

CRA RELEASES DRAFT GUIDANCE ON CHARITIES MAKING GRANTS AS QUALIFYING DISBURSEMENTS

*By Terrance S. Carter, Theresa L.M. Man & Lynne M. Westerhof**

A. INTRODUCTION

It has been five months since Bill C-19, *Budget Implementation Act, 2022, No. 1* (“Bill C-19”) received Royal Assent and amended the *Income Tax Act* (“ITA”) to include a new way for charities to give by making “qualifying disbursements” to qualified donees and grantee organizations. On November 30, 2022, the Canada Revenue Agency (“CRA”) published a draft guidance (“Draft Guidance”)¹ on what the CRA will require of charities making “grants” under the qualifying disbursements regime.

As explained in *Charity & NFP Law Bulletin* Nos. 511 & 513,² Bill C-19 introduced significant changes to how charities can disburse funds, especially how charities may now give funds to organizations that are

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¹ CG-032 “Registered charities making grants to non-qualified donees (draft)” (30 November 2022), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html>>.

² Terrance S. Carter & Theresa L.M. Man, *Charity & NFP Law Bulletin* No. 511, “Bill C-19 Budget Implementation Act, 2022, No. 1 Proposes Major Changes to Legislative Framework Governing Charities” (25 May 2022) online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2022/chylb511.pdf>> and *Charity & NFP Law Bulletin* No. 513, “Bill C-19 is Amended to Simplify Funding of Non-Qualified Donees” (28 June 2022), online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2022/chylb513.pdf>>.

not registered charities or other types of qualified donees (“QDs”).³ Bill C-19 received Royal Assent on June 23, 2022, with its changes regarding qualifying disbursements coming into force that same day.

The CRA is now seeking feedback concerning the Draft Guidance before publishing a final version, which may be different in some respects. Because qualifying disbursements represent a significant change in the law regarding how charities may use their resources, it is both important for the charitable sector to understand what the Draft Guidance is saying at present (reflecting the current thinking of the CRA) and to provide feedback to the CRA to assist with its development of a final form of the guidance. The deadline to provide feedback to the CRA on the Draft Guidance is January 31, 2023.

Note that the Draft Guidance is largely focussed on guidelines regarding grant making to non-QDs as part of the qualifying disbursements regime, with only limited reference to making gifts to QDs.

The Draft Guidance is very lengthy. Readers are encouraged to review the document in its entirety, as a comprehensive summary of all aspects of the Draft Guidance is beyond the scope of this Bulletin. Instead, this Bulletin provides a brief overview of the new regime of qualifying disbursements, a high-level summary of the contents of the Draft Guidance, as well as an explanation of key concerns about its content that would need to be amended or addressed by the CRA prior to the release of the final version.

Since the final version of the guidance is likely to be different from the Draft Guidance, charities should be careful before relying on either the Draft Guidance or this Bulletin when planning to make qualifying disbursements. Rather, charities, in consultation with their legal counsel, may wish to take a cautious approach and wait for the final version of the guidance to be released by the CRA before moving forward in making any qualifying disbursements.

B. BRIEF OVERVIEW OF QUALIFYING DISBURSEMENTS

Before Bill C-19 received Royal Assent, Canadian registered charities were allowed to use their resources in only two ways, by (1) conducting their own activities by devoting their resources to charitable activities carried on by their own staff and volunteers or through intermediaries, or (2) making gifts to QDs. If a

³ For a full definition of “qualified donee”, see definition in *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 149.1(1). See also, “Qualified donees” (date modified January 11, 2017) online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/qualified-donees.html>>.

charity wanted to work with an organization that was not a QD, it had to demonstrate that it was conducting its own activities by exercising direction and control over the non-QD organization on how it utilized any funds or other resources provided by the charity. These requirements are referred to as the “own activities” test under the ITA and CRA’s “direction and control” administrative policy.⁴ The own activities test and the CRA’s policy were the subject of considerable advocacy for change by the charitable sector, as they were criticized as being inconsistent with modern development philosophy (which prioritizes equal, empowered partnerships) and because they promoted a paternalistic, colonial approach to work in the developing world and with Indigenous communities.⁵

In response to the advocacy efforts of the charitable sector, Bill C-19 amended the ITA so that charities may give their resources to non-QDs.

Bill C-19 now allows charities to (1) conduct their own activities under their direction and control (either through a charity’s own staff and volunteers or through intermediaries) in the same manner as the pre-Bill C-19 regime, or (2) make qualifying disbursements by way of gifts or “otherwise making resources available” to both QDs and non-QD grantee organizations. As such, the making of gifts to QDs under the previous regime has now become part of the broader ability of charities to make qualifying disbursements.

The ITA sets out the following requirements for charities if they want to make qualifying disbursements:

qualifying disbursement means a disbursement by a charity, by way of a gift or by otherwise making resources available,

- (a) subject to subsection (6.001), to a qualified donee, or
- (b) to a grantee organization, if

⁴ See CRA Guidance CG-002 “Canadian registered charities carrying on activities outside Canada” (27 November 2020), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-002-canadian-registered-charities-carrying-activities-outside-canada.html>>; CRA Guidance CG-004 “Using an intermediary to carry on a charity’s activities within Canada” (27 November 2020), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/using-intermediary-carry-a-charitys-activities-within-canada.html>>.

⁵ Open Letter from 37 Canadian charity lawyers summarizing concerns with the aspects of the regulatory regime that applies to Canadian registered charities (19 February 2021) <<https://www.carters.ca/pub/bulletin/charity/2021/Making-It-Easier-to-Do-Good.pdf>>.

(i) the disbursement is in furtherance of a charitable purpose (determined without reference to the definition *charitable purposes* in this subsection) of the charity,

(ii) the charity ensures that the disbursement is exclusively applied to charitable activities in furtherance of a charitable purpose of the charity, and

(iii) the charity maintains documentation sufficient to demonstrate

(A) the purpose for which the disbursement is made, and

(B) that the disbursement is exclusively applied by the grantee organization to charitable activities in furtherance of a charitable purpose of the charity;⁶

A “grantee organization” is defined in subsection 149.1(1) of the ITA to include a person, club, society, association or organization or prescribed entity, but not a QD.

From the definitions above, it is evident that the requirements for charities to make qualifying disbursements to a QD are not overly detailed, although charitable organizations must be aware of the rule in subsection 149.1(6.001) of the ITA that prohibits them from disbursing their income by way of gifts to QDs when such gifts “in excess of 50% of the charitable organization’s income for that year are not qualifying disbursements.” By way of contrast, if charities wish to make qualifying disbursements to grantee organizations, they must meet the three requirements set out above in paragraph (b) of the definition of “qualifying disbursement.” Therefore, the Draft Guidance sets out to explain to charities what these requirements are and how to comply with them.

C. SUMMARY OF THE DRAFT GUIDANCE

The Draft Guidance is divided into seven sections with two appendices. This section of the Bulletin provides a very high-level summary of the contents of the Draft Guidance. Analysis and comments on the Draft Guidance are set out in the next section of this Bulletin.

1. Sections 1-3: Introduction, General Requirements and How Charities Operate

In sections 1 to 3, the Draft Guidance explains the two ways a charity may operate under the ITA:

⁶ *Income Tax Act*, *supra* note 3 at s. 149.1(1) “qualifying disbursement”

11. The Income Tax Act allows a registered charity to operate in the following ways:

- carrying on its own charitable activities through:
 - its staff and volunteers
 - an intermediary (over which a charity must exercise direction and control)
- making qualifying disbursements through:
 - gifts to qualified donees
 - grants to non-qualified donees (a charity must meet accountability requirements)⁷

The Draft Guidance defines the meaning of the terms “charity,” “grant” and “grantee” as used in the document itself. The Draft Guidance also mentions the general requirements for registered charities under the ITA, *i.e.*, they must have exclusively charitable purposes, devote all resources to activities that further their charitable purposes, and meet the public benefit test.⁸

2. Sections 4-6: Making Grants to Grantees

The Draft Guidance explains that with the amendments to the ITA in June 2022, “charities can support the activities of [non-QDs] (grantees), provided charities can show that they meet accountability requirements set out [in the Draft Guidance].” These accountability requirements are explained in sections 4 to 6 of the Draft Guidance, including what they are and how charities would need to take steps to comply with them.

As explained above, the new definition for “qualifying disbursement” in the ITA sets out requirements for charities when making disbursements to grantee organizations. The Draft Guidance refers to these as “accountability requirements” for grants and states that charities must ensure and demonstrate in their books and records that all these requirements are met, namely:

- the disbursement is in furtherance of a charitable purpose of the charity,

⁷ CG-032, *supra* note 1 at para 11.

⁸ See CRA Policy Statement CPS-024 “Guidelines for registering a charity: Meeting the public benefit test” (date modified 23 January 2019), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html>>. See also “Charitable Purposes” (date modified 3 February 2020), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/registering-charitable-qualified-donee-status/applying-charitable-registration/charitable-purposes.html>>.

- the charity ensures that the disbursement is exclusively applied to charitable activities in furtherance of a charitable purpose of the charity, and
- the charity maintains documentation sufficient to demonstrate the purpose for which the disbursement is made, and that the disbursement is exclusively applied by the grantee organization to charitable activities in furtherance of a charitable purpose of the charity.

The Draft Guidance indicates that the CRA recommends the following steps in the grant making process:

- A. Establish how the grant furthers the charity's charitable purposes.
- B. Assess the grant's overall risk level: high, medium, or low risk.
- C. Consider the accountability tools the CRA recommends the charity implement, based on the grant's risk level.
- D. Determine how to apply the accountability tools to mitigate risk and meet the accountability requirements.⁹

The Draft Guidance then explains how accountability requirements may be met in steps B, C, and D of the grant making process by: (1) assessing risks involved with the grant, (2) identifying accountability tools to combat the risk, and (3) applying the accountability tools so identified. It explains that there may be other ways for a charity to demonstrate accountability, but ultimately, the charity is responsible to ensure it meets these requirements.¹⁰

a) Assessing Risk

When assessing the level of risks involved with a grant, the Draft Guidance provides a matrix that serves as a guideline to explain non-exhaustive risk factors a charity should consider. Risks factors in the matrix are: the charity's experience, the grantee's experience, grant activity location, grant amount, private benefit concerns, nature of resources granted, and grant duration. With each risk factor, the matrix sets out indicators of high, medium and low risks. For example, the matrix indicates that a grant above \$25,000 is considered high risk, and a grant of \$5,000 or less is considered to be low risk; activities outside of Canada in regions with significant instability are considered high risk and grants inside Canada are considered low risk; and a long-term grant is high risk, but a short-term grant of less than a year is low risk.

⁹ CG-032, *supra* note 1, at para. 21.

¹⁰ *Ibid* at para 23.

The Draft Guidance states that charities should weigh the significance of each risk in deciding the grant's overall risk level and response. As well, Appendix A of the Draft Guidance provides examples of scenarios that might increase or decrease the risk level of a grant, based on which the charity might need to consider whether it would be appropriate to work with the grantee to adjust the grant terms.

b) Identifying and Applying Accountability Tools

The Draft Guidance explains that “accountability tools” can be used by charities to mitigate risk. Depending on the grant's risk level, the CRA recommends using the following accountability tools depending on the risk level: conducting pre-grant due diligence review; reviewing and documenting the grant activity with the grantee; setting out the terms of the grant in a written agreement; monitoring and reporting how the grant is being used by the grantee; transferring grants in periodic instalments according to a transfer schedule; and asking the grantee to separately track the grant and how it is used. For example, lower risk activities may use some of the same accountability tools as higher risk activities, but with less stringent requirements (*e.g.*, simple written agreements may be acceptable in low-risk situations, while formal written agreements with comprehensive terms may be necessary in high-risk situations).

The Draft Guidance goes into detail explaining what each accountability tool means and how to use it. It also indicates that in addition to risk considerations, the charity should collaborate with the grantee to determine what tools are appropriate in the circumstances.

While the CRA does not provide a template for written agreements, Appendix B to the Draft Guidance set out a list of information that could be included in a grant agreement, such as a description of the grant activity and the charitable purpose it furthers, the location of the activity, start and end dates, timelines and frequency of written reports, the right of the charity to inspect the grant activity, periodic transfer of resources to the grantee, and a requirement for the grantee's books and records to be sufficiently detailed.

While it may be challenging for charities to determine which tools should be adopted and recorded in a particular situation, it is hoped that the variety of accountability tools available to charities will allow them to demonstrate compliance to the CRA in a way that makes sense in their unique circumstances.

c) Keeping Books and Records

The Draft Guidance emphasizes the importance of charities keeping adequate books and records in Canada that contain enough information to allow the CRA to determine whether the charity is operating in accordance with the ITA. When charities make grants, the Draft Guidance reiterates that the granting charities must maintain books and records to allow the CRA to check whether: the grants meet the accountability requirements; the grantee's use of resources can be verified; and the grantee continues to use the grant's resources on the purposes and activities set out in the grant's terms.

3. Section 7: Special Topics

The last section of the Draft Guidance goes over several "special topics" that are related to grant making, such as anti-terrorism considerations, directed donations and acting as a conduit, pooled grants, granting charitable goods, reporting grants in the T3010 *Registered Charity Information Return*, and the granting of real property (*e.g.*, land or buildings).

One topic in particular that charities may wish to review relates to the new reporting requirements in the *Income Tax Regulation 3703*, which requires that charities include certain information on their T3010 *Registered Charity Information Return* when they make qualifying disbursements in excess of \$5,000 to a grantee organization in a taxation year. The Draft Guidance provides that the regulation applies to grantees regardless if they operate inside or outside of Canada. It clarifies that a charity may apply to the CRA with a special request that certain information not be made available to the public if its release would place the charity, grantee, their staff, or volunteers in danger.

D. ISSUES AND CONCERNS WITH THE DRAFT GUIDANCE

1. Confusing Defined Terms of "Grants" and "Grant Making"

There are several aspects of the Draft Guidance that should be amended before it is finalized. One of the major concerns with the Draft Guidance is its use of language that is noticeably different from what is used in the ITA provisions, which the CRA intends to interpret and apply.

The Draft Guidance states that it focuses "on making grants to grantees." This language is confusing, because the terms "grants" and "grantees" used in the Draft Guidance are not used in the ITA. Instead, the ITA uses the terms "qualifying disbursements" and "grantee organizations." The definition of "grant" in

the Draft Guidance is particularly challenging to understand when contrasted with the first portion of the ITA’s definition of “qualifying disbursement” (both are set out below for ease of comparison):

Language in Draft Guidance	Language in ITA
<p>“grant” refers to <i>transfers of both monetary and non-monetary resources</i>, or otherwise making resources available, <i>to a non-qualified donee</i> (grantee).¹¹ [emphasis added]</p>	<p>qualifying disbursement means a <i>disbursement</i> by a charity, by way of a <i>gift</i> or by otherwise making resources available [...] to a <i>qualified donee</i>, or [...] a grantee organization [...] ¹² [emphasis added]</p>

The ITA is clear that a qualifying disbursement is to be a *disbursement*, which is defined in *Black’s Law Dictionary* as “an amount of *money given for a particular purpose*” [emphasis added].¹³ This definition is especially fitting in light of how a charity must ensure that the qualifying disbursements it makes to a grantee organization will further the charity’s charitable purposes. Further, there are only two acceptable ways of making a disbursement according to the ITA, either by a gift or by “otherwise making resources available.”

In contrast, the Draft Guidance defines a “grant” with language that is much broader in scope than the definition of qualifying disbursement by referring to “transfers” of “monetary and non-monetary resources.” A transfer, according to *Black’s Law Dictionary*, can include “any mode of disposing of or parting with an asset or an interest in an asset *including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance*” [emphasis added].¹⁴ According to this definition, a charity paying account service fees to their bank would be seen as making a grant, since it would involve the transfer of monetary resources to a non-QD. Clearly, capturing such transactions does not reflect the intended scope of the ITA provisions.

¹¹ CG-032, *supra* note 1 at para 4.

¹² *Income Tax Act*, *supra* note 3 at s. 149.1(1) “qualifying disbursement.”

¹³ *Black’s Law Dictionary*, 11th ed (Thomson Reuters, 2019) sub verbo “disbursement.”

¹⁴ *Ibid*, sub verbo “transfer.”

2. Unclear Meaning of “Otherwise Making Resources Available” and Its Implications

The Draft Guidance does not explain what is meant by “otherwise making resources available” in the ITA. The ITA clearly indicates that a charity can make “gifts” to non-QDs and can “otherwise mak[e] resources available” to non-QDs.

However, the Draft Guidance instead makes repeated reference to charities “transferring” monetary and non-monetary resources and does not use the phrase “otherwise making resources available” that is used in the ITA. It is not clear whether the concept of “transferring” non-monetary resources in the Draft Guidance is intended to mean (a) the charity is *gifting* non-monetary resources to a non-QD, or (b) the charity is *making available* non-monetary resources to a non-QD. This confusion is illustrated in Examples 2 and 3 in section 4.0 of the Draft Guidance:

- Example 2 – The Draft Guidance gives an example where a “charity with purposes to advance religion provides a grant to a grantee that is facilitating a religious educational program for young people” and the charity allows the grantee to “use the charity’s church hall to conduct the program, and this will include overhead and insurance coverage.”¹⁵ In this example, clearly nothing was “transferred” from the charity to the grantee, so what is being described in this example by default must be the charity “otherwise making resources available” although not described as such.
- Example 3 - The Draft Guidance gives an example where a “charity with purposes to protect the environment provides grants to grantees who are graduate students looking to launch non-profits that deliver charitable programs” and that the “grant resources include cash, financial administration, and support from the charity’s employees. The charity can also grant intellectual property assets, provided any private benefit concerns such as non-charitable use of the profits are addressed.”¹⁶ While there was a “transfer” of cash, there was no “transfer” involved for the charity in providing financial administration, human resources support, and intellectual property. As such, this would again involve another instance of the charity “otherwise making resources available” although not explained as such.

¹⁵ CG-032, *supra* note 1 at section 4 “Examples.”

¹⁶ *Ibid.*

It is important that this confusion regarding gifting versus otherwise making resources available be clarified by the CRA, especially in light of the fact that qualifying disbursements involving charities “otherwise making resources available” cannot be used to meet the charities’ disbursement quota as explained below in this Bulletin.

3. Unclear Definition of “Charity”

One other issue to be aware of with the definitions in the Draft Guidance is its definition of “charity”:

“charity” includes all three types of registered charities: charitable organizations, public foundations, and private foundations. The term “charity” also *includes applicants for registration*.¹⁷ [emphasis added]

The ITA defines a charity in subsection 149.1(1) as “a charitable organization or charitable foundation,” a definition which, on the face of it, does *not include* any reference to or possibility for the inclusion of applicants for registration. The ITA also says that only a charity may make a qualifying disbursement.¹⁸ Therefore, it is concerning that a CRA guidance – which, is generally considered to have the *de facto* force of law, although it does not actually carry the force of law – would include “applicants for registration” in its qualifying disbursement regime when the legislation itself does not include such organizations in its definition of qualifying disbursements.

4. Lack of Explanation that Some Qualifying Disbursements Do Not Meet Disbursement Quota Obligations

The Draft Guidance does not address how qualifying disbursements are treated for purposes of the disbursement quota (“DQ”). It also does not point out that some qualifying disbursements cannot be used to meet the DQ obligations of the granting charity.

The DQ is the minimum amount that a charity must spend on its charitable activities or in making *gifts* that are qualifying disbursements to QDs.¹⁹ The DQ is calculated based on the assets owned by the charity in the preceding 24 months that are not used directly in charitable activities or administration. According

¹⁷ *Ibid* at para 4.

¹⁸ *Income Tax Act*, *supra* note 3 at s. 149.1(1) “qualifying disbursement.”

¹⁹ See *Income Tax Act*, *supra* note 3 at s. 149.1(2)(b), (3)(b), and (4)(b). See also Terrance S. Carter, Theresa L.M. Man, and Jacqueline M. Demczur “Bill C-32 Will Increase DQ, Affect Trust Reporting, and Make Other Changes to the Income Tax Act” *Charity & NFP Law Bulletin No. 517* (23 November 2022) online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2022/chylb517.pdf>>.

to paragraphs 149.1(2)(b), (3)(b) and (4)(b) of the ITA, *gifts* made by a charity that are qualifying disbursements (whether it be gifts to QDs or gifts to non-QDs) will be counted towards meeting a charity's DQ obligation. However, qualifying disbursements made by "otherwise making resources available" to either QDs or non-QDs would *not* be counted towards the DQ.

As explained above, the Draft Guidance does not explain what is meant by "otherwise making resources available" and how the CRA intends to administer such qualifying disbursements. It also does not clarify whether "otherwise making resources available" is intended to refer to the transfer of non-monetary resources by a charity or something different.

This means that for a charity that has as its sole charitable purpose the assisting of other registered charities (such as umbrella organizations and title holding organizations referred to in CRA's Policy statement CPS-026 *Guidelines for the registration of umbrella organizations and title holding organizations*²⁰), if it makes available office space that it owns free of charge to another charity or if it provides administrative support services for other registered charities, then this will not count toward meeting the DQ obligation of the charity in question, even though a gift of cash to cover such expenses would count toward meeting its DQ obligation. This concern is illustrated in Examples 2 and 3 in section 4.0 of the Draft Guidance explained above.

It is apparent that the Department of Finance has made a tax policy decision to exclude some qualifying disbursements from what can be included in meeting the DQ obligation of a charity. The Draft Guidance cannot be criticized for the wording of the ITA. It is currently the law in Canada, particularly since Bill C-32, being the *Fall Economic Statement Implementation Act, 2022*, introduced in the House of Commons on November 4, 2022, did not propose any amendments to Bill C-19 to rectify this serious discrepancy.²¹ However, it would have been helpful if the CRA had explained the consequences of making different

²⁰ CRA Policy statement CPS-026 "Guidelines for the registration of umbrella organizations and title holding organizations" (effective date 1 May 2008), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-026-guidelines-registration-umbrella-organizations-title-holding-organizations.html>>.

²¹ Terrance S. Carter, Jacqueline M. Demczur, and Lynne Westerhof, "Recent Legislative Changes May Facilitate Impact Investing by Charities", *Charity & NFP Law Bulletin No. 516* (29 September 2022), online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2022/chylb516.pdf>> .

types of qualifying disbursements for DQ purposes so that charities would be able to factor this consideration into their grant making process.

5. Concerns about Qualifying Disbursement Limit and Revocation Have Not Been Addressed

The Draft Guidance also fails to clarify subsection 149.1(6.001) of the ITA, which sets a qualifying disbursement limit for charitable organizations. Charitable organizations cannot make qualifying disbursements to QDs by way of gifts which exceed 50% of their income for the year (“>50% Gift”). Further, if a charity did make a >50% Gift to a QD, subsection 149.1(6.001) deems this transaction to not be a qualifying disbursement.

As explained in *Charity & NFP Law Bulletin* Nos. 511 & 513, this provision of the ITA presents several issues for charities.²² Firstly, the legislation refers specifically to qualifying disbursements made “by way of gifts” which, as mentioned above, could cause confusion in the charitable sector if qualifying disbursements by way of gifts are treated differently than qualifying disbursements by “otherwise making resources available.” Secondly, if the >50% Gift is deemed not to be a qualifying disbursement, then it is not clear what it is considered to be. In other words, to a granting charity, once it has made a >50% Gift to a non-QD that meets the requirements in the ITA for qualifying disbursements, and this is a fact; it is not clear how something that has already occurred can be deemed not to be a fact. Thirdly, and perhaps most concerning of all of the issues, if the >50% Gift is not a “qualifying disbursement,” then the CRA has grounds to revoke the charitable organization’s registered status under paragraph 149.1(2)(c) of the ITA.

The Draft Guidance only has one paragraph in relation to the qualifying disbursement limit. It does not explain what a >50% Gift will be considered to be (since it will no longer be considered a qualifying disbursement). Instead, the Draft Guidance states that if a >50% Gift is made, the charitable organization “may be re designated as a public foundation.”²³ In one regard, this could be helpful, as public foundations do not have any qualifying disbursement limit as charitable organizations do. However, the Draft Guidance does not address when such a re-designation will apply and whether the >50% Gift will still be deemed not to be a qualifying disbursement, thus potentially leaving the charitable organization (even

²² *Bulletin* Nos. 511 & 513, *supra* note 2.

²³ CG-032, *supra* note 1 at para 71.

after it had been re-designated as a public foundation) vulnerable to revocation under paragraphs 149.1(2)(c) or (3)(b.1) of the ITA.

6. Does Not Reflect New Legislative Provisions About Directed Gifts

Section 7.4 of the Draft Guidance is also problematic because it misinterprets paragraph 168(1)(f) of the ITA. That paragraph permits the CRA to revoke a charity's charitable registration if it accepts a gift "the granting of which was expressly or implicitly conditional on the charity [...] making a gift to another person, club, society, association or organization other than a qualified donee." Such a gift is generally referred to in the Draft Guidance as a "directed donation."

The Draft Guidance states that paragraph 168(1)(f) of the ITA is "intended to prevent a charity from acting as a conduit."²⁴ However, this statement is not an accurate summary of what the paragraph in the ITA actually says. "Conduit" is not a term that is used in relation to charities in the ITA. Rather, it is a term defined in another CRA guidance. In the CRA's guidance CG-004, *Using an intermediary to carry on a charity's activities within Canada*, acting as a conduit is when a charity funnels its resources to a non-QD without direction or control, thus putting the charity at risk of revocation of its charitable status.²⁵ The Draft Guidance, however, does not clarify how a charity would become a conduit in circumstances the charity makes a qualifying disbursement (where the charity is not required to exercise direction and control from the own activities test). The Draft Guidance also does not offer any explanation as to why the concept of conduit (whatever its definition is) relates to the directed gift provision in paragraph 168(1)(f). Without any explanation, the Draft Guidance's reference to conduits appears to be reaching beyond the scope of the provisions in the ITA.

A second reason that the Draft Guidance's administration of paragraph 168(1)(f) is problematic is that it offers no explanation as to what an implicit conditional gift may be. If a person makes a gift to a charity and requests or suggests (but does not require, as a condition) that the charity use the funds to support a local food bank that is a grantee organization, is this an implicit conditional gift despite an apparent lack of conditions? If so, the Draft Guidance should state this explicitly, though such an interpretation would go beyond the plain language meaning of "condition." If not, then paragraph 168(1)(f) of the ITA does not apply to such gifts and the CRA's requirements set out in section 7.4 of the Draft Guidance concerning

²⁴ *Ibid* at para 76.

²⁵ CG-004, *supra* note 4 at section 2.4.

exerting “authority” over such gifts are not necessary and should be deleted from the Draft Guidance or at the very least be clearly stated to be optional.

While it is encouraging that section 7.4 of the Draft Guidance appears to suggest that a charity may be able to fundraise for programs being run by grantee organizations provided that the charity retains the ultimate authority over how its resources are used and clearly communicates this to donors, nevertheless, this section does not align with the actual wording of the ITA and appears to conflate several charity law concepts, such as conditional gifts, precatory gifts, and acting as a conduit.

7. Does Not Address Charitable Purposes of Charities that Make Gifts to QDs

The Draft Guidance could be improved if it included a section to explain whether a charity that has a single charitable purpose of making gifts to QDs may make qualifying disbursements.

Many passive funding charities, especially charitable foundations, have purposes that closely resemble the sample purpose set out below:

To receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to qualified donees as defined in subsection 149.1(1) of the *Income Tax Act* (Canada).²⁶

The ITA requires that qualifying disbursements to grantee organizations must be made “in furtherance of a charitable purpose of the charity.”²⁷ Charities whose only purpose is to make gifts to QDs (such as the example above) will not be able to make qualifying disbursements to grantee organizations because to do so would not further their charitable purpose.²⁸ The charitable sector would benefit from an explanation that sets out the types of charitable purposes charities would need to have in order to make qualifying disbursements to a wide variety of grantee organizations. For example, if a charity wanted to support a broad range of grassroots non-QDs that alleviate poverty, what examples of charitable purposes would they need to enable this?

²⁶ “Other purposes beneficial to the community” (date modified 20 April 2018) online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/registering-charitable-qualified-donee-status/applying-charitable-registration/charitable-purposes/other-purposes-beneficial-to-community.html>>.

²⁷ *Income Tax Act*, *supra* note 3 at s. 149.1(1) “qualifying disbursement.”

²⁸ For further discussion, see *Charity & NFP Law Bulletin No. 513*, *supra* note 2.

The appeal of having a charitable purpose that allows a charity to make gifts to QDs is that it enables charities to make gifts to a wide variety of QDs. Will the same framework be available for these types of single purpose charities to make qualifying disbursements to grantee organizations? The Draft Guidance does not offer any answers in this regard.

E. CONCLUSION

The Draft Guidance is not yet an official guidance from the CRA. As indicated above, charities may want to exercise caution, after consulting with their legal counsel, before relying on the Draft Guidance in planning how to make qualifying disbursements. In the meantime, the Draft Guidance provides a valuable opportunity for charities and other stakeholders in the charitable sector to provide feedback to the CRA regarding the new legal regime of making qualifying disbursements, especially when making qualifying disbursements to grantee organizations, *i.e.*, non-QDs. The introduction of qualifying disbursements in the ITA represents an important change in the law of charity in Canada, and a finalized guidance from the CRA will set the standard for the approach charities will need to take in applying these recent amendments to the ITA.