
CRA RELEASES GUIDANCE ON INELIGIBLE INDIVIDUALS

*By Ryan Prendergast and Terrance S. Carter**

A. INTRODUCTION

On August 27, 2014, the Canada Revenue Agency (“CRA”) released CG-024, its Guidance on how the ineligible individual provisions in the *Income Tax Act* (ITA) should be interpreted and enforced (“Guidance” or “CG-024”).¹ The provisions were introduced in the 2011 Federal Budget and came into force January 1, 2012. They provide that CRA can refuse to register an applicant for charitable registration or suspend receipting privileges or revoke the registration of a charity or a Registered Canadian Amateur Athletic Association if an ineligible individual is on the board or part of senior management of a charity, or is in a position to control or manage the organization.² The Guidance emphasizes that CRA intends to enforce the provisions in a balanced way and that the sanctions are discretionary. CG-024 also provides some relief to charities in that it states that the legislation does not require charities to search or proactively determine, through criminal record or background checks, whether an ineligible individual is involved in the charity. Further, the Guidance acknowledges that individuals with “lived experience,” such as an assault charge, can be an ineligible individual but also benefit a charity. In this regard, the Guidance provides guidelines about how a charity can respond to a CRA letter about an ineligible individual. In an FAQ on the CRA website dated August 10, 2011, CRA indicated that it would be “developing detailed administrative guidance on how these new rules will be

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¹ CG-024 – *Ineligible Individuals* (August 27, 2014), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cg-024-eng.html>> [*Ineligible*].

² Although the ineligible individual provisions apply to both charities and Registered Canadian Amateur Athletic Associations, for ease of reference the term “charities” will be used to refer to both throughout this bulletin.

applied.”³ The length of time that it has taken to produce the Guidance is an indication of the complexities involved in the issues that it addresses. This *Charity Law Bulletin* provides an overview of the more important aspects of the Guidance.

B. WHO IS AN INELIGIBLE INDIVIDUAL?

The Guidance begins by outlining who falls within the ineligible individual provisions. As stated in the legislation, an ineligible individual is someone who at any time has been:

- a) convicted of a “relevant criminal offence” unless a pardon has been granted for the offense;
- b) convicted of a “relevant offence” in the past five-years;
- c) a director, trustee, officer or like official of a registered charity when the charity engaged in conduct that could reasonably have constituted a “serious breach” of the requirements for registration under the ITA and for which the registration was revoked in the past five-years;
- d) an individual who “controlled or managed”, directly or indirectly, a registered charity when the charity engaged in conduct that can reasonably have constituted a serious breach of the requirements for registration under the ITA and for which its registration was revoked in the past five-years; or
- e) a promoter of a tax shelter that involved a registered charity, the registration of which was revoked in the past five-years for reasons that included or were related to participation in the tax shelter.⁴

CG-024 goes on to describe the meaning of key terms such as “relevant,” “relevant criminal offense,” “relevant offense,” “serious breach,” “a person who controls or manages,” and a “promoter of a tax shelter.” These descriptions are helpful for charities seeking to understand if they are working with an ineligible individual.

³ Canada Revenue Agency, “Eligibility Requirements for Individuals who are Directors or Control or Manage Registered Charities and Registered Canadian Amateur Athletic Associations or Applicants for such Status”. Available online at: <http://www.cra-arc.gc.ca/gncy/bdgt/2011/qa22-eng.html>.

⁴ *Income Tax Act* (RSC, 1985, c 1 (5th Supp)), 149.1(1).

1. Relevant⁵

An offense is “relevant” if it relates to financial dishonesty or if it is relevant to the operation of an organization. Examples of financial dishonesty are misappropriation of funds, forgery, and fraud. To determine whether an offense is relevant to the operation of an organization CRA will look to the facts and consider the nature of the offense and the relationship between the offense and the operation of the organization. Offenses are likely relevant to an organization if the victim is similar to the beneficiaries of the program; the operation of the organization provides an opportunity for a similar offense; or the organization’s operations would be at risk if a similar offense was committed.

2. Relevant criminal offense⁶

A “relevant criminal offense” is a criminal offense under the laws of Canada or an offense that would be a criminal offense if it were committed in Canada. Only offenses in federal statutes are criminal. A person convicted of a relevant criminal offense remains an ineligible individual unless a pardon is granted or a record suspension is ordered.

3. Relevant offense⁷

A “relevant offense” is an offense under provincial legislation or an offense under federal legislation that is not a criminal offense. Examples of relevant offenses are breaches of charitable fundraising legislation, consumer protection legislation, and securities legislation. A person convicted of a relevant offense is an ineligible individual for five years from the date of conviction.

4. Serious breach⁸

The definition of “serious breach” described in the Guidance is somewhat broader than some may have anticipated. The Guidance states at paragraph 17 that, “to determine whether someone is or is not an ineligible individual, the breach that resulted in revocation must be serious.” This is an exercise that many legal advisors to charities have found challenging because it was not clear

⁵ *Ineligible, supra* note 1 at 7.

⁶ *Ibid* at 6.

⁷ *Ibid* at 7.

⁸ *Ibid* at 11.

when the registration of a charity was revoked following an audit whether it was a “serious breach” or not. However, the Guidance goes on to state that, “The CRA considers **any** revocation resulting from an audit to be a serious breach”. While some examples include revocation for issuing fraudulent receipts and misappropriating assets, many revocations following an audit may also be based on less serious contraventions of the ITA, including failure to maintain books and records or issuing a receipt not in compliance with the ITA regulations. However, revocation for failure to file an annual information return or due to a lapse in governing documents (ex. loss of corporate status for failing to continue under the *Canada Not-for-profit Corporations Act*) would not be considered a serious breach under the ineligible individual provisions.

5. Person who controls or manages⁹

A person who “controls or manages” can include a director, trustee, or officer, but is also wider to include any person that knows, or ought to have known, how the organization operates. Under the ineligible individual provisions, people who control or manage a charity are accountable, whether or not they directly participated in the non-compliant conduct. Individuals who have the power to make decisions about the actions of the organization or appropriate the organization’s assets have control. Individuals who manage can hire or dismiss employees or prepare budgets.

6. Application to Authorized Representatives

The Guidance confirms that an application for charitable status may be refused in an ineligible individual “made the application”. CRA further clarifies at paragraphs 38 to 39 that anyone who: (i) signs a completed Form T2050; and (ii) anyone who provides information to the CRA about the applicant organization, including its authorized representative or contract person, will be considered to have made the application. As a result, although an ineligible individual may not be “a director, trustee, officer, or like official of the organization”, or may not be someone who “controls or manages the organization”, if that individual signs or provides information to CRA concerning the application, the application may also be refused.

⁹ *Ibid* at 12.

C. ENFORCING THE INELIGIBLE INDIVIDUAL PROVISIONS

CG-024 explains how CRA intends to enforce the provisions in a balanced way, noting that the sanctions available to the CRA are discretionary and that CRA will assess each case on its own merit. CRA has stated that it is concerned about deliberate abuses of the system and that it intends to use the provisions to limit threats to beneficiaries and assets of charities.

The Guidance makes it clear that the legislation does not require charities to search or proactively determine whether an ineligible individual is involved in the charity. Charities are not required to conduct a criminal record or background check to determine if someone is an ineligible individual.

1. CRA Sanctions

The legislation does not prohibit an ineligible individual from being a director or an employee of a charity. Instead, CRA can consider the following actions:

- If an ineligible individual makes an application to register a charity CRA can refuse to register;
- If an ineligible individual is a director, trustee, officer, or like official of the organization, CRA can refuse to register, suspend receipting privileges for one year, or revoke registration; and
- If an ineligible individual controls or manages the charity CRA can refuse to register, suspend receipting privileges for one year, or revoke registration.

The Guidance states that CRA will consider what made the person an ineligible individual, what roles and responsibilities the ineligible individual has in the charity, and how the charity has lessened any potential risk that the individual poses to the charity.

Before CRA makes a final decision it must set out its concerns in writing and give the charity a fair opportunity to respond to the concerns.

2. Exceptions

CRA also recognizes that in some cases it is useful to a charity to have someone who is an ineligible individual involved in its work. For example, people with similar “lived experience” can provide important programming insights. CG-024 uses the example of a board member with an assault conviction being integral to a charity providing counselling services to people with anger-management issues because the ineligible individual could help hire staff who are responsive to the needs of the charity’s clients.

3. Example of CRA Enforcement

On September 13, 2014, CRA revoked the charitable registration of the Friends and Skills Connection Centre. One of the reasons cited in the notice of intention to revoke registration was that during the audit period one of the organization’s directors was found to have previously been a director of another charity which had engaged in conduct that constituted a serious breach of the requirements for registration under the ITA.¹⁰ The director was therefore an ineligible individual. This is the first example of CRA enforcing the sanctions from CG-024 after the Guidance was issued. Previously, the only other publicly known instance of CRA applying the ineligible individual provisions was the revocation of Jesus of Bethlehem Worship Centre as a charity on July 11, 2014, which occurred prior to the Guidance being issued.¹¹

D. HOW CAN A CHARITY RESPOND?

Part D of the Guidance outlines how a charity can respond to CRA after it is notified that CRA plans to implement a sanction. The onus is on the charity to explain how the ineligible individual contributes to the charity if it wishes to the sanction.

A charity can respond with evidence that the ineligible individual did not make the application, is no longer a director, trustee, or officer of the charity, or does not in any way control or manage the charity. Alternatively, the charity can also explain that CRA should use its discretion. The Guidance outlines that to do so a charity must show how it has restricted the ineligible individual’s roles and responsibilities,

¹⁰ Canada Revenue Agency, “The Canada Revenue Agency revokes the registration of the Friends and Skills Connection Centre as a charity” September 13, 2014. Online at: http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=884489&utm_source=mediaroom&utm_medium=eml

¹¹ Canada Revenue Agency, “The Canada Revenue Agency revokes the registration of the Jesus of Bethlehem Worship Centre as a charity” July 11, 2014. Online at: <http://news.gc.ca/web/article-en.do?nid=867509>.

how it has implemented appropriate control measures, or how it benefits from the individual's experience.

The Guidance emphasizes that a charity must provide "adequate documentary evidence," such as copies of ledgers, cheques or financial reports indicating who has access to a charity's assets if it hopes to avoid sanctions or revocation.¹² A mere statement that someone is not an ineligible individual is insufficient.

E. ADDITIONAL RESOURCES

CG-024 also includes useful appendices. Appendix A is a self-assessment questionnaire to help someone determine if he/she is an ineligible individual. Appendix B contains tips about methods such as due diligence, risk assessment, and fraud prevention, which charities can implement to protect their beneficiaries and assets, and therefore avoid the risks associated with ineligible individuals. The remaining appendices include questions and answers, checklists, and definitions.

Consistent with CRA's 2011 FAQ, the Guidance does not require charities to search or proactively determine, through criminal or other checks, whether an ineligible individual is involved in the charity. However, the Guidance also notes that in some instances such checks will constitute good governance, particularly where a charity works with vulnerable beneficiaries, or may be required by an insurer.

F. CONCLUSION

CG-024 is a useful overview of the administrative approach CRA will take in enforcing the ineligible individual rules. It outlines how charities can avoid sanctions under the rules and provides useful examples and case studies to make the rules accessible. Individuals working with and advising charities, including directors, officers, and staff, should read CG-024. Although it remains to be seen how the enforcement process will look, the Guidance it is useful to understand how CRA will approach the provisions.

¹² *Ibid* at 20.



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