
REVIEW AND COMMENTARY ON THE CRA'S FINAL GUIDANCE ON QUALIFYING DISBURSEMENTS

*By Terrance S. Carter, Jacqueline M. Demczur and Urshita Grover**

A. INTRODUCTION

On December 19, 2023, following feedback received from the charitable sector over the last year, the Canada Revenue Agency (“CRA”) released [Guidance CG-032, Registered charities making grants to non-qualified donees](#) (“Final Guidance”).¹ This Final Guidance sets out the CRA’s requirements for charities making “grants” to both qualified donees and grantee organizations (*i.e.* non-qualified donees) under the qualifying disbursements regime which has been in place since June 2022.

This *Bulletin* provides an overview of the history and development of the qualifying disbursements regime, a summary of the key requirements set out in the Final Guidance that charities interested in making qualifying disbursements need to be aware of, as well an in-depth commentary on substantive issues, either addressed in the Final Guidance or which may require further clarity from the CRA.

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¹ CRA Guidance CG-032, “Registered charities making grants to non-qualified donees” (date modified 19 December 2023), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html>>.

B. HISTORY AND DEVELOPMENT OF THE QUALIFYING DISBURSEMENTS REGIME

There are many registered charities that will, at times, need to work with other organizations to achieve their charitable purposes. As explained in our *Charity & NFP Law Bulletin Nos. 518 and 519*,² until June, 2022, Canadian registered charities were only permitted to apply their resources in two ways, being (1) conducting their own activities by devoting their resources to charitable activities carried out by their own staff and volunteers or through intermediaries, or (2) making gifts to qualified donees (“QDs”), such as other registered charities, registered Canadian amateur athletic associations, registered foreign universities (the student body of which ordinarily includes students from Canada), or registered journalism organizations, *etc.*, as defined in subsection 149.1(1) of the *Income Tax Act* (Canada) (“ITA”).³

The first way is referred to as the “own activities” test under the ITA and the CRA’s “direction and control” administrative policy (“Own Activities Regime”).⁴ Under this Regime, if a registered charity wanted to work with an organization that was not a QD (“Non-QD”), then the charity had to demonstrate that it was conducting its own activities by exercising direction and control over the Non-QD concerning how the Non-QD utilized any funds or other resources provided by the charity to conduct a charitable program or activity on its behalf.

However, in recent years, there had been significant criticism of the Own Activities Regime by the charitable sector, specifically that it is inconsistent with modern development philosophy (which prioritizes equal, empowered partnerships), as well as promotes a paternalistic, colonial approach for work in the developing world and with Indigenous communities.⁵ In response to these concerns, Bill C-19,

² Terrance S. Carter, Theresa L.M. Man & Lynne M. Westerhof, *Charity & NFP Law Bulletin No. 518*, “CRA Releases Draft Guidance on Charities Making Grants as Qualifying Disbursements” (7 December 2022), online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2022/chylb518.pdf>> and *Charity & NFP Law Bulletin No. 519*, “Draft Qualifying Disbursement Guidance Poses Practical Challenges for Charities” (25 January 2023), online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2023/chylb519.pdf>>.

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 11 January 2017), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/qualified-donees.html>>.

⁴ See CRA Guidance CG-002 “Canadian registered charities carrying on activities outside Canada” (date modified 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” (date modified 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), online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2021/Making-It-Easier-to-Do-Good.pdf>>.

Budget Implementation Act, 2022, No. 1 (“Bill C-19”)⁶ was passed on June 23, 2022, amending the ITA to introduce an alternative new regime for charities to operate under when working with third party organizations.

This new regime allows Canadian registered charities to make qualifying disbursements to both QDs and Non-QDs, including Non-QDs which are within or outside Canada, in the form of either a gift or “otherwise making resources available” (“Qualifying Disbursements Regime”). Specifically, the ITA sets out the following requirements for charities if they want to make qualifying disbursements to QDs or Non-QDs (with Non-QDs being referred to as “grantee organizations” in the ITA) (*underlining emphasis added below*):

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

(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 charity⁷

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.

The CRA subsequently published a draft guidance concerning the Qualifying Disbursements Regime on November 30, 2022, *CG-032*, “Registered charities making grants to non-qualified donees” (“Draft

⁶ Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures* (Royal Assent 23 June 2022), online: *Parliament of Canada* <<https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/royal-assent>>.

⁷ See *Income Tax Act*, *supra* note 3 at s. 149.1(1) for a full definition of “qualifying disbursement”.

Guidance”),⁸ followed by the release of the Final Guidance just over a year later on December 19, 2023. As mentioned above, the Final Guidance explains what the CRA requires of charities when they make what the CRA describes as “grants” to Non-QDs/grantee organizations under the new Qualifying Disbursements Regime. There is only limited reference in the Final Guidance about charities making gifts to QDs.

For context, it is worth noting that, prior to Bill C-19, the initial proposal concerning qualifying disbursements was set out in the Federal Budget released on April 7, 2022 (“Budget 2022”) with the intention that these proposed changes were to “implement the spirit of Bill S-216”.⁹ Bill S-216 was an earlier proposed bill of the Senate initiated by Senator Ratna Omidvar, which garnered significant support from the charitable sector. It was based on the principles that charities (1) must be able to operate efficiently when devoting their resources to charitable activities, (2) must be held to reasonable standards in the proper use of their resources, and (3) should be able to promote local capacity-building and collaborative decision-making in the communities with whom they work.¹⁰

Earlier drafts of Bill C-19 contained prescriptive regulations that would have imposed onerous documentation and due diligence requirements for charities interested in making qualifying disbursements.¹¹ These requirements, though, were removed in the final version of Bill C-19 as a result of considerable advocacy by the charitable sector. However, the same concerns about the new Qualifying Disbursements Regime becoming overly regulated continued to be an issue in the Draft Guidance given its extensive compliance requirements. As will be explained below, these onerous regulation concerns have not been rectified in the Final Guidance.

C. KEY PROVISIONS IN THE FINAL GUIDANCE AND COMPARISON TO THE DRAFT GUIDANCE

1. Initial Comments

It is important to be aware that the Final Guidance constitutes a significant rewrite of the Draft Guidance. As such, it is essential that readers take the time to read the Final Guidance in its entirety, particularly as the following summary of its key provisions and their comparison to those set out in the earlier Draft

⁸ CRA Guidance CG-032, “Registered charities making grants to non-qualified donees” (date modified 30 November 2022), online: *Government of Canada*. (“Draft Guidance”)

⁹ “Budget 2022” (7 April 2022), online: *Government of Canada* <<https://www.budget.canada.ca/2022/pdf/budget-2022-en.pdf>> at 8.3.

¹⁰ S-216, *Effective and Accountable Charities Act*, 1st Sess, 44th Parl, 2021, preamble (third reading 9 December 2021).

¹¹ 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>>.

Guidance, is not exhaustive or intended to be a replacement for studying and understanding the Final Guidance itself.

2. Introduction and Background

In Section 1, the Final Guidance provides background information in relation to its use by the reader, stating that “[t]his guidance is not law.”¹² Rather, it is explained that the Final Guidance contains recommended ways that “a charity can meet the Income Tax Act requirements while taking reasonable, flexible, and proportionate measures based on the nature of each grant”¹³ through appropriate due diligence. This is a helpful clarification for those in the charitable sector who do not have a legal background and may otherwise assume that a guidance from the CRA is law.

3. Technical Terms and Definitions

The Final Guidance then provides definitions for the following terms as used throughout the document: “accountability requirements”, “accountability tools”, “charity”, “due diligence”, “grant”, “grantee” and “risk”. As summarized in the following comparison chart, there have been changes in the terminology used in the Final Guidance as compared to the Draft Guidance, with the differences *italicized* below for ease of reference:¹⁴

Term	Definition used in Draft Guidance	Definition used in Final Guidance
Accountability requirements	Not a defined term.	“ accountability requirements ” refer to the Income Tax Act requirements for making a grant.
Accountability tools	Not a defined term.	“ accountability tools ” refer to due diligence measures the CRA recommend a charity apply to meet the accountability requirements.
Charity	“ charity ” includes all three types of registered charities: charitable organizations, public foundations, and private foundations. <i>The term “charity” also includes applicants for registration.</i>	“ charity ” includes all three types of registered charities: charitable organizations, public foundations, and private foundations.
Due Diligence	Not a defined term.	“ due diligence ” refers to steps taken to satisfy the legal requirements for granting under the Income Tax Act; this guidance recommends a

¹² Final Guidance, *supra* note 1 at para 6.

¹³ *Ibid.*

¹⁴ *Ibid* at para 7.

		process for doing this through accountability tools.
Grant	“grant” refers to <i>transfers of both monetary and non-monetary resources, or otherwise making resources available, to a non-qualified donee (grantee).</i>	“grant” refers to a <i>“qualifying disbursement” made to a “grantee organization”, as defined in the Income Tax Act. A grant can include both cash and non-cash resources. While the term “grant” is commonly applied to other arrangements within the charitable sector, this guidance uses the term “grant” in relation to the Income Tax Act requirements for making a “qualifying disbursement” to a “grantee organization”.</i>
Grantee	“grantee” is a <i>non-qualified donee</i> and is defined in the Income Tax Act to include “a person, club, society, association or organization or prescribed entity, but does not include a qualified donee”. <i>A grantee is an individual or organization that the charity works with to further its charitable purposes.</i>	“grantee” refers to a <i>“grantee organization”, as defined in the Income Tax Act, and includes “a person, club, society, association or organization or prescribed entity, but does not include a qualified donee”.</i>
Risk	Not a defined term.	“risk” in general refers to conditions that could compromise the charity’s registration and the public’s trust in the charitable sector. In terms of this guidance, we recommend a charity apply due diligence to mitigate the risk of grant resources being misused.

4. Explanation of the CRA’s Interpretation and Approach to Qualifying Disbursements

In Section 1.3, after referring to a portion of the definition of “qualifying disbursement” in subsection 149.1(1) of the ITA (with the full definition set out above on page 2), the Final Guidance states:

9. To meet these accountability requirements, a charity must be able to interpret and apply key terms in the legislation, such as the following:

- “ensures”
- “exclusively applied”
- “in furtherance of a charitable purpose of the charity”
- “maintains documentation sufficient to demonstrate”¹⁵

A summary chart is then provided in Section 1.4 of the Final Guidance. It sets out the various qualifying disbursement requirements contained in subsection 149.1(1) of the ITA, and then explains how the CRA

¹⁵ *Ibid* at para 9.

intends to interpret each requirement and apply the related accountability requirements. In addition, this chart contains the CRA's related recommendations for each requirement and where in the Final Guidance more detailed comments from the CRA can be found.¹⁶ This summary chart was not included in the Draft Guidance, so its inclusion in the Final Guidance is a helpful addition and will be a good resource for charities to regularly consult in determining how best to fulfill the CRA's accountability requirements.

The Final Guidance is also helpful in setting out the CRA's general approach to the Qualifying Disbursements Regime. This includes the CRA acknowledging that, despite its best efforts, a charity may not be able to ensure or guarantee that grant resources will be applied exactly as intended and, for this reason, the CRA aims to adopt a reasonable, flexible, and proportionate approach to granting.

In addition, the Final Guidance states that the CRA aims to adopt the same reasonable, flexible, and proportionate approach to grant documentation. This includes the CRA recommending that the charity maintain documentation to show the grant's purpose, that the grantee exclusively applied the granted resources to that purpose, and that the charity has applied due diligence when making the grant.¹⁷

5. Comparing the Qualifying Disbursements Regime with Own Activities Regime

In Section 2, the Final Guidance explains the two ways in which a charity may operate under the ITA:

14. 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 grantees (non-qualified donees)**, where a charity must meet accountability requirements¹⁸ [*bolding included*]

On this issue, the Final Guidance has added a section describing the similarities between the requirements for granting through qualifying disbursements (accountability requirements) and own activities (direction and control). This section explains that, in both arrangements, charities can work with Non-QDs to pursue charitable activities if the charity ensures and demonstrates that doing so furthers its own charitable

¹⁶ *Ibid* at para 13.

¹⁷ *Ibid*.

¹⁸ *Ibid* at para 14.

purposes, specific requirements are met in doing so, and this is evidenced by the charity through documentation in its books and records.¹⁹

In terms of describing key differences between the two regimes, the Final Guidance contains an expanded list as compared to the Draft Guidance. Although not an exhaustive list here, the Final Guidance explains that (1) the charitable activities being carried out with a grant are those of the grantee, not the charity, (2) a charity can support the grantee's new or existing activities, (3) a charity is not required to provide ongoing instructions to the grantee, and (4) any grant arrangement could avoid unintended consequences for a charity that could arise as compared to if it is carrying on its own activities through an intermediary, such as incurring liability to third parties under an agency relationship.²⁰

6. Due Diligence Review

While the Draft Guidance indicated that a due diligence review was one of the various accountability tools available to a charity making qualifying disbursements, the Final Guidance actually sets out a due diligence model which is the basis upon which the CRA recommends the grant-making process should be conducted by charities.²¹ This model contemplates different and more detailed recommended due diligence steps to be taken by charities involved in the grant-making process as compared to those in the Draft Guidance. On this issue, the Final Guidance places a greater emphasis on a charity determining the level of due diligence that it needs to meet the accountability requirements through the use of accountability tools, with the CRA providing a separate subsection describing these various tools together with two matrices for charities to use to conduct a risk assessment and then determine the level of due diligence which may be required depending on the identified risk level.

Specifically, in Section 3, the Final Guidance recommends the following due diligence steps to be taken by charities who wish to make grants:

3.1: Establish how the grant activity furthers the charity's charitable purpose.

3.2: Assess the grant's risk level – low, medium, or high – based on factors that may affect the charity's ability to meet the Income Tax Act requirements.

3.3: Determine how much due diligence the charity needs to apply through accountability tools based on the risk level.

¹⁹ *Ibid* at para 19.

²⁰ *Ibid*.

²¹ *Ibid* at para 21.

3.4: Apply the accountability tools in collaboration with the grantee.

3.5: Document the charity's due diligence over the grant's duration in its books and records.²²

a) Charitable purposes

As a starting point, the Final Guidance makes clear in Section 3.1 that a charity's grant activity must further at least one of its own charitable purposes as set out in its own governing documents. This means that a grant by a charity which furthers any charitable purpose more generally (but is not one of the charity's own purposes) is not sufficient to be a legitimate grant under the Qualifying Disbursements Regime. This may mean that before a charity can make grants to Non-QDs, it may first need to review and amend its charitable purposes, with the said amended purposes required to also be approved by the CRA. Further commentary on this issue of charitable purposes is set out in Section D below.

b) Assessing the grant's risk level

As compared to the Draft Guidance, the Final Guidance also sets out more factors that may affect a charity's ability to meet the ITA requirements for assessing the grant's risk level. Specifically, when assessing the level of risks involved with a grant, Section 3.2 of the Final Guidance provides a matrix that serves as a guideline to explain risk factors a charity should consider, although the listed factors are described as "non-exhaustive".²³

The risk factors set out in this matrix are (1) the charity's experience, (2) the grantee's experience, (3) purposes and governing documents of the grantee organization, (4) governance structure of the grantee organization, (5) the grantee's regulation and oversight, (6) private benefit concerns, (7) grant activity, (8) grant amount, (9) nature of resources granted, and (10) grant duration. With each risk factor, the matrix sets out indicators of low, medium and high risks, which charities should find helpful in identifying the level of risk that might be associated with the various grants that they are considering making to Non-QDs.

The Final Guidance also provides examples at the end of Section 3.2 of significant changes in grant conditions. Here, it is explained that if there is a significant change in grant conditions, then the charity

²² *Ibid.*

²³ *Ibid* at para 36.

should assess whether the grant's overall risk level has changed, and work with the grantee to adjust the grant's terms accordingly.

- c) Determining how much due diligence the charity needs to apply through accountability tools based on risk levels

Next, when determining the level of due diligence needed to meet the applicable accountability requirements, there is an additional matrix set out in Section 3.3 which contains guidelines to help a charity determine whether the use of accountability tools will be limited where there is a low risk, moderate where there is a medium risk, or extensive in a high-risk situation. These accountability/risk assessment tools in the matrix are (1) research and review of grantee, (2) description of grant activity, (3) written agreement, (4) reporting plan, (5) transfer schedule, and (6) separately tracked funds. Again, this matrix should be useful to charities in determining, on a grant by grant basis, which accountability tools it should consider utilizing in various grant situations.

The Draft Guidance previously recommended that experts may be consulted or legal advice may be obtained if, for example, a written agreement is not feasible, or a written final report with supporting documentation is not appropriate, in the circumstances.²⁴ However, the Final Guidance has removed these recommendations and, in its place, added "research" as a factor in the risk matrix.

- d) Apply the accountability tools in collaboration with the grantee

In Section 3.4 of the Final Guidance, it is indicated that charities are encouraged to work together with grantees to ensure that the accountability requirements set out in the Final Guidance are met. A helpful example of the application of the accountability tools by a charity in a specific grant situation is set out in this Section of the Final Guidance.

- e) Document the charity's due diligence over the grant's duration in its books and records

Section 3.5 of the Final Guidance reminds charities that they are required under the ITA to keep adequate books and records, which contain sufficient information to allow the CRA to determine whether they are operating in accordance with all applicable legal requirements. Specifically, in relation to grants, the Final Guidance indicates that a charity's books and records must allow the CRA to check whether (1) the charity's grants meet the accountability requirements, (2) the grantee's use of the charity's resources can be verified through appropriate supporting documentation, and (3) the grantee continues to use the granted

²⁴ Draft Guidance, *supra* note 8 at paras 45, 51 and 85.

resources for the purposes and activities set out in the grant's terms. The Final Guidance makes clear that a charity making grants which does not keep adequate books and records could be subject to possible CRA compliance measures.

7. Special Topics

Section 4, the last section of the Final Guidance, details special granting topics, namely 1) limits, 2) directed gifts and conduits, 3) reporting grants, 4) pooled grants, 5) charitable goods, 6) real property, 7) disaster or emergency relief, 8) anti-terrorism considerations, and 9) grants inside and outside Canada. Two these topics are described below:

- (a) Directed gifts and acting as a conduit: This section has been revised in the Final Guidance and now contains different examples of expressly conditional and implicitly conditional gifts as compared to those set out in the Draft Guidance.²⁵ Further commentary on the directed gifts issue is set out later in this *Bulletin*.
- (b) Granting real property to a grantee: The Draft Guidance contemplated that there could be re-gifting of real property, whereas the Final Guidance no longer references that as a possibility. Specifically, the Draft Guidance stated that “[a] charity may wish to grant real property to a grantee, *which the grantee may then transfer to another non-qualified donee.*” (*emphasis added*). However, the Final Guidance states that “[a] charity may wish to grant real property to a grantee. For example, this includes transferring property title or granting cash for a grantee to purchase or renovate real property.”²⁶ In describing the recommended accountability tools, the Final Guidance states that the charity “should” (*i.e.* permissive) get adequate documentation, whereas getting adequate documentation was a “must” for a charity (*i.e.* mandatory) in the Draft Guidance. However, the practical reality is that whatever is included in the Final Guidance, even if it is only permissive language, will become over time the *de facto* threshold standard that charities will be expected to meet.

Of particular note, registered charities will want to review the “Reporting grants” section concerning the new reporting requirements under *Income Tax Regulation 3703*, which state that charities must include certain prescribed information in their Form T3010 *Registered Charity Information Return* when they make qualifying disbursements in excess of \$5,000 to a grantee organization in a taxation year. This

²⁵ Final Guidance, *supra* note 1 at paras 76, 77.

²⁶ *Ibid* at para 102; Draft Guidance, *supra* note 8 at para 87.

requirement applies to both cash and non-cash grants, and applies regardless of whether the grantee is within or outside Canada.

The Final Guidance clarifies that the charity can apply to the CRA to make 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. Further, while not mentioned in the Final Guidance, when a charity makes grants totaling more than \$5,000 to a grantee in a fiscal period, it is required to report the name of the grantee, the purpose of the grant, the amount of cash and non-cash disbursements, and where the activities were carried on (if outside Canada) using the new Form T1441 *Qualifying Disbursements: Grants to Non-Qualified Donees (Grantees)*.²⁷

D. COMMENTARY

As detailed above, the Final Guidance has been substantially revised as compared to the Draft Guidance, including some noticeable improvements in structure, definitions and examples, that are helpful. However, the Final Guidance still falls short in addressing a number of the concerns that were earlier raised by the charitable sector with regards to the Draft Guidance, as described below.

1. Need to Review Charitable Purposes of the Charity

In accordance with the ITA, the Final Guidance requires that a qualifying disbursement must be exclusively applied to charitable activities that furthers the charitable purpose of the donor charity. However, charitable foundations (both public and private foundations) with the sole charitable purpose of making gifts to QDs will not be able to make qualifying disbursements to grantee organizations since they are not QDs. As a result, these limited purpose foundations will need to review and revise their charitable purposes, specifically to add one or more active charitable purposes, if they are interested in and wish to be able to make qualifying disbursements under this new regime. While many in the charitable sector had hoped for its inclusion, the Final Guidance does not provide an alternative simplified process for foundations to revise their purposes in order to be more easily enabled to make qualifying disbursements. To be fair to the CRA, this may be because it was simply not possible to come up with an alternative process that could be easily administered by the CRA on a simplified basis.

²⁷ Form T1441, “Qualifying Disbursements: Grants to Non-Qualified Donees (Grantees)” (last modified 8 January 2024) online: Government of Canada <<https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/t1441.html>>.

2. Imposition of Extensive Additional Requirements

a) Risk Assessment

While the Draft Guidance did not define the term “risk”, the Final Guidance states that “‘risk’, in general, refers to conditions that could compromise the charity’s registration and the public’s trust in the charitable sector”.²⁸ The Final Guidance then states in relation to “risk” that “[i]n terms of this guidance, we recommend a charity apply due diligence to mitigate the risk of grant resources being misused”.²⁹ While this definition provides a brief explanation that the due diligence review to be conducted is to mitigate the “risk of grant resources being misused”,³⁰ charities will still have a difficult time assessing and documenting risk according to the extensive process set out in the Final Guidance. Specifically, the word “risk” is mentioned 31 times in the Final Guidance but is not mentioned at all in section 149.1 of the ITA. Similarly, while CRA recommends using a “due diligence model”, “due diligence” is also not mentioned, even once, in section 149.1 of the ITA.

As previously explained in *Charity & NFP Law Bulletin No. 519*, portions of the risk matrix that the CRA is requiring resemble the United States (“US”) Department of the Treasury’s Risk Matrix in many respects, in addition to that of the Financial Action Task Force’s (“FATF”) recommendations for the purpose of anti-terrorist financing avoidance with their international activities.³¹ However, there is no explanation why US or FATF risk matrix frameworks would be needed in Canada for charities carrying out charitable activities and doing so through grants being made to Non-QDs.

As well, the Final Guidance has again set out arbitrary threshold requirements in its risk matrix,³² such as providing that grants outside Canada and grants over \$50,000 (instead of the previous \$25,000 in the Draft Guidance) are high risk, or that grants between two and five years are medium risk (instead of the previously defined “longer term grants” *i.e.* longer than one year but less than two years being medium risk in the Draft Guidance). No explanation is provided in the Final Guidance for these threshold requirements.

²⁸ Final Guidance, *supra* note 1 at para 7, last bullet point entitled “risk”.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Supra* note 2 at 3-5.

³² See Final Guidance, *supra* note 1 at para 25.

b) Accountability Requirements and Tools

In addition to the word “risk”, the word “accountability” is mentioned 66 times in the Final Guidance (an increase from 46 times in the Draft Guidance) but is not mentioned at all in section 149.1 of the ITA itself.

In response to criticism by the charitable sector, the Final Guidance now describes “accountability requirements” to “refer to the Income Tax Act requirements for making a grant” and “accountability tools” to “refer to due diligence measures [the CRA] recommend a charity apply to meet the accountability requirements.”³³ The terms “accountability requirements” and “accountability tools” had previously not been defined in the Draft Guidance, although examples of the same had been provided.

As previously explained in *Charity & NFP Law Bulletin No. 519*, suggested accountability tools in the Draft Guidance (and now included in the Final Guidance) are similar to the requirements for “expenditure responsibility” with regard to private foundations in the US and, as such, are unnecessarily complicated.³⁴ In addition, these accountability tools are similar to the requirements that were in the proposed ITA Regulations that were ultimately removed from Bill C-19.³⁵ As such, there is no reason why these tools should apply to qualifying disbursements at this point. This is particularly the case since these onerous accountability requirements are inconsistent with Parliament’s intent of making changes to the ITA in the spirit of Bill S-216, which involved upfront due diligence and reporting rather than the long and onerous list of requirements set out in earlier drafts of Bill C-19.

In this regard, there are two examples under Section 4 of the Final Guidance where unnecessarily onerous accountability requirements remain, namely (1) pooled grants, and (2) granting of charitable goods.³⁶ Specifically, before a charity can make a pooled grant with multiple organizations, the Final Guidance recommends the charity must sign onto at least one written agreement with all parties (“ideally”, or if not feasible, then it is indicated that other accountability arrangements may be acceptable). Otherwise, the Final Guidance, similar to the Draft Guidance, recommends approaching pooled grants cautiously.³⁷ This warning (which was also in the Draft Guidance) will likely discourage the use of pooled grants because of the complexity associated with them.

³³ *Ibid* at para 7.

³⁴ *Supra* note 2 at 5-9.

³⁵ *Ibid*.

³⁶ See *Charity & NFP Law Bulletin No. 519*, *supra* note 2 at 9-11.

³⁷ Final Guidance, *supra* note 1 at paras 94-98.

As well, the special accountability considerations required for granting of charitable goods (*i.e.* goods that can only reasonably be used for charitable purposes, such as medical supplies) require written documentation, such as a written agreement, and that the charity require final written reports on how goods were used by the grantee.³⁸ These requirements are even more onerous than is the case for “charitable goods” under the Own Activities Regime in the CRA’s Guidance CG-002, *Canadian registered charities carrying on activities outside Canada*.³⁹

3. Unclear Explanation of “Otherwise Making Resources Available”

Section 149.1 of the ITA clearly indicates that a charity can make “gifts”, as well as “otherwise making resources available”, to Non-QDs, but does not explain what the phrase “otherwise making resources available” means. Similar to the Draft Guidance, the Final Guidance does not make mention of or explain the phrase “otherwise making resources available” except in passing when restating the definition of qualifying disbursements from the ITA.

As such, there are two possibilities for what the phrase “otherwise making resources available” could mean in practice: (1) the charity is gifting non-monetary resources to a Non-QD, or (2) the charity is making available (but not gifting) non-monetary resources to a Non-QD, such as use of space, staff, administration services, volunteers, or use of branding. This uncertainty will be an important issue to consider when preparing agreements that go beyond gifting cash to a Non-QD and instead includes the more nebulous statutory option of “otherwise making resources available” in order to make a “grant” to a Non-QD.

4. Some Qualifying Disbursements Do Not Meet Disbursement Quota Obligations

The Final Guidance mentions that “[f]or reporting purposes, and to help the charity meet its disbursement quota, the charity must be able to determine the fair market value of non-cash grants.”⁴⁰ However, the Final Guidance does not provide an explanation of what this determination process would involve.

According 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 disbursement quota obligation. However, qualifying disbursements made by “otherwise

³⁸ *Ibid* at paras 99-101.

³⁹ See CG-002, *supra* note 4 at s. 5.2.3.

⁴⁰ Final Guidance, *supra* note 1 at para 82.

making resources available” to either QDs or Non-QDs would not be counted towards the disbursement quota, which means that making property space, staff and volunteers available, as well as engaging in micro-finance loans and other types of impact investing to both QDs and Non-QDs are not counted towards a charity’s disbursement quota obligations. This may be potentially problematic for some charities that otherwise have challenges in meeting their disbursement quota obligations annually or do not have a disbursement quota surplus to rely upon in the event of a shortfall in a particular year.

5. Does Not Reflect Wording in ITA About Directed Gifts

New paragraph 168(1)(f) of the ITA states that the CRA can revoke a charity’s charitable registration if the charity 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” (*emphasis added*). The Final Guidance states that “[t]his prohibition covers grants to grantees.”⁴¹

The Final Guidance also states that the “intent of this provision is to ‘prevent organizations from acting as conduits in the making of a directed gift’ to a non-qualified donee,”⁴² but does not provide any explanation concerning what it considers a “conduit” or what “acting as conduits” actually means other than to recommend that a charity should retain “authority over the use of its resources, and clearly communicate this to the donors.”⁴³ Instead, the Final Guidance quotes from “Explanatory Notes Relating to the Income Tax Act and Other Legislation” (“Explanatory Note”),⁴⁴ which also do not define what “conduits” or “acting as conduits” mean.

Similar to the Draft Guidance, the Final Guidance does not provide any explanation about what an “express or implicit conditional” gift is, which it should do since conditional gifts have a particular meaning at common law.⁴⁵ As a result, paragraph 168(1)(f) needs to be read and then considered in the Guidance based on its actual statutory wording rather than what the Explanatory Note referenced above suggests the legislative intent to be.

⁴¹ *Ibid* at para 75.

⁴² *Ibid*.

⁴³ *Ibid* at para 78.

⁴⁴ The Honorable Chrystia Freeland, “Explanatory Notes Relating to the Income Tax Act and Other Legislation” (April 2022) online: *Department of Finance Canada* <<https://fin.canada.ca/drleg-apl/2022/nwmm-amvm-0422-n-eng.pdf>> at 38-39.

⁴⁵ *Victoria Order of Nurses for Canada v Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 at paras 102-105 <<https://canlii.ca/t/fnqh5/>>; *Norman v Watch Tower Bible and Tract Society of Canada*, 2013 BCSC 2099 at para 11, *aff’d* 2014 BCCA 277 <<https://canlii.ca/t/g1x7n>>; *Women’s Christian Assn. of London v McCormick Estate*, [1989] 34 E.T.R. 216; *Schilthuis v Arnold* (1996), 1996 CanLII 463 (ON CA), 95 O.A.C. 196 C.A. at 197 <<https://canlii.ca/t/6j45>>.

In this regard, paragraph 168(1)(f) specifically states what is intended to be prohibited here are gifts to charities that are “expressly or implicitly conditional” on the charity making a gift to a Non-QD. This means that, as a conditional gift, the gift to the charity would not be complete until the condition in question was fulfilled and, until that occurs, a charitable receipt could not be issued. Accordingly, in the event that the condition was not fulfilled, then there would be no gift at law and the property intended to be gifted would need to be returned to the donor.⁴⁶ If, as the Final Guidance appears to suggest in its interpretation of “conditional”, paragraph 168(1)(f) is to have a different application than what it currently states, then the ITA will need to be amended to address this apparent disconnect.

In this regard, the Final Guidance correctly explains what an “explicitly conditional” gift is because the example set out in the Final Guidance includes a right of reversion to the donor as part of the conditional gift as follows: “A donor indicates that a gift must be used to grant money to a specific non-qualified donee, and if it is not used for that purpose, the funds must be returned to the donor. This could constitute a legally binding conditional gift, and if the charity accepted it, this could jeopardize its registration” (*emphasis added*).⁴⁷

However, the example provided in the Final Guidance of a gift that is “implicitly conditional” appears to be problematic. Specifically, the example given is that “[a] charity includes the name of a non-qualified donee in its own name, purposes, or other formal documents, indicating this would be the sole recipient of any grants the charity makes. Any funds the charity receives from a donor could be implicitly conditional on the charity granting it over to the specified non-qualified donee, and could jeopardize the charity’s registration.”⁴⁸ The concern here is that this example of a gift that is purportedly “implicitly conditional” does not, in fact, describe a gift that is actually conditional at law, *i.e.* there is no right of reversion back to the donor if the condition is not fulfilled. As such, it is difficult to understand the legal basis for the CRA to interpret that a gift to a charity that includes the name of a Non-QD in its name, purpose or other formal documents could be a prohibited gift contrary to paragraph 168(1)(f) of the ITA and be the basis for potential revocation of a charity’s charitable registration.

Similar to what was done in the Draft Guidance, it appears that, in interpreting what a gift that is “implicitly conditional” (as referenced in paragraph 168(1)(f)) actually is, the Final Guidance is incorrectly equating

⁴⁶ *Victoria Order of Nurses for Canada v Greater Hamilton Wellness Foundation*, *ibid* at para 103.

⁴⁷ Final Guidance, *supra* note 1 at para 76.

⁴⁸ *Ibid* at para 77.

a donor restricted gift “directing” the said gift to a particular beneficiary (*e.g.* a Non-QD) as being the same as a conditional gift at common law which would require a right of reversion to the donor. A more robust explanation of what “implicitly conditional” means in the context of directed gifts is, unfortunately, not set out in the Final Guidance.

The consequences of this unclear application of paragraph 168(1)(f) of the ITA to “implicitly conditional” gifts could unnecessarily limit the fundraising abilities of charities engaged in charitable projects which may, in turn, involve grants to Non-QDs. As such, the CRA should consider revising the Final Guidance so that its interpretation of conditional gifts reflects the ITA’s actual wording as well as what a conditional gift is at common law.

It is interesting to note that the Final Guidance states that the directed gift provision in the ITA does not apply to a charity carrying out its own activities through an intermediary under the charity’s direction and control but does not provide an explanation about why this is, in fact, the case. Presumably this is because a transfer over to the Non-QD under the Own Activities Regime would not involve a “gift” to a Non-QD.

In order to ensure that the dichotomy in approaches to the directed gift provision in paragraph 168(1)(f) of the ITA do not lead charities to feel the need to utilize the Own Activities Regime in order to raise funds for projects involving Non-QDs, it is hoped that the CRA will further review this issue and provide an interpretation of paragraph 168(1)(f) in the Final Guidance which will be more in line with the actual wording of the ITA as explained above.

6. Some Concerns Addressed

The differences between the Draft Guidance and Final Guidance do illustrate how the Final Guidance has addressed a number of the concerns raised by the charitable sector. For example, the Final Guidance has clarified and made more consistent with the ITA the definitions of “charity”, “grant” and “grantee”, even though the exact wording of “qualifying disbursement” definition from the ITA is referenced only once. Additionally, the Final Guidance has updated the section on “grants and anti-terrorism considerations” by adding reference to the humanitarian exemption and authorization regime due to amendments to the *Criminal Code* (Canada).⁴⁹

⁴⁹ *Ibid* at para 105.

E. CONCLUSION

The new Qualifying Disbursements Regime is an important option for registered charities to consider when working with Non-QDs. However, there are complexities and significant due diligence requirements that must be carefully reviewed before deciding whether to make a qualifying disbursement to a grantee organization. Despite having significantly revised the Draft Guidance, there are substantive issues in the Final Guidance that will need to be very carefully considered. As such, whether or not a registered charity decides to embark on making a grant to a grantee organization through the Qualifying Disbursements Regime or instead chooses to continue with the Own Activities Regime is a decision that will need to be carefully reviewed with its legal counsel.



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