
**ASSOCIATION OF FUNDRAISING PROFESSIONALS
GREATER TORONTO CHAPTER – CONGRESS 2009**

The Legal Track: Keeping Fundraisers in the Know

Toronto – November 30, 2009

New CRA Policy on Foreign Activities

**By Terrance S. Carter – Carters Professional Corporation
and M. Elena Hoffstein – Fasken Martineau DuMoulin LLP**

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A. INTRODUCTION


- **June 30, 2009, CRA released *Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities* (“Proposed Guidance”)**
- **Intended to update and replace the current CRA publication on foreign activities entitled *Registered Charities: Operating Outside Canada RC4106* (“Current Policy”) and Registered Charities Newsletter No. 20**

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2

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- **Proposed Guidance constitutes an improvement over the Current Policy by providing a more practical guide for charities that operate outside of Canada**
- **This presentation summarizes the Proposed Guidance, and where appropriate, compares and contrasts it with the Current Policy**
- **See Charity Law Bulletin #172 “CRA’s Proposed New Guidance for Charities Operating Outside of Canada” and other publications at <http://www.carters.ca/pub/bulletin/charity/2009/chvlb172.pdf>**

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3

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B. SUMMARY OF GUIDANCE

- A summary of the Proposed Guidance follows, together with commentary where appropriate
- The Proposed Guidance is intended to assist registered charities and applicants for charitable registration that wish to carry on activities outside of Canada comply with the requirements of the *Income Tax Act* (“Act”)
- The Proposed Guidance is organized to address a number of specific issues that are of importance to charities with international operations

1. Local Laws

- Charities operating within Canada must comply with Canadian laws
- Charities operating outside of Canada may be operating in areas where the laws are very different, but the Act does not require charities to comply with laws in foreign jurisdictions
- This is a change in position for CRA

- However, being a registered charity in Canada does not exempt a charity from the laws in the jurisdiction in which they operate
- CRA strongly recommends that all charities make themselves aware of local laws before operating abroad
- Awareness of local laws will ensure that the public benefit of an activity is not offset by the harm that may result to those carrying out the activities, to the beneficiaries of the charity, or to anyone else

2. Canada’s Anti-Terrorism Legislation

- **Added to the Proposed Guidance is a section on compliance with Canada’s anti-terrorism legislation**
- **The Current Policy pre-dates September 11, 2001 and does not mention anti-terrorism legislation**
- **The Proposed Guidance reminds charities that it is their responsibility to ensure that they do not operate or associate with individuals or groups that support terrorist activities**
- **Failure to do so may result in the charity losing its status under the Act**

- **However, the Proposed Guidance does not provide any explanation with regard to how to ensure compliance, i.e. no reference to the CRA anti-terrorism checklist posted in April 2009 at <http://www.cra-arc.gc.ca/tx/chrts/enslftns/ccrc-eng.html>**
- **Also failure to mention the requirement in the T3010B to include the names of all recipient intermediaries on the T3010 as a matter of public record notwithstanding concerns about the safety of those recipients**

3. How can a Charity Operate?

- **Two means available under the Act by which a registered charity can pursue its charitable purposes**
 - a) **The charity can make gifts to qualified donees**
 - b) **The charity can carry out its own charitable activities, which in turn would require that the charity must control all of its activities and resources (referred to as “its own activities test”)**

a) Gifts to Qualified Donees

- A registered charity can make gifts to other organizations that are on the list of qualified donees as set out in the ITA
- Qualified donees include, but are not limited to other Canadian registered charities, prescribed universities outside Canada, the United Nations and its agencies, municipalities, provincial and federal governments and a foreign charity that the Canadian Government has made a gift to in the preceding 12 months

b) Carrying on Its Own Charitable Activities

- The carrying on of its own charitable activities requires a charity to be actively involved in programs that are intended to achieve its charitable purposes
- This can be done by the charity directly funding its own employees and/or volunteers in carrying out its programs
- It is not permissible for a registered charity to carry out its charitable purposes by merely giving either monies or other resources to an organization that is not a qualified donee

- The Current Policy, acknowledges that it “may not be practical for the charity to meet its ‘own activities’ test by operating abroad using its own employees or volunteers directly funded by that charity”
- In the Current Policy, CRA indicates that a charity is allowed to work through other organizations if it “employs certain structured arrangements that allow it to retain direction and control over the use of its resources”

- In the Proposed Guidance, CRA’s language has become more specific:
 - “When working through an intermediary, a charity must always direct and control the use of its resources. A charity cannot simply act as a passive funding body for an intermediary’s programs. A charity that does not carry out its own activities, or direct and control its resources, risks sanctions under the Act, including the loss of its charitable status” (emphasis added)

4. Intermediaries
- When a charity cannot carry out an activity with its own staff or volunteers, a charity is permitted to use an intermediary to carry out its activities
 - The Proposed Guidance states that the charity should be able to document that, “it has reasonable assurance that the intermediary, by virtue of its reputation, expertise, capacity, or experience, can carry out the tasks required by the charity”
 - Proposed Guidance set out different types of possible intermediary relationships acceptable to CRA, but CRA does not recommend one relationship over another

- a) Agents
- In an agency relationship, a registered charity can appoint an agent to act as its representative in carrying out specific tasks on behalf of the charity and, in doing so, transfers monies or other charitable resources to the agent for the tasks
 - Agents can be organizations or individuals and do not need to be qualified donees under the ITA or registered charities in their own countries

- Agency agreements can be one-time agreements or can be master agreements where there is to be a longer term relationship between the parties which are then supplemented by letter agreements accompanying each transfer of monies
- CRA warns charities in the Proposed Guidance that they “must always be able to show that the agent is carrying on the charity’s own charitable work”
- Agency arrangements have traditionally been the most common method used by registered charities to carry on activities outside of Canada through intermediaries

- However, the Proposed Guidance does not discuss some of the issues that should be considered with regard to choosing an agency relationship
- Liability Issues:
 - It is a principle of law that a person may appoint a third party as his or her agent to act on his or her behalf
 - In such situations, the actions of the agent are deemed to be actions of the principal and, as a result, the principal is thereby vicariously responsible for the actions of the agent

- This vicarious responsibility for the acts of its agent can then expose the registered charity (as principal) to significant liability, both civil and criminal (e.g. anti-terrorism legislation)
- This concern is identified by the CRA in the Current Policy
- Unfortunately, a warning about the significant liability associated with utilizing an agent as an intermediary is absent in the Proposed Guidance

• **Insurance Issues:**

- Some insurers may have concerns about the vicarious liability risks associated with agency relationships
- The liability risk of a charity that is associated with any of its agency relationships may not be covered by the charity’s insurance policy unless fully disclosed to the insurer
- It is important for a charity to advise its insurer in writing of the nature and extent of its agency relationships to ensure there is proper insurance coverage for the agent’s activities

• **Disbursement Quota Issues:**

- Until the agent expends the funds received from the charity, there is no charitable disbursement that can be counted toward the disbursement quota of the charity
- As such, the charity would have to carefully monitor the timing of when the agent expended monies and resources on behalf of the charity in relation to calculating its disbursement quota

b) **Joint Venture Participants**

- A charity can also carry on its activities jointly with other organizations or individuals through a joint venture relationship where the participants pool their resources in order to accomplish their goal in accordance with the terms of a joint venture agreement
- A charity can work with non-qualified donees as long as the charity is exercising control over the activities proportionate to the resources it is providing and it can demonstrate this fact

- Generally, a joint venture governing body is required to establish, conduct and oversee the joint venture
- For instance, where the registered charity contributes 40% of the fundraising for the project, then the charity should have 40% of the voting rights on the governing board
- However, CRA warns that being susceptible to being voted down by other joint venture participants, the charity would need to retain the right to discontinue supplying resources to the joint venture

- c) Co-operative Participants
- “Co-operative participant” is defined as “an organization that a charity collaborates with to achieve a common, charitable purpose. It is not meant to create or imply a special legal status between the organizations”
 - Charities can be considered co-operative participants in situations where the charity works side by side with another organization to achieve a particular goal, but the organizations do not pool their resources or carry out the project as a joint venture
 - Note the Proposed Guidance no longer uses the term “co-operative partnership” as used in the Current Policy, which incorrectly implied a legal relationship

- d) Contractors
- CRA permits charities to contract work out to an organization or individual in another country to provide goods and services to achieve the charitable purpose of the charity, including core charitable services
 - Contractors can be organizations or individuals and do not need to be either qualified donees under the ITA or recognized charities in their own countries
 - However, the registered charity is required to give specific instructions to its contractors

- There are important issues to consider when comparing a contractual v. agency relationship, which issues are highlighted below
- Liability Issues:
 - The vicarious liability that exists between a charity and its agent in an agency relationship does not generally exist with a contract for service between a charity and the third party intermediary with whom it contracts to provide services
 - This is because the means being utilized to effect the relationship is different, i.e. a contract versus a principal/agent relationship

- Instead, the liability associated with the work being carried out by the third party contractor under the contract for service is generally limited to the contractor under the contract and, does not extend back to the charity
- However, it is still possible for a plaintiff in a lawsuit being brought against a third party contractor and the charity to argue that the charity exercised too much day-to-day control over the activities of the contractor and, therefore, might possibly be liable for the actions of the contractor

- Insurance Issues:
 - In contrast to the agency relationship, a contract for service may be more attractive to an insurer, as it does not generally involve vicarious liability for the actions of the third party contractor as is the case with an agency relationship
- Disbursement Quota Issues:
 - The time of payment of monies under a contract for services would be the time that the expenditure would be counted for DQ purposes, not when the contractor fulfills the terms of the contract

5. The “Own Activities Test”

- The key component of the Proposed Guidance is the requirement that a charity must meet the “own activities test”
- Defined in the Proposed Guidance as follows:
 - “Whether a charity works through its staff or through intermediaries, the Act requires a charity to devote all of its resources to charitable activities carried on by the organization itself... This requirement is referred to as the ‘own activities’ test.”
- Reference to staff would likely include volunteers, although not stated as such in the Proposed Guidance

- Charities cannot act as a passive funding body for a non-qualified donee
- 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
- The “own activities test” applies to charities that are offshoots of non-qualified donees, such as a charity that is subordinate to a head body organization located outside Canada
- Charities cannot simply send payments to head bodies, affiliates or other member organizations without receiving goods or services in return

6. Control and Direction of Resources

- One part of a charity’s own activities test is the control and direction that the charity exercises over its resources
- A charity should always have an agreement in place with any intermediaries that it works with
- In some cases, the agreement may only require a verbal discussion, while other situations will call for all measures of control discussed below in the Proposed Guidance

- Generally, an agreement will need the fewest measures of control when both of the following are true:
 - The resources transferred can, because of their nature, likely only be used for charitable purposes
 - There is a reasonable expectation that the intermediary will use the resources only for charitable purposes
- This has been referred to as the “Charitable Goods Policy”

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- Six “measures of control” to assist in meeting the “own activities test”
 - a) Written agreements
 - b) Description of activities
 - c) Monitoring and supervision
 - d) Ongoing instruction
 - e) Periodic transfers
 - f) Separate activities and funds

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a) Written Agreements

- Although not formally required under the Proposed Guidance, CRA recommends that a charity have a written agreement with each of its intermediaries
- However, simply entering into an agreement is not enough to prove that a charity meets the “own activities test”
- Instead, the charity must be able to show that it has a real ongoing active relationship with its intermediary
- In situations where the money spent on a one time activity is about \$1,000 or less, other forms of communication than a written agreement might be used to show direction and control

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- Appendix E to the Proposed Guidance includes a “Checklist of the Elements of a Written Agreement”
- Some examples from Written Agreement Checklist include:
 - Is a clear, complete, and detailed description of the activities to be carried out by the intermediary provided? Do the activities further the charity’s purposes?
 - Are the locations where the activity will be carried out clearly stated?
 - Are all the time frames and deadlines set out?

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- Does the intermediary have to provide regular written financial and progress reports, supported by documentary evidence, to the charity to prove the receipt and disbursement of funds and the progress of the activity?
- Is there a provision for funding in instalments based on satisfactory performance, and for the withdrawing or withholding of funds or other resources at the charity’s discretion? (Funding includes the transfer of all resources)
- Does the charity have ongoing instructions in place?
- Are an effective date and adequate termination provisions established?

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b) Description of Activities

- A statement of activities is required to show that the charity is able to give “a clear, complete, and detailed description of that activity”
- The Proposed Guidance lists what the description should demonstrate, some of which are listed as follows:
 - 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

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- 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
- How the charity monitors the activity, the use of its resources, and those who carry on the activity
- The mechanisms that allow the charity to modify the nature or scope of the activity, including discontinuance of the activity if the charity so decides

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c) Monitoring and Supervision

- That one way that a charity can demonstrate it controls the use of its resources and meets the “own activities test” is to have an “ongoing relationship with its intermediary through regular monitoring and supervision”
- However, the Proposed Guidance offers no details concerning what is meant in this regard
- Based on the example provided, the agent sends monthly progress reports, photos, receipts and vouchers, and the staff visits the site quarterly, but no list of factors provided

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d) Ongoing Instruction

- Charities are expected to provide ongoing instructions to their intermediaries to provide any necessary additional instructions or directions to the intermediary
- Records of any ongoing instructions and minutes of meeting are some of the ways to show that a charity has given ongoing direction to the intermediary and continues to control the activities
- The Proposed Guidance recommends using written instructions to communicate with intermediaries whenever possible

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e) Periodic Transfers

- The Proposed Guidance recommends making periodic transfers of funds based upon demonstrated performance
- A charity should retain the right to discontinue the transfer of funds and to have unused funds returned if the charity is not satisfied with the reporting, progress, or outcome of an activity
- When a charity has unused money transferred back to it by the intermediary, this will help show that the charity is maintaining control over its own resources

f) Separate Activities and Funds

- The Proposed Guidance points out the importance of a charity being able to distinguish between its activities and those of its intermediary when carrying on activities through an intermediary
- A charity cannot simply pay the expenses that an intermediary incurs to carry on the intermediaries own activities
- For certain types of arrangements, such as agency relationships, the charity's funds should be segregated

7. Funding from CIDA and Other Government Programs

- The Proposed Guidance points out that not all CIDA funded activities will be considered to be charitable
- The participating charity must, therefore, ensure that the project meets its own charitable purposes
- CRA recommends contacting the Charities Directorate in situations of uncertainty regarding CIDA-funded projects to determine if it is charitable

8. Keeping Books and Records in Canada

- Charities must keep adequate books and records in Canada, in either English or French, failing which, the charity could be subject to sanctions under the Act, including the loss of charitable status
- The books and records must allow CRA to verify that charitable funds are either being spent on its own activities or are being gifted to a qualified donee



- The books and records must have enough information to allow CRA to determine if the charity is operating in accordance with the Act
- A charity should receive timely financial and progress reports and supported with documents to verify the expenditures
- In situations where records are difficult or impossible to obtain, the charity must demonstrate that it made all reasonable efforts to obtain the necessary records
- However, the Proposed Guidance does not recognize that remote computer access to electronic documents is sufficient

a) Agents

- The agent is required to keep the funds, property, books and records of the charity separate and apart from those of the agent
- The agent's records should include progress reports and documentation of funds received and expenditures made on behalf of the charity
- If local laws prohibit the transfer of source documentation to Canada, copies should be forwarded regularly and originals should be available for inspection
- Upon completion of each activity, the charity should obtain a final comprehensive report



b) Contractors

- Charities should obtain regular financial and progress reports from their contractors
- These reports should include a description of the funds received from the charity and the expenses that the contractor has incurred in carrying out an activity
- When the project is completed, the charity should obtain a, “final comprehensive report” with supporting documentary evidence, such as invoices, photographs and receipts
- However, with a contractual relationship CRA shouldn’t be requiring the contractor to produce copies of invoices and receipts after completion of the project

 46 

c) Joint Ventures



- A charity must ensure that it regularly receives full and complete updates on all financial information relating to the entire venture
- The charity needs to show how its contribution ties in with the overall project and how its resources have been devoted to its charitable objects
- There is a noticeable absence of any guidelines with books and records concerning Co-operative Participants

 47 

9. Foreign Activities and a Charity’s Disbursement Quota

- The Proposed Guidance confirms that the disbursement quota is not affected by whether the charity is carrying on its own activities or not
- CRA does mention that calculating the disbursement quota could be difficult when working jointly or in partnership with another organization

“[O]ne acceptable approach is to adjust the charity’s contribution downwards to reflect the overhead costs of the project or program as a whole”

 48 

10. Appendices

- **Appendix A – Disaster Relief:** Deals with groups attempting to organize and register in the wake of a disaster in order to provide disaster relief
 - CRA typically assigns priority to these files
 - However, these groups must still meet the same requirements as all other applicants
 - CRA encourages groups that wish to help in international disaster situations to consider working with well-established, experienced relief organizations

- **Appendix B – Capacity Building:** Deals with charities that are helping a community to develop the abilities and resources necessary for the community to become more self-sufficient
 - CRA states that charities may need to help with a community’s problems “in a holistic fashion, rather than simply dealing with one of a community’s problems in isolation”, such as with regard to micro-finance
 - Before beginning capacity building programs, charities should try to make sure that their objects and activities allow them to carry out whatever activities they anticipate will be required

- **Appendix C – Joint Ventures:** Lists some factors that will be considered when determining whether or not a charity meets the “own activities test” when working through joint ventures
 - Presence of members of the Canadian charity on the governing body of the joint venture
 - Presence in the field of members of the Canadian charity
 - Joint control by the Canadian charity over the hiring and firing of personnel

- **Joint ownership by the Canadian charity of foreign assets and property**
- **Signature of the Canadian charity on loans, contracts, and other agreements**
- **Review and approval of the venture's budget by the Canadian charity, availability of an independent audit of the venture, and ability to discontinue funding**
- **Authorship of such things as procedures manuals, training guides, and standards of conduct by the Canadian charity**

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- **On-site identification of the venture as being the work, at least in part, of the Canadian charity**
- **Input by the Canadian charity into the venture's initiation and follow-through, including the charity's ability to direct or modify the venture and to establish deadlines or other performance benchmarks**

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- **Appendix D – Transferring Property to Non-Qualified Donees: Deals with situations where a charity wishes to transfer real or capital property to a non-qualified donee**
 - **The *Income Tax Act* prohibits gifting of money or resources to non-qualified donees**
 - **CRA acknowledges that in some countries, foreign ownership of real property is not allowed**
 - **In these situations, a title-holding arrangement with a local charity or governmental body could be used as long as the arrangement restricts the use of the property to the exclusively charitable purposes of the charity**

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- Another exception is with regards to development projects, where a charity has no interest in operating a facility after its construction
- Charities should make all reasonable efforts to make sure any facilities constructed as part of development work are not misused
- CRA strongly recommends that a charity consult with the Charities Directorate whenever it wants to dispose of real property abroad (other than by a gift to a qualified donee, or a sale at fair market value)

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- Appendix E – Checklist for Agreements: Is a checklist that CRA has developed for charities to use in helping make sure that the agreements they enter into contain the “minimum elements necessary” for compliance with the Act
 - See slide 34 and 35 above for examples of what should be included in a written agreement

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C. ADDITIONAL AREAS OF CONCERN

- In addition to the concerns already referenced above, there are still some additional areas of practical concerns with regard to the Proposed Guidance
- Examples of those areas of concern include:
 - The title of the Proposed Guidance is somewhat of a misnomer because the requirements for working with a non-qualified donee are the same inside and outside of Canada
 - The requirement for intermediaries to produce originals or copies of vouchers or receipts is not always realistic

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- The one thousand dollar exemption from agreements is helpful but likely too little, given the cost of putting an agreement in place
- There's no explanation that CRA will permit a sub-contract or sub-agency arrangement, which they currently do
- The *de-minimis* threshold (lesser of \$5,000 or 5%) for tithes and memberships fees in the current policy, has been left out of the Proposed Guidance
- Query on what basis CRA can state that the Guidance will apply to applicants for charitable status as well as to charities once they become registered

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D. CONCLUDING COMMENTS

- The Proposed Guidance is an improvement over the Current Policy and as such should be carefully studied by charities and their advisors
- Clarifies much of the ambiguous wording that was previously contained in the Current Policy
- However, there are still a number of concerns with the Proposed Guidance that Canadian charities operating in the international context will want to carefully monitor

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