising costs –bequest are one of the least expensive vehicles in planned giving
- cost – bequest 1-5% vs. 50% for special events
- diversification of revenue



Importance (Cont) – Canadian charities foreign expenditures

- 2002 - 1.4 B
- 2004 - 1.8B
- 2005 - 2.1B



Trust by Canadian Public of Charities by type of charity

Of the ten types of charities in Canada according to a recent survey Canadians are most likely to trust hospitals a lot or some (89%), trust charities that focus on children/children's activities (85%), trust health prevention/health research (84%), trust charities that focus on education (77%), churches (67%) and least likely to trust international development charities (57%).

**Talking About Charities 2006: Tracking Canadian's
Opinions About Charities and The Issues Affecting Them
by Ipsos Reid for The Muttart Foundation, September
2006**



CRA Charities Partnership and Outreach Program Funding Priorities

- 1. Conducting foreign activities in compliance with a charity's obligations under the *Income Tax Act*.

Increasingly, registered charities are conducting some of their charitable activities internationally. As charitable activities are conducted beyond Canadian borders, a number of control or compliance issues may arise that could result in a charity being non-compliant with respect to its obligations under the *Income Tax Act*.
- 2. Fundraising, receipting, and maintaining books and records in compliance with a charity's obligations under the *Income Tax Act*.

See CRA website.



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Corporate, Trust and Donor Issues

Operating Abroad – Corporate and Trust law issues

- Letters Patent/Articles of Incorporation – objects and restrictions –avoiding ultra vires activities
- By-laws and resolutions
- Trusts agreement –scope
- Donor restricted gifts



Charitable Objects – eg. International Development

Relief of Poverty -To relieve poverty in developing nations by providing food and other basic supplies to persons in need.

Health - To develop or promote public health in developing nations by educating and instructing the public on prevention of, and curative measures for, health problems and by researching and documenting changes in the health of the community.

Drinking Water -To improve the quality of drinking water in developing nations by constructing wells and water treatment, irrigation and sewage treatment systems.

Agriculture - To improve skills in forestry, agriculture and horticulture and to assist in the preservation of the environment in developing nations.

Disaster Relief - To provide necessities of life to victims of disasters.

Source: Ontario Not-For Profit Incorporator's Handbook.

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Objects that may require modifications or additions

To establish and maintain a hospital.

To establish and maintain a hospital in Mississauga, Ontario.

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).



CRA Considerations

CRA – Considerations that apply to all charities and those operating abroad

- no partisan political activities
- limited non partisan political activities
- only undertake charitable activities
(relieve poverty, advance education, advance religion, benefit community as a whole)
- cannot violate Canadian public policy



CRA Views on Canadian Charities operating outside of Canada

- RC4106 “Registered Charities Operating Outside Canada”
- Registered Charities Newsletters
- Information Letters
- Policy Statements
- Consultation on Proposed Policy



CRA – Considerations that apply to Canadian charities operating abroad ***

- The Canadian Income Tax Act allows charities to conduct their charitable purposes by
 - 1) giving monies to another "qualified donee" (usually a Canadian charity but also includes the United Nations and a small number of foreign entities) or
 - or
 - 2) their own activities (at home or abroad)
- No third option - A Canadian charity cannot just transfer money to a foreign charity.



Qualified Donees

Donations to Qualified Donees – Tax Credit for Charitable activities abroad

- registered charities, registered Canadian amateur athletic assoc., tax exempt housing corporations, Canadian municipalities
- United Nation and its agencies
- certain Universities outside Canada that student body of which ordinarily include students from Canada(Reg 3503) ("Schedule VIII Universities" or "prescribed universities")



Eligibility for Tax Credit (Continued)

- a charitable organization outside of Canada to which Her Majesty in right of Canada (federal government or its agents) has made a gift in the corporation's taxation year or the preceding 12 months. (see CRA Circular 84-3R5 and Attachment to IC 84-3R5, Gifts to Certain Charitable Organizations Outside Canada)



OWN ACTIVITIES

Ways for Canadian Registered Charity to Carry on “Own Activities”

1. employee in foreign country
2. agency agreement
3. contractor
4. joint venture/joint ministry agreement
5. cooperative partnership agreement



1) Employees or Volunteers

- Can be Canadian employees or volunteers or locals.
- best model? eg. MSF, missionaries
- advantages -skills, beliefs, control, reporting, language, returning workers
- concerns – local knowledge, costs, sustainability, danger,



2) Agency Agreement

- Canadian charity appoints agent abroad to conduct Canadian charity's activities with Canadian charity providing funding and control
- most common
- need written agency agreement
- concern – charity liability for agents actions, agents ignore agreement, hierarchy



3) Contractor Agreement

- Canadian charity hires foreign contractor to conduct certain work
- eg. drill well
- need written agreement
- not agent – business agreement, limited liability



4) Joint Venture/Joint Ministry Agreement

- Canadian charity can work with a foreign organization jointly pursuant to a joint venture/ministry agreement (JVA/JMA)
- pool resources to carry out certain works
- need written JVA or JMA
- control by Canadian charity at least in proportion to Canadian charity contribution



5) Cooperative Partnership Agreement

- Canadian charity works with foreign organization and each contributes different resources and undertakes a different part of the project
- need Cooperative Partnership Agreement
- disbursement quota concern if Canadian charity does all admin services for project



RC 4106 – “Own activities”

- ❑ assurances that other organization is able to deliver services (due diligence)
- ❑ expenses must further objects of Canadian Charity and constitute charitable activities
- ❑ adequate written agreement
- ❑ periodic, specific instructions
- ❑ regularly monitors project and evidence
- ❑ periodic payments, right to discontinue, in certain circumstances



Written Agreements –Part 1

- 1) names and addresses of all parties
- 2) duration of agreement/project
- 3) description of specific activities
- 4) written progress reports and right to inspect
- 5) payments by instalment based on reasonable progress



Written Agreements –Part 2

- 6) withdrawing or withholding funds at charities discretion
- 7) adequate records in Canada
- 8) agent – adequate records and funds segregated for Canadian Charity's funds
- 9) signature of all parties
- 10) date



Exceptions?

Transfer of Property in Foreign Country

- Canadian charity should maintain ownership and control over assets
- can sell assets at fair market value (FMV) or transfer to qualified donee
- exception
 - 1) can transfer assets if charitable ('charitable goods policy')—eg. food to hungry, prayer books
 - 2) prohibition on foreign ownership of real estate
 - 3) development work –can turn over to local control – need assurances of continued community benefit



“Charitable Goods Policy”

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).

1985 CRA Staff memo cited in CMDA Case



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Charitable Goods Policy – Beware.

- 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. (MDA Case) [emphasis added]
- CRA will look at nature of goods, which organization receives goods and controls placed



Charitable Goods Policy – Beware.

- ❑ is it a policy?
- ❑ suspicious transfers, sham transactions
- ❑ when to use – small amounts, emergency, very reputable, non-political, non-sectarian, organization acting as representative



Repayment of bona fide Debt/Loan

- repay loan to creditor regardless of whether in Canada or outside
- must be a real debt
- if foreign charity advances funds to Canadian charity consider whether foreign charity should gift or loan amount
- disbursement quota issues



Tithes, Royalties, Membership or Similar Fees

- international associations/alliances
- goods and services, training courses, literature, membership, intellectual property
- amount paid must be proportional to benefit received unless small amount (ie. lesser of 5% of expenditures or \$5000)
- need to be able to document and if excessive then CRA considers it gift to non-qualified donee and can result in revocation



Canadian Cases

Canadian Cases on Registered Charities Operating Abroad

- Tel-Aviv Foundation Case
- Canadian Magen David Adom Case
- Bayit Lepletot Case
- Travel Just Case



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

- promotion of education and relief of poverty in Tel-Aviv by agency agreement
- 1990, 1993 audit (lack documents of overseas expenditures, foreign management not aware of agency agreement, etc.)
- 1996 undertaking and 1997 audit



Tel Aviv Foundation v. Canada (cont)

- 1997 audit –little control over funds disbursed to agent (just conduit and not controlling), cannot show reporting, funds of Foundation not kept separate from agent, grant to Air Force Museum in Beersheva (outside of objects - ultra vires), no evidence of alleged oral arrangements that superceded agency agreement.
- Federal Court of Appeal (FCA) in 2002 finds against Foundation



Tel Aviv Foundation –Lessons Learned

- stay within your objects
- have agreement but also follow it –control projects and have reporting
- undertakings must be strictly complied with
- avoid military in foreign country?
- changes to agreements should be in writing



Canadian Magen David Adom for Israel and MNR (2002 FCA 323)

- ❑ object – To donate emergency medical supplies and ambulances directly to the people of Israel ('Israeli Red Cross')
- ❑ CMDA appointed Canadian representative in Israel to implement –no written agreement
- ❑ 1986 audit – concerns – funds to US MDA for purchasing ambulances, not directly to General Motors, and also no agency agr. with MDA in Israel and no control over ambulances



Canadian Magen David Adom (cont)

- audit of 1993 and 1995, 1996 years
- concerns – no agency agreement, persistent DQ problems, non-charitable expenditures like bullet proof vests (too indirect/can be used by anyone), not “emergency medical supplies” –objects.
- transfer of capital assets (ambulance) to MDA in Israel and one to IDF after agency agreement. Ambulances and telecom equipment can be used for non-charitable purposes



Canadian Magen David Adom (cont)

- 2001 notice of revocation and FCA dismisses appeal and CMDA loses charitable status
- Federal Court of Appeal concerned over:
 - 1) agent “not effectively authorized, controlled and monitored by the charity”
 - 2) equipment not only used for charitable purposes and concerns of involvement by agent with Israeli military operations



Magen David Adom –Lessons Learned

- ❑ CRA will go after powerful and good charities
- ❑ need for written agreement
- ❑ disbursement quota
- ❑ no donations of equipment to foreign military
- ❑ who wants a 16 year audit?



Canadian charities and involvement with foreign militaries

- permissible – eg in natural disaster foreign military transports your food to affected area
- not permissible – eg. transferring to foreign military capital equipment
- grey area
- recent discussions - CMDA, Heseg Foundation
- concern in conflict areas of close relationship between humanitarian groups and the military



Bayit Lepletot, 2006 FCA 128 (March 28, 2006)

- Canadian Charity deals with Rabbi in Israel who “presumably” exercises some control over Israeli charity with similar name to the Canadian Charity. But no evidence of his control over charitable works
- Agent can carry on charitable work but it must be shown that the agent is actually carrying on the work. Not sufficient for agent to be part of another organization that does work. No factual basis for arguing delegation. Status revoked.



Travel Just, 2006 FCA 343 (October 24, 2006)

- application for charitable status – ethical tourism –deemed refusal and appeal
- **OBJECTS** a. ...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; ...
- concerns – vague/subjective objects and concern with private benefit



Bequest Considerations

Ideas for encouraging bequests and avoiding problems with bequests

- be proactive rather than reactive
- is your charity conducting foreign activities/ has your board discussed issue?
- be aware of legal, ethical and practical issues
- have professional relationship with professional advisors
- gift acceptance policies
- encourage donors to seek legal advice



Steps to encouraging bequests (cont)

- conduct due diligence on own charity
- place accurate, complete and helpful information on website
- avoid providing legal advice and don't provide wills or codicils
- respond to requests for information – UK study - 1/3 of top UK charities did not respond at all to first request, 1/6 did not respond to second request.



Important Legal Considerations in Bequests

- Correct Name of Charity*
- Clarity in will drafting
- Capacity of testator
- Validity of will
- Charitable Status*



Important Legal Considerations in Bequests (Cont)

- Revocation of Wills
- Bequest property and acceptability*
- Bequest restrictions and acceptability*
- Due Diligence
- Disappearing will, Powers of Attorney
- Disappearing assets
- Trusts, Residual Interests and Deferred Gifts



Important Legal Considerations in Bequests (Cont)

- Taxes and bequests
- Use and abuse of Powers of Attorney prior to death
- Ownership can defeat testamentary intention
- Beneficiary designation can defeat testamentary intention
- Probate Avoidance
- Claims against estate



Bequest and Acceptability of Property

- gift acceptance policy
- land – environmental concerns
- flow through marketable securities, private corporation shares
- valuation issues and costs
- GINKY – gifts in kind (is it useful to charity or can it be sold)
vs. refusal to accept



Bequest and Acceptability of Restrictions

- gift acceptance policy – may have limits
- has specific purpose been fulfilled, program discontinued
- outside objects (ultra vires)
- power to vary clause, precatory vs. binding
- against public policy
- restrictions not compliant with other laws



To Restrict or not to Restrict

- charity always prefers no restriction – best in terms of flexibility and maximizing use of resources
- is it better to ignore the issue or deal with it in material?
- charity can discuss problems with restrictions, suggest sample language for innocuous restrictions and also clauses on variation



Opportunities

- think about long term
- apply some financial and staff resources to planned giving
- general fundraising, major gifts and planned giving
- public and private foundations – little given to international issues



Promotional materials

- ❑ are they correct, truthful and not misleading?
- ❑ are you providing legal, accounting or other advice?
- ❑ do you recommend that donors seek independent legal advice?
- ❑ do you provide correct legal name of charity?
- ❑ has it been vetted by someone who is knowledgeable?



Professional Advisors and Charities

- very important to have input from professional advisors
- have a model – planned giving committees, hiring advisors etc.
- not all professional advisors are equal in skills and knowledge
- see my article on “Charities, Professional Advisors and Planned Giving Committees” at www.blumbergs.ca



Imagine Canada New Code of Ethics and Gift Acceptance Policies

- 9. If the charity receives, or anticipates receiving, gifts-in-kind of \$100,000 or more in a year and has annual revenue in excess of \$500,000, it will establish a Gift Acceptance Policy (including valuation issues) for the receipt of gifts-in-kind
- “Imagine Canada’s new Ethics Code: Imagining a more ethical Sector” at globalphilanthropy.ca
- gift acceptance policies are a very important tool to anticipate and avoid legal and ethical issues.



Canadian Council for International Cooperation (CCIC)

- CCIC Code of Ethics
- principles of development and partnership
- conduct – governance, integrity, finances, communication with public, HR
- CCIC Ethics Review Committee
- www.ccic.ca



OPERATIONAL ISSUES

Concerns and Traps

1. terrorism
2. bribery and corruption
3. fraud and illegal charity tax shelters
4. money laundering
5. private benefits



Concerns and Traps (continued)

6. logistics/security of staff abroad
7. ethical issues
8. cultural, religious, gender issues.
9. IP issues (trademark, copyright, trade secrets, licences)
10. Legal constraints outside of Canada (eg. Russia, foreign currency restrictions, land)



Concerns and Traps (continued)

11. donor and CIDA constraints
12. books and records (in Canada, official language, frequency, types)



Marketing and Ethics

- see Canadian Council for International Cooperation (CCIC) material (ccic.ca)
- avoid stereotypes, people as hopeless
- avoid masking diversity and difficulty
- Northern superiority vs. partnership
- see CCIC Code of Ethics



Gifts in Kind

- help people, avoid waste and landfills
- be careful with gifts in kind
- are gifts in kind useful, appropriate
- cost of shipping, insurance, taxes, sorting, storage
- should be covered in gift acceptance policy



Endowments

- sunset clause (Buffett) vs. perpetual
- some international development charities will not create endowments
- should be board decision, not donor pressure
- endowments generally correlate with larger charities that have been around longer



International Alliances

- complexity and opportunity
- donate to charity in country that yields best tax savings (rate and income)
- be clear about which country your material relates to



Not for Profit (Non-Profit) Bequests

- non-profits that are not registered charities have less restrictions
- restricted tax benefits for bequests provide unique opportunity on death for non-profits to fundraise



T3010A – Registered Charity Information Return

- C4 -Did the charity carry on programs, directly or indirectly, **outside** Canada? If yes, were any carried out: by employees or volunteers of the charity? - under agency agreement, contract, joint-venture, or similar arrangements? - through gifts to qualified donees? - by other means?
- C5 For programs the charity managed directly, outside of Canada, list the countries or regions where programs were carried on. Do **not** include countries or regions where programs were managed by a qualified donee.
- F1 What were the total expenditures on programs **outside** Canada during the fiscal period, excluding gifts to qualified donees?
- DUE 6 MONTHS AFTER CHARITIES**
YEAR END



More Information

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