New CRA Guidance on Grants to Grantees: Some preliminary comments

By Mark Blumberg and Maddy Sawyer (January 15, 2024)

The CRA has released an updated or "finalized" version of **Guidance CG-032, Registered charities making grants to non-qualified donees** on December 19, 2023. Here is a PDF of that Guidance. As with all CRA guidance, it is subject to review and changes. In this note we will refer to the original draft guidance provided on November 30, 2022, as the "Draft Guidance" and the guidance above as the "Guidance".

In this note we will provide some preliminary thoughts on the Guidance. We encourage groups to read the Guidance completely as we are not attempting in this note to reproduce all of the concepts and are only commenting on a limited number of issues. Our views may evolve as CRA provides more clarity or there are court cases, etc.

We will be writing about the new rules further in this note, but here is a very high-level summary for those working in the charity sector.

Executive Summary

We are proponents of Canadian charities working with non-qualified donees. Generally, we would suggest that most Canadian registered charities not use the new grant to grantee system except in exceptional cases and most charities would be far better off using the direction and control rules if they wish to provide resources to non-qualified donees.

There are many advantages of using the direction and control rules. Specifically, it provides much greater certainty and more flexibility in certain important circumstances. Also, CRA seems to be indicating that their position is that if you use direction and control, the new directed donation rules don't apply. It is not clear if that is the correct approach, but it is another major benefit of the direction and control approach.

It is unlikely that many groups will wish to use both direction and control and the new grant to grantee rules as there are some differences between the two systems and keeping track of the use

of two different systems for many groups will be much more complicated than just using one system.

If you will be using the grant to grantee system, then unfortunately, while the Guidance is somewhat helpful, there is still a lot of uncertainty surrounding these new rules. There is no question that there is much greater certainty when it comes to the direction and control rules than these new rules, as we have at least five court cases that deal with the direction and control rules and decades of experience.

In a few years, there may be greater certainty about the grant to grantee rules through court decisions or legislative changes, and we may have a different view. At the moment, we are finding that when we file a charity application or put in a request to Client Assistance at CRA that involves a registered charity working with a non-qualified donee, if the charity is using direction and control, we get answers much more quickly than when the request or application involves grants to grantees. It took CRA over a year to put out this revised guidance, and it appears they are still trying to grapple with many of the complexities of this new legislation.

History and reading the Guidance

The Guidance is CRA's current interpretation on the new provisions in the *Income Tax Act* (the "ITA") that were introduced by the Finance Department in the 2022 Federal Budget and came into force in June 2022. The ITA only provides a few short sentences on the new rules, and with no case law interpreting those sections and so many different stakeholders having different views on how to interpret the new legislation, it is not an easy task to put together the Guidance.

The new ITA provisions were a result of the Finance Department responding quickly to a piece of legislation that was being considered in Parliament that would have potentially resulted in tens of billions of dollars in costs to the Federal and Provincial governments with probably little charitable benefit. That legislation would have allowed unlimited charitable resources to be funneled out of Canada without accountability or benefit to charitable causes or beneficiaries. Further, the Finance Department's initial proposal for the new legislation was altered by the Finance Committee and the actual legislation that was passed provided less certainty on a number of issues.

Be careful when reading the Guidance, as a large amount of the content is not immediately viewable, and you need to expand certain paragraphs. Often one may skip over these sections but then you're losing a large amount of the Guidance. It is important to carefully go through the Guidance in full, even if you have read the Draft Guidance, as the Guidance is longer (with 10,300 words compared with 9,200 words in the Draft Guidance) and CRA has made some significant changes and additions to the Guidance.

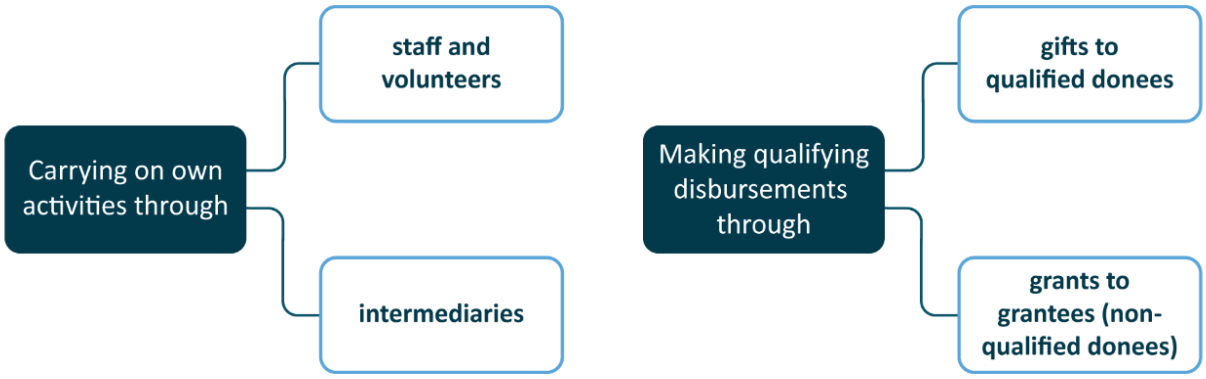
Understanding the Guidance

What is a qualifying disbursement?

It is important to keep in mind when reading the Guidance that the ITA introduced a new concept for registered charities, called a "qualifying disbursement." Qualifying disbursements include both

a) a gift to a qualified donee and b) a grant to a grantee organization. Making gifts to qualified donees is nothing new for registered charities, but one should note that those gifts are now also considered to be a qualifying disbursement.

CRA has provided the following graphic to explain how a registered charity can use its resources (outside of fundraising and administration):



Putting gifts to qualified donees together with grants to grantees and direction and control with intermediaries with staff and volunteers is actually probably more confusing, but it is technically accurate.

It would be helpful to have a guidance on both types of qualifying disbursements, including gifts to qualified donees, as such gifts can be complex and have the potential for abuse of charitable resources. However, the Guidance, and this note, is specifically focused on the grants to grantee organizations. As CRA has not put out a guidance on gifts to qualified donees and this topic affects many charities, we have recently prepared a course on the subject: **Making gifts to qualified donees: Discussing a seemingly simple proposition.** Hopefully one day CRA will produce a guidance on that topic.

Defining "Risk" and "Due Diligence"

In the Draft Guidance, there were many references to risk and different risk levels, as a charity first has to assess the risk of a grant before it can assess the accountability tools needed to implement the grant (more on this below). Some lawyers had asked CRA to define the word "risk". We did not think it was necessary, but now we have a CRA definition of risk that is quite broad namely ""risk" in general refers to conditions that could compromise the charity's registration and the public's trust in the charitable sector."

In contrast, although the phrase due diligence is referred to about 28 times in the Guidance, almost all of the actual guidance relating to due diligence in the Draft Guidance has been removed in this Guidance. That is unfortunate, considering how important due diligence is to the appropriate process of issuing a grant to a grantee. Now charities will not know what CRA means by "due

diligence", and many will not come even close to meeting CRA's expectations relating to due diligence.

What is a "Grant" to a "Grantee Organization"

In the Guidance, CRA has included the language from the ITA in the definition of the grant to grantee, which is particularly useful for people to read. For example, CRA notes in paragraph 9:

> 9. To meet these accountability requirements, a charity must be able to interpret and apply key terms in the legislation, such as the following:
>
> - "ensures"
> - "exclusively applied"
> - "in furtherance of a charitable purpose of the charity"
> - "maintains documentation sufficient to demonstrate"

It is very important for the public to understand what is in the ITA and what the legal requirements are.

Further, CRA has broken down some of their interpretations of the language from the ITA to assist charities in understanding the new rules. CRA does note that:

> 11. A charity does not have to follow our granting recommendations. It can show in its books and records that it has used other measures to meet the accountability requirements.
>
> 12. A charity could jeopardize its registration if it does not meet the requirements of the Income Tax Act.[Footnote9] Depending on the degree of the non-compliance, the charity will be subject to CRA compliance measures. This could include education letters, compliance agreements, sanctions, or in the most severe cases, revocation of registration.[Footnote10]

In other words, these are "recommendations", and you can do other things, but if you get it wrong, there can be consequences for charities up to and including revocation of registration. This means it is probably best to follow CRA's recommendations or alternatively write to CRA with specifics as to how you would like to carry out your grant to grantee program and get their feedback in writing from CRA.

As mentioned above, the CRA does a good job of breaking apart each piece of the ITA wording and explaining how they view these sections in Section 1.4.

For example, for the "charitable purpose of the charity" requirement, there is emphasis on "stated purposes". When CRA says stated purposes, they mean it has to be both in your "objects" or "purposes" it also has to be part of the common law definition of charity. Many older organizations that are registered charities have older purposes that if CRA were to review them today, CRA

would say they are not exclusively charitable. We have written about this topic before. Therefore, organizations cannot just rely on what is written in their articles and letters patent of their documents. If you would like more information on this topic, the PPDDA Guidance has a more extensive discussion of stated purposes.

The CRA also discusses what we think is the most difficult part of the ITA, that "the charity **ensures** that the **disbursement** is **exclusively applied** to **charitable activities**...". The CRA's interpretation of that is "A charity must make sure that the grant resources are used only for charitable activities that further its charitable purposes." For many charities who have not changed their objects or purposes in over a decade this will be enough to deter them from using this approach of grant to grantees.

Then under **CRA's application and recommendations** it provides

> "Despite best efforts, a charity may not be able to "ensure" or guarantee the grant resources will be applied exactly as intended. For this reason, we aim to adopt a reasonable, flexible, and proportionate approach to granting.
>
> We recommend the charity apply due diligence by using accountability tools over the grant's duration. The grant's risk influences the level of due diligence required: limited, moderate, or extensive.

The CRA uses the term "Despite best efforts" – not despite good efforts or making tremendous effort, but "best efforts" the charity does not achieve this standard. For many charities this will be enough to deter them from using this approach of grant to grantees. If you want to understand CRA's expectations about due diligence, you will find more in the Draft Guidance than here in the Guidance.

Also, CRA is saying that they will be taking a reasonable and flexible approach if the funds are not "applied exactly as intended". They don't say the funds were not applied to "charitable activities". So, it is not clear the extent to which this flexibility will apply. Perhaps they are referring to a Canadian charity granting money for charitable activity "A" and some of the funds are spent on charitable activity "B", both of which are charitable and in your charity's objects.

The CRA is clear that if you cannot "ensure" (and they use another word "guarantee") "the grant resources will be applied exactly as intended", then you should not do the grant.

Some will take comfort that the CRA puts in "For this reason, we aim to adopt a reasonable, flexible, and proportionate approach to granting." For others who are more skeptical perhaps the notion of trying to "aim" for "reasonable, flexible, and proportionate approach to granting" is perhaps less convincing especially in light of the clear wording in the ITA that "the charity **ensures** that the **disbursement** is **exclusively applied** to **charitable activities**..."" This would be a good time to repeat what CRA says "This guidance is not law"!

Direction and Control vs. Grant to Grantees

In paragraphs 17 and 18, CRA tries to compare and contrast "direction and control" vs. grant to grantees.

While they describe accurately some similarities between "direction and control", we still have concerns that, as with the Draft Guidance, the CRA incorporates some of the views of the detractors of direction and control. It appears that CRA is perhaps artificially inflating the differences between direction and control and grant to grantees in order to make the new rules seem better or seemingly more palatable to those who were pushing for the elimination of direction and control. There may be some cases where these new rules may be better for a registered charity, but we can certainly also see many cases where direction and control would be better for a registered charity to use.

In trying to point out the differences between direction and control and the new granting rules, we note that in some cases CRA is not necessarily providing an accurate picture of what is required of charities under direction and control. Below is the list of difference between direction and control and the new granting rules from the Guidance and our commentary in blue on the rules for direction and control:

Here are some key differences with grants:

- Our recommended approach to grants focuses on accountability and due diligence, rather than directing and controlling the charity's own activities. *[The term used is "direction and control". This does not mean a charity needs to be directing and controlling. A Canadian charity does not need to micromanage an intermediary and be inflexible to have direction and control. One can avoid using the term direction and control, if one finds that problematic, and instead use the phrase structured arrangement as CRA has used in the past or working with an intermediary that is a non-qualified donee.]*
- Charitable activities are those of the grantee, rather than those of the charity.
- A charity can support the grantee's new or existing activities.
- The relationship between a charity and grantee can be a collaboration, rather than a hierarchy with the charity in charge. *[There is no reason that working with an intermediary cannot be a "collaboration", and while it certainly can be hierarchy, it can also be very respectful. In many cases, the intermediary has a lot of power and there is a tremendous amount of respect by the Canadian charity for the intermediary. As well, the intermediary often is and certainly should be involved with planning and implementing the charity's project.]*
- A charity is not required to provide ongoing instructions to the grantee. *[As the world is constantly changing it makes sense that a charity would provide ongoing instructions but depending on the nature of the project and the description of the activity, there could be more or less ongoing instructions. Even in the case of making a grant to grantee, there is the need for communication, reporting and potentially changing grants. So, it's not clear at all that there is much of a difference in this regard.]*
- Granting is not intended to make the grantee a representative of the charity, but instead allows the grantee autonomy to carry on its programs as an independent

party. *[In the case of both direction and control and grant to grantees, the parties are both independent parties. If they were not an independent party, then there might not even be a need for direction and control or grant to grantees at all. This point is actually similar to point as bullet 2 and 3 above. Depending on the charity, as well as the description of activities and the project involved under each system, you can provide a certain degree of autonomy. If one plans carefully, direction and control in many respects provides greater autonomy than these new rules. One small example is if any funds of a Canadian charity are spent by a grantee on administration and not on charitable activities, which is perfectly normal under direction and control, then the Canadian charity can be revoked.]*

- The grant arrangement could avoid the unintended consequences for a charity carrying on its own activities through an intermediary, such as incurring liability to third parties under an agency relationship. [*This is a red herring. CRA has for many years removed any references to agency agreements in their guidance on direction and control. Almost any charity using agency agreements has typically not received any legal advice from a charity law practitioner in decades as it relates to foreign activities. Groups typically use contractor agreements with intermediaries under direction and control and presumably under the grant to grantee framework will use similar types of agreements. If a group were to use an agency agreement under grant to grantee framework, then there is the possibility of incurring liabilities to third parties.*]

The CRA ends the section with the following not so helpful observation:

> **Note that whether engaged in its own activities or making a grant, a charity must meet the requirements of the Income Tax Act.**

Changing Relationships

Paragraph 20 provides that a Canadian charity could be using direction and control and then switch the arrangement to being a grant to grantee and vice versa.

This is one of the more balanced discussions of the two different ways of working with non-qualified donees. It does provide, in the third paragraph of the example, some description of the extra work that would be necessary if you took an existing direction and control arrangement and moved it over to a grant to grantee arrangement. The majority of groups who have existing direction and control relationships are likely not going to want to have to do the extensive due diligence, risk analysis and extra books and records this transition requires. Especially since in many cases there will be less flexibility in funding the non-qualified donee.

Recommended Approach

Section 3.0 of the Guidance, "The CRA's recommended grant-making process: the due diligence model", outlines how charities should be carrying out a grant to a grantee. While CRA makes it clear that this is just one approach and other approaches could be used, it would not be advisable

for a group to come up with another approach unless it has received CRA approval in writing. After all, the consequences of not getting it right could be catastrophic.

It is interesting to note in paragraph 22 the following:

> 22. A charity should apply a reasonable and consistent approach to its grants, that is, treating similar grants in a consistent way.

This is a little bit of a surprising twist in that CRA is suggesting that you need to treat similar grants in a consistent way, but what happens if a charity has or would like to have a number of different ways that they do grant making? We guess if your charity were to have its own grant making approach under grant to grantees, it will need to ensure that similar grants are dealt with consistently.

Administration

In paragraph 24, CRA deals with the issue of administrative expenses. As we all know, administrative expenses are important especially when dealing with complicated issues or projects. The CRA states:

> 24. We understand that charities may need to devote reasonable expenses to administer and manage the grant.[Footnote12] We consider these to be necessary and important.

It is very important to realize that when CRA is referring to "charities" above, CRA is referring to a "Canadian registered charity". And yes, a Canadian registered charity can have reasonable expenses for management and administration including for their granting program. There is nothing new in that statement.

However, what is missing here, similar to the Draft Guidance, is reference to whether or not a Canadian registered charity can contribute to the grantee's reasonable expenses for management and administration. Unfortunately, because of the wording of the Income Tax Act that a grant to grantee grant needs to be spent only on "charitable activities", that means that a Canadian charity cannot provide funds under the grant to grantee system where some of the money is used for administration. It would have been better if CRA was clearer about this issue.

In contrast, under direction and control or a structured arrangement, when an intermediary is doing a project for the Canadian charity, the Canadian charity can have reasonable administrative expenses and most importantly can allow the intermediary to have also reasonable administrative expenses and the Canadian charity can pay for those reasonable administrative expenses. This is another reason that in many instances it's better to have direction and control rather than a grant to grantee.

Charitable Purposes

CRA has a quite good section in paragraphs 28 to 34 dealing with charitable objects. Or charitable purposes. They are clear that many charities will not be able to do grants to grantees if, for example, they have only a gifts to qualified donees purposes or gifts to register charity purposes.

Many registered charities have objects or purposes that would not meet CRA's current view of exclusively charitable objects and purposes. Many Canadian charities have not updated their objects or purposes in decades. Some have not updated them in over 100 years. The standard of review in 1967 when the registry was set up was very minimalistic. You can read our article on this topic here.

Just keep in mind that if you make a grant and either the purpose of the grant is not in your objects or purposes or the purpose of the grant is in your objects or purposes, but that purpose or object is no longer charitable, then in both cases providing the funds will not be a qualifying disbursement.

It is not clear what those funds will be, but they will not be a qualifying disbursement.

The failure of some charities to change their objects over many decades is unfortunate. If you want to understand more about changing your objects, you can read our article above or we have a course on that topic as well.

Charitable Activities

The CRA discusses a number of general requirements including complying with the law, meeting the public benefit test and not conferring an unacceptable private benefit.

Assessing the Risk

In terms of assessing the risk for grants to grantees, CRA sets out certain factors that would result in a grant being low, medium or high risk. Many grants would fall into the high-risk category either because the charity does not have significant experience with grants or the grantee is either newly established or conducting a new charitable program, or the grant is $50,000 or higher.

As with the Draft Guidance, in the Guidance CRA does not provide further guidance as to whether certain risk factors should be weighed more than others. For example, for a $1,000,000 cash grant, it is likely that CRA will view this as a “high-risk” grant even if all the other risk factors are considered to be “low-risk”.

The CRA also discusses purposes and governing documents of the grantee organization and notes that if it is “not clear that the charitable grant activity would fall within a purpose of the grantee” then this would be a high-risk grant. First of all, this seems to assume that all of these non-qualified donees would have purposes. Many non-qualified donees, whether for profit companies or individuals, are not going to have “purposes”. Further, if a grantee was a nonprofit that has purposes, and the charitable grant activity is outside of the purposes of the nonprofit, the issue should be more that the grant likely shouldn’t be made, not that it is a high-risk grant.

Changes in grant conditions

The CRA sets out a large number of potential significant changes in grant conditions that could either increase or decrease the risk and may necessitate a review of the grant and its risk.

Accountability Tools

Keep in mind that CRA places a lot of emphasis on the charity determining the amount of risk and consequently the accountability tools that are needed will either be limited, moderate or extensive. Charities will need to be constantly evaluating the risk profile of a particular grant, and therefore the accountability tools needed for that particular grant may also change.

When you read the accountability tools suggested in Section 3.3.1 and paragraphs 41 to 65, you may note that many of them are similar to the tools used when working with an intermediary under direction and control.

The CRA in paragraph 54 has brought in a similar concession that they had with direction and control, namely that a written agreement may not be necessary for non-recurring grants of $5,000 or less. However, with grants to grantees, this is only for a very low-risk grant. With direction and control, it applies to any intermediary arrangement.

The requirements in paragraph 58 for written agreements when making grants to grantees is similar to written agreements under direction and control except there is no need for a separate activity.

Special Topics

Section 4.0 deals with a number of special topics from paragraphs 73 to 113.

Directed Gift or Directed Donation

One of the most challenging aspects of the new legislation is the "directed gift" provisions. Of particular note, CRA has added to this section from the Draft Guidance to indicate in the Guidance that the directed gift provisions apply only to grant to grantees and not to direction and control.

The new section in question, section 168(1)(f) of the ITA, gives CRA the power to revoke the registration of a charity if it "accepts a gift the granting of which was expressly or implicitly conditional on the charity, association or organization making a gift to another person, club, society, association or organization other than a qualified donee."

While it is possible that the Finance Department had intended that the directed gifts provisions only applied to a grant to grantees, based on the language of the legislation, it is not clear that that is the case and arguably the new section 168(1)(f) of the ITA applies more broadly than grants to grantees. The ITA refers to "grantee organization" in reference to non-qualified donees but never the word "granting" or "grant" relating to charities. The ITA actually refers to "disbursements" to grantee organizations.

The current position of CRA that the rule when a charity "accepts a gift the granting of which was expressly or implicitly conditional" this only applies to grants to grantees and not direction and control. As with all CRA positions, they could change in the future.

As this is arguably one of the most important sections of the Guidance, here are paragraphs 75 to 81 in full:

- **Directed gifts and acting as a conduit**

  75. The Income Tax Act provides that a charity could have its registration revoked if it accepts a gift from a donor that is expressly or implicitly conditional on the charity "gifting" it over to a specific recipient, other than a qualified donee.[Footnote26] This prohibition covers grants to grantees. The intent of this provision is to "prevent organizations from acting as conduits in the making of a directed gift" to a non-qualified donee.[Footnote27] This prevents situations such as where a charity, with donor knowledge, solely exists as a fundraising arm of an affiliate organization. In these circumstances, the charity would not be in a position to make decisions around the use of resources, or act independently of the affiliate.

  76. Here is an example of an explicitly conditional gift:

  - A donor indicates that a gift must be used to grant money to a specific non-qualified donee, and if it is not used for that purpose, the funds must be returned to the donor. This could constitute a legally binding conditional gift, and if the charity accepted it, this could jeopardize its registration.

  77. Here is an example of an implicitly conditional gift:

  - A charity includes the name of a non-qualified donee in its own name, purposes, or other formal documents, indicating this would be the sole recipient of any grants the charity makes. Any funds the charity receives from a donor could be implicitly conditional on the charity granting it over to the specified non-qualified donee, and could jeopardize the charity's registration.

  78. To avoid concerns about directed gifts, the charity should retain authority over the use of its resources, and clearly communicate this to the donors. For example, the charity could communicate that:

  - Donors can indicate their program preference for how a charity will apply their donation, but ultimate authority on the use of resources must rest with the charity.
  - If the charity does not use the donation the way the donors prefer, the charity will not return the donation to the donors.

  79. For example, this message could be included on the donations page of the charity's website and in any of its fundraising communications.

> 80. Provided a charity can show it retains authority over the use of its resources, we will consider the charity to not be engaged in directed giving.
>
> 81. Alternatively, a charity could use the donation to carry on its own activities through an intermediary, provided the charity exercises direction and control over the use of its resources.

It is important to note that in paragraphs 75 to 77, when CRA is providing examples of conditional gifts, these are just examples and not by any means comprehensive. Any one of these examples could include a number of different variations that would be a directed gift.

The example in paragraph 77 dealing with an implicitly conditional gift will be of concern to many organizations that have a similar name to a group inside or outside of Canada that is not a qualified donee. This may in fact make it impossible or very difficult for a large number of organizations to do a grant to a grantee.

Paragraph 78 is interesting. Essentially it is having charities say to donors that if you give money for a particular program, it is a program preference that is not binding on the charity. If a person gives a donation and it is a precatory or non-binding request or wish that the donation be used for a particular program or purpose, then a charity can use the funds for that request or not.

However, in many cases money is given to charities that are restricted and if a charity were to spend that money on something else without a court order or an amendment clause/cy pres clause, then the charity would be in a breach of trust situation. We don't think that CRA was nearly as clear about this in this Guidance.

We would also point out that CRA has recently put out a letter dealing with a non-binding wish in which CRA said that they will look at all the facts and circumstances of the situation. In other words, just indicating that something is non-binding is not determinative of the situation and you could say it's non-binding on CRA as to whether they revoke your charitable status.

Further, for some charities, the language provided in paragraph 78 may not be much of a problem, but for other charities it will be a huge impediment to fundraising.

CRA says this must be clearly communicated to the donor, and paragraph 79 specifically mentions communicating in “any of its fundraising communications”. Would “any of its fundraising communications” mean that every e-mail, letter, conversation, etc relating to fundraising to a donor would need to include this language?

CRA does say that a charity would not be involved in directed giving if it “retains authority over the use of its resources”. For CRA to determine in an audit whether a charity retains authority over its resources CRA would review all minutes of meetings, policies, communications with donors, communications with partners, etcetera. Many charities may not have the level of detail in their books and records that CRA will require relating to this issue. We would think that in an audit, a charity having control over the use of its resources would be assumed unless there was some contraindication. In this case, CRA is saying that the charity has a positive obligation to show it retains authority over the use of its resources. Charities will need to carefully review their

processes, policies, communications with donors and partners, books and records, to make sure that it is absolutely clear in all circumstances that the charity retains authority over the use of its resources.

Do the directed donation rules apply to direction and control?

Paragraph 81 could potentially mean that it is CRA's position that the directed donation rules don't apply to a situation where a charity has actual direction and control over the funds being given to a non-qualified donee.

> 81. Alternatively, a charity could use the donation to carry on its own activities through an intermediary, provided the charity exercises direction and control over the use of its resources.

It is not absolutely clear what the word "Alternatively" is relating to, but it seems to indicate in paragraph 81 that charities can show they have "authority over the use of its resources" when the charity is correctly using direction and control to avoid being engaged in a directed donation.

Earlier in paragraph 75 dealing with "Directed gifts and acting as a conduit" CRA notes that "This prohibition covers grants to grantees." This refers to directed donations. But CRA's Guidance saying that the directed donation rules apply to grant to grantees does not completely rule out it applying as well to direction and control. CRA further states that the intent of this provision is to "prevent organizations from acting as conduits in the making of a directed gift" to a non-qualified donee." Clearly case law shows that a Canadian charity cannot be a conduit but as there is no case law on grant to grantees it seems to be CRA's view that the directed donation provisions are applying that type of concept to a grant to grantee scenario.

While we are not sure that this is the correct interpretation as there may be other interpretations, there are a number of practical advantages of CRA arriving at this approach. If this is correct then a Canadian charity only using direction and control would need to comply only with the conduit provisions in the CRA guidance but not the new directed donation rules. Much of the fundraising done by certain groups that use direction and control would not be possible if directed donation rules applied to direction and control.

If that interpretation of paragraph 81 is correct, then that paragraph could undercut the whole notion of using grants to grantees for many groups that are doing public fundraising where some or all of the funds may go to non-qualified donees. The risks of being found to have accepted a directed gift are significant, so this is a very large reason why many charities will again prefer to use direction and control rather than grants to grantees.

Keep in mind that when CRA seems to be stating that the conduit provisions apply to direction and control and that the new directed donation provisions don't if you're using direction and control (as opposed to grant to grantee), it is the actual direction and control that CRA reflects in their guidance. A charity cannot simply say they are using direction and control, they actually have to follow the rules for direction and control as set out by CRA. So, it is particularly important for groups that are doing direction and control to make sure that they are actually doing direction and control. We see groups frequently thinking that because they have a 'separate bank account' and

obtain ‘receipts’ that they have direction and control. There are 8 measures of control that are needed, and a separate bank account is not even needed. There is extensive CRA guidance on direction and control in addition to cases and letters on the topic and you need to ensure that you are complying with those requirements if you are using direction and control.

It is also important for groups to review their gift acceptance policies and standard template agreements to minimize risk relating to either directed donations or conduits.

Reporting Grants

In the Guidance, the CRA reminds charities that there will be new reporting on the T3010 relating to grants to grantees. Specifically grants over $5,000 in any year to a grantee, whether in Canada or outside of Canada, will be listed on the T3010. As well the total number and amounts of grants under $5,000 will also be listed. CRA has recently placed on their website the new T3010 version 24.

Pooled Grants

The CRA discusses pooled grants in paragraphs 94 to 98 with an example of pooled grants after paragraph 98. These conditions for pooled grants are potentially more onerous than the joint venture requirements for direction and control. For example, the due diligence would be “Review both the grantee(s) and grantors.” For some who talk about quickly providing funds, for example in a disaster scenario, it's not clear that the new rules and CRA's guidance is going to be helpful.

Although it is not discussed specifically under pooled grants, when a Canadian charity provides a grant to a pooled fund using the grant to grantee mechanism all of the Canadian funds need to be spent on charitable “activities” and not either non charitable activities or administration. This stipulation alone may make it difficult for Canadian charities to enter into some pooled fund arrangements.

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