
**THE 2009 ANNUAL
CHURCH & CHARITY LAW™ SEMINAR**

Toronto – November 10, 2009

**CRA's Proposed New Guidance for Charities
Operating Outside Canada and
Its Implications**

By Karen J. Cooper, LL.B., LL.L., TEP
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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
- CRA is accepting comments on the Proposed Guidance until September 30, 2009

- Proposed Guidance constitutes an improvement over the Current Policy by providing a more practical guide for charities that operate outside of Canada
- This presentation presents the obligations that charities have when carrying on activities abroad with reference to the Proposed Guidance and 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/chylb172.pdf>

B. 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 the “own activities test”)

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1. Gifts to Qualified Donees

- A registered charity can make gifts to other organizations that are on the list of qualified donees provided for in the ITA
- Qualified donees include more than just other Canadian registered charities
- The simplest way to carry on activities outside Canada is for a charity to make a gift to a qualified donee that has the experience and capacity in the foreign country to carry on the activity

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- List of qualified donees:
 - Prescribed universities outside Canada
 - United Nations and its agencies
 - Municipalities, provincial and federal governments
 - Foreign charities that the Canadian Government has made a gift to in the preceding 12 months

2. 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

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- In the Proposed Guidance, CRA's provides:

"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*)

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C. INTERMEDIARIES

- When a charity cannot carry out an activity with its own staff or volunteers, it may use an intermediary to carry out its activities
- The Proposed Guidance sets out different types of acceptable intermediary relationships, but CRA does not recommend one type of relationship over another

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1. Agents

- **In an agency relationship, a 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**
- **Agents can be organizations or individuals and do not need to be qualified donees under the ITA or registered charities in their own countries**

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- **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 designations accompanying each transfer of monies**
- **CRA warns charities 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**

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- **However, there are a number of issues that should be considered when engaging an agent:**
- **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**

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- This vicarious responsibility for the acts of its agent can then expose the charity (as principal) to significant liability, both civil and criminal (e.g. anti-terrorism legislation)
- Insurance Issues:
 - Some insurers have concerns about the vicarious liability risks associated with agency relationships

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- Disbursement Quota Issues:
 - Until the agent spends the funds received, there is no charitable disbursement that can be counted toward the disbursement quota of the charity
 - As such, a charity would have to carefully monitor the timing of when the agent expended monies and resources on its behalf to calculate its disbursement quota

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2. Joint Ventures

- 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

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- Generally, a joint venture committee is required to establish, conduct and oversee the joint venture
- Where the charity contributes 40% of the resources for the project, the charity should have 40% of the voting rights on the governing board
- CRA warns that if a charity is susceptible to being voted down by other joint venture participants, the charity should need to retain the right to discontinue supplying resources to the joint venture

3. Co-operative Participants
- “Co-operative participant” is defined as “an organization that a charity collaborates with to achieve a common, charitable purpose. No longer referred to as a partnership
 - Charities are considered co-operative participants 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

4. Contractors
- CRA permits a charity to contract with an organization or individual in another country to provide goods and services to achieve its 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 considering a contractor relationship
- Liability Issues:
 - The vicarious liability that exists 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

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- Any liability associated with the work being carried out by the contractor under the contract for service is generally limited to the contractor and does not extend back to the charity
- However, it is still possible for a plaintiff in a lawsuit being brought against a 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

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- 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 contractor
- 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

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D. THE “OWN ACTIVITIES” TEST

- The key consideration that a charity must have when carrying on activities abroad is whether it meets 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.”

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- Charities cannot act as a passive funding body or conduit 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

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- 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
- How does this apply to charities and religious organizations? This is the source of much discussion in response to the Proposed Guidance

1. Control and Direction of Resources

- One part of the “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 six measures of control discussed below

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- 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 in the past 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, CRA recommends that a charity have a written agreement with each of its intermediaries
- But... simply entering into an agreement is not enough to prove that a charity meets the “own activities” test
- The charity must also be able to show 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 the Checklist:
 - Are the locations where the activity will be carried out clearly stated?
 - Are all the time frames and deadlines set out?
 - Does the intermediary have to provide regular written financial and progress reports, supported by documentary evidence, to prove the receipt and disbursement of funds and the progress of the activity?

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- 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 below:
 - Exactly what the activity involves, its purpose, and the charitable benefit it provides
 - Who benefits from the activity
 - A comprehensive budget for the activity, including payment schedules

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- 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

- One way 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”
- Based on the example provided in the Proposed Guidance, the intermediary should send monthly progress reports, photos, receipts and vouchers, and the staff visits the site quarterly, but no specific 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 will 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

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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

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2. Keeping Books and Records in Canada

- Charities must keep adequate books and records in Canada, in either English or French
- 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

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E. FOREIGN ACTIVITIES AND THE 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”

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F. ADDITIONAL ISSUES

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

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- 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

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2. Canada's Anti-Terrorism Legislation

- Added to the Proposed Guidance is a section on compliance with Canada's 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

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3. 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

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G. 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
- **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
- **Appendix C – Joint Ventures:** Lists factors that will be considered when determining whether or not a charity meets the “own activities test” when working through joint ventures

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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
- **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

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H. 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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