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Charities Working with Non-Charities: What are the Options?

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A. Why is this Topic Important?

- Registered charities frequently interact with non-charities in the course of their operations
- This can include working with suppliers of goods and services, contractors and professionals, such as accountants and lawyers, to assist in carrying on operations
- As long as the charity does not pay more than fair market value for the goods and services it acquires from non-charities, and those goods and services are needed to achieve the charitable purposes of the charity, then there is no concern
- However, when a charity is working with a non-charity in order to deliver charitable programs and activities of the charity, then it becomes more complicated
- At that point it becomes necessary to know what a charity can and cannot do when working with non-charities in carrying on charitable programs and activities
- That is the focus of this presentation at a high-level



- For a more detailed and technical discussion of the options, reference can be made to the following resources from Carters:
 - “Review and Commentary on the CRA’s Final Guidance on Qualifying Disbursements” Charity & NFP Law Bulletin No. 524 dated January 31, 2024, <https://www.carters.ca/pub/bulletin/charity/2024/chylb524.pdf>
 - “The New Qualifying Disbursement Regime” by Terrance S. Carter on February 13, 2024, <https://www.carters.ca/pub/seminar/charity/2024/Handout-New-Qualifying-Disbursement-Regime-revised-after-TSC-2024-February-13.pdf>
 - “A Deeper Dive into QDs and DQs: Qualifying Disbursements and Disbursement Quota Regimes” by Terrance S. Carter on April 3, 2024, <https://www.carters.ca/pub/seminar/charity/2024/Deeper-Dive-into-%20QDs-and-DQs-Qualifying-%20Disbursements-and-Disbursement-Quota-Regimes-tsc.pdf>
 - “Issues to Consider in Working with the Qualifying Disbursement Regime” by Terrance S. Carter on September 20, 2024, <https://www.carters.ca/pub/seminar/charity/2024/Issues-to-Consider-Working-with-the-Qualifying-Disbursement-Regime-TSC-Sept-20-2024-rev-after.pdf>
 - “Draft Qualifying Disbursement Guidance Poses Practical Challenges for Charities” Charity & NFP Law Bulletin No. 519 dated January 25, 2023, <https://www.carters.ca/pub/bulletin/charity/2023/chylb519.pdf>

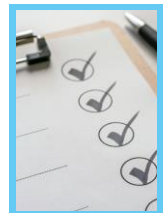


B. What is Meant by “Non-Charity”?

- The term “non-charity” for this presentation means any organization located inside or outside of Canada, that is not a Canadian registered charity or other type of “qualified donee” (defined below) that becomes involved in delivering charitable programs and activities for a registered charity
- Qualified donees consist of a list of entities set out under ss 149.1(1) of the *Income Tax Act* (“ITA”), the largest group of which are Canadian registered charities
- Registered charities are able to make gifts to all categories of qualified donees, including other registered charities



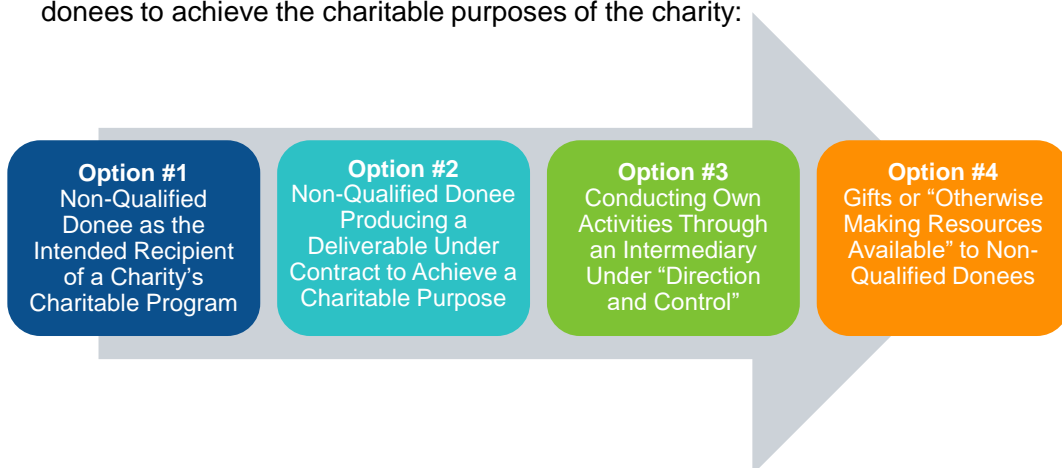
- The full list of qualified donees from the ITA is set out below for ease of reference:
 - a registered charity (including a registered national arts service organization)
 - a registered Canadian amateur athletic association
 - a registered journalism organization
 - a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged
 - a registered Canadian municipality
 - a registered municipal or public body performing a function of government in Canada
 - a registered university outside Canada, the student body of which ordinarily includes students from Canada
 - a registered charitable organization outside Canada to which His Majesty in right of Canada has made a gift
 - His Majesty in right of Canada, a province, or a territory
 - the United Nations and its agencies
- His Majesty in right of Canada, a province, or a territory, and the United Nations and its agencies are qualified donees that do not have to be registered to be recognized as such



- Given that registered charities can make gifts to qualified donees, it is relatively straightforward for a registered charity to work with other qualified donees to implement charitable programs and activities
- The problem arises when registered charities need to work with non-charities that are not qualified donees
- For the balance of this presentation non-charities are referred to by the more technically correct term of “non-qualified donees”

C. What are the Options for Charities Wanting to Work with Non-Qualified Donees?

- The following are the options for registered charities wanting to work with non-qualified donees to achieve the charitable purposes of the charity:



Option #1 Non-Qualified Donee as the Intended Recipient of the Charity's Charitable Program

- The Canada Revenue Agency ("CRA") guidance CG-014 "Community economic development activities and charitable registration" <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/community-economic-development-activities-charitable-registration-014.html> provides examples of charities supporting non-qualified donees as legitimate charitable purposes
 - a) Promoting commerce or a particular industry or trade for the public benefit, such as agriculture, horticulture or craftsmanship
 - b) Improving the socio-economic conditions for the public benefit in an area of social and economic deprivation, including areas affected by a disaster, such as restoring local small businesses to prevent community deterioration
- The CRA policy CPS-026 "Guidelines for the registration of umbrella organizations and title holding organizations" <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-026-guidelines-registration-umbrella-organizations-title-holding-organizations.html> contemplates that an umbrella organization can fund non-charitable entities with the provision of services that are narrowly focused on increasing, enhancing, or improving the non-charitable entity's services to charitable beneficiaries (*i.e.* the public)

Option #2 Non-Qualified Donees Producing a Deliverable under Contract to Achieve a Charitable Purpose

- This option can occur when a charity, such as a research charity, contracts with a researcher to undertake research needed by the charity to achieve a charitable purpose under specific terms of reference by means of making, for instance, a research grant
- This option could also include an educational charity awarding an educational grant to a non-qualified donee in order to develop new curriculum content
- What is important with Option #2 is that the charity must have a detailed contract in place that clearly sets out the charitable purpose of the charity that is to be achieved and the specifics of the deliverables that the non-qualified donee is being contracted to do on its own and the timelines for completion
- However, the recipient non-qualified donee is not required to operate under the ongoing "direction and control" of the charity in fulfilling the contract

Option #3 Conducting Own Activities Through an Intermediary Under “Direction and Control” (“Own Activities Regime”)

- In addition to a charity carrying on its own activities through its own staff, volunteers and directors, a charity can also carry out its own charitable programs and activities through third-party intermediaries, such as contractors, agents, or joint venture participants
- However, this option requires that the activities of the intermediary be done under the “direction and control” of the charity in order to show that the program is the own activity of the charity
- More details on the Own Activities Regime are set out in section D below



Option #4 Gifts or “Otherwise Making Resources Available” to Non-Qualified Donees (“Qualifying Disbursement Regime”)

- A new option for charities working with non-qualified donees became available in June 2022 as a result of amendments to the ITA
- The new Qualifying Disbursement Regime option allows charities to make gifts or “otherwise making resources available” to non-qualified donees, provided that to do so achieves a charitable purpose of the charity
- CRA describes a qualifying disbursement to a non-qualified donee as a “grant”, although the term “grant” has different meanings within the charitable sector
- This option, though, involves complying with a significant list of “accountability requirements” established by the CRA
- More details on the new Qualifying Disbursement Regime are set out in section E below

D. Key Considerations with the Own Activities Regime – Option #3

- CRA has published two guidance documents to explain the Own Activities Regime and the requirement to comply:
 - CG-002 “Canadian registered charities carrying on activities outside Canada” <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-002-canadian-registered-charities-carrying-activities-outside-canada.html>; and
 - CG-004 “Using an intermediary to carry on a charity’s activities within Canada” <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/using-intermediary-carry-a-charitys-activities-within-canada.html>
- In essence, everything that the charity does through a third-party intermediary must be seen as being done as an activity of the charity itself rather than that of the third-party intermediary
- This is to be accomplished in the opinion of the CRA by the charity exercising “direction and control” over the activities of the intermediary
- This includes reviewing the status and activities of an intermediary to make sure it has the necessary capacity and will follow through with the intended charitable activities

- CRA explains that “direction and control” can best be evidenced by the charity entering into an agreement with the intermediary above \$5,000
- The type of agreement depends upon the type of intermediary relationship that is involved
 - Agent
 - Consultant or contractor
 - Joint venture participant
 - Co-operative participant
- An agreement under the Own Activities Regime needs to include amongst others, a detailed statement of activities that the intermediary is to accomplish on behalf of the charity, with ongoing “direction and control” from the charity, periodic transfer of resources, and regular reporting by the intermediary back to the charity, including the provision of back up receipts and other books and records from the intermediary



- Some of the operational challenges with the Own Activities Regime are as follows:
 - a) The requirement that the activities of the intermediary must be seen as the activities of the charity is in most cases a legal fiction which often creates confusion and frustration by charities having to implement and explain the fiction to the intermediary
 - b) “Direction and control” is a paternalistic concept which perpetuates a colonial attitude when working with groups, such as Indigenous and Majority World communities
 - c) “Direction and control” is the antithesis of the concept of “subsidiarity” when working with Majority World communities
 - d) “Direction and control” is out of step with how other jurisdictions, such as the US, as well as England and Wales, carry on operations internationally

E. Key Considerations with the Qualifying Disbursement Regime – Option #4

- In order to make a qualifying disbursement to a non-qualified donee (referred to in the ITA as a “grantee organization”), the charity can either make a gift or “otherwise making resources available” to the non-qualified donee if:
 - (1) The disbursement is in furtherance of a charitable purpose,
 - (2) The charity ensures that the disbursement is exclusively applied to charitable activities in furtherance of a charitable purpose of the charity, and
 - (3) The charity maintains documentation sufficient to demonstrate the requirements of 1) and 2) above



- CRA released its final version of guidance CG-032 “Registered charities making grants to non-qualified donees” on December 19, 2023 <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html>
- Guidance CG-032 explains the process of making a qualifying disbursement to a non-qualified donee (“grant” to a “grantee organization”) as involving five steps:

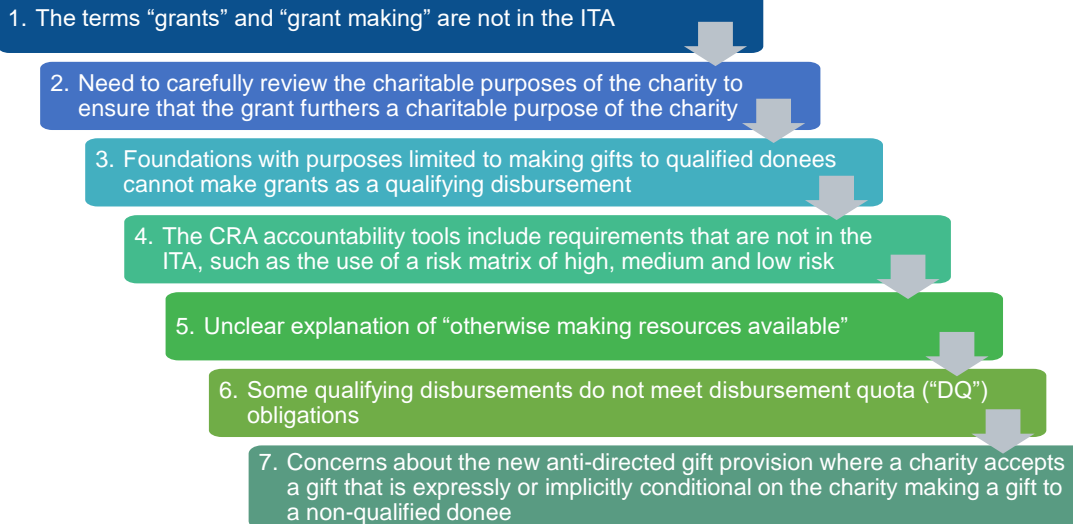


- The accountability tools that the CRA requires is depicted by the CRA as follows:



- While written agreements may not be necessary for non-recurring grants of \$5,000 or less, the CRA generally recommends the use of written agreements which are generally extensive in scope

- The challenges with the Qualifying Disbursement Regime in the form of grants to non-qualified donees (a "grantee organization") include the following:



F. Score Card Comparison Between Own Activities Regime (Option #3) and Qualifying Disbursement Regime (Option #4)

Own Activities Regime (Option #3)	Score	Qualifying Disbursement Regime (Option #4)	Score
1. Focus on the charity being the <u>directing mind</u> with an intermediary <u>carrying out instructions</u> received from the charity	✗	1. Focus on <u>supporting the activities of the grantee organization</u> but only in furthering a charitable purpose of the donor charity	✓
2. More of a <u>hierarchical top down</u> relationship	✗	2. More of a <u>collaborative relationship</u>	✓
3. The funds or resources are <u>not gifted</u> , instead they are transferred to an intermediary as <u>an extension of the charity</u> by means of a contractual agreement	✗	3. The funds or resources <u>are either gifted or are otherwise made available</u> to the grantee, allowing the grantee autonomy to carry on its programs as an independent party	✓
4. The applicable <u>regulatory due diligence</u> is in the form of <u>ongoing "direction and control"</u> by the charity over the activities of the intermediary	✓	4. The applicable <u>regulatory due diligence</u> is in the form of <u>applying risk matrices</u> and following <u>extensive accountability requirements</u> rather than providing ongoing "direction and control"	✗
5. An <u>agreement is needed</u> to reflect "direction and control" over own activities of the charity e.g. contract for service or co-operative participation	✓	5. For qualifying disbursements <u>above \$5,000 (or below but expected to be made on an ongoing basis)</u> , <u>a grant agreement is recommended</u> to address a significant degree of risk assessment and accountability requirements	✗

Own Activities Regime (Option #3)	Score	Qualifying Disbursement Regime (Option #4)	Score
6. As the intermediary is acting as an <u>extension of the charity</u> under the "direction and control" of the charity, the charity <u>may be exposed to liability</u> by the intermediary	✗	6. Grant arrangement could <u>avoid the unintended consequences</u> for a charity carrying on its <u>own activities through an intermediary</u> , such as incurring liability to third parties under an agency relationship	✓
7. Charitable programs done through an intermediary <u>will count toward the disbursement quota</u> of the charity	✓	7. Qualifying disbursements in the form of "otherwise making resources available" <u>will not count towards the disbursement quota</u> of the charity	✗
8. Contracting with an intermediary to allow the intermediary <u>to purchase land</u> is subject to <u>significant restrictions</u>	✗	8. <u>Gifting of real estate</u> should be carefully documented but is generally <u>less restrictive</u>	✓
9. Contracting with an intermediary in Canada "may" <u>attract HST/GST</u> (need expert HST advice)	✗	9. Making a qualifying disbursement to a grantee in Canada <u>will not attract HST/GST</u> (need expert HST advice)	✓
10. <u>Onerous</u> reporting requirements in Form T3010	✗	10. <u>More onerous</u> reporting requirements in Form T3010 and Form T1441	✗

* item #10 above revised on February 13, 2025

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