



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## **CRA Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities**

**NATIONAL CHARITIES AND NOT-FOR-PROFIT LAW SECTION  
CANADIAN BAR ASSOCIATION**

**October 2009**

## **PREFACE**

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Charities and Not-for-Profit Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Charities and Not-for-Profit Law Section of the Canadian Bar Association.

# TABLE OF CONTENTS

## CRA Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>POLICY .....</b>	<b>2</b>
	A. General .....	2
	B. The “Own Activities” Test .....	2
	C. Direction and Control.....	6
	D. Keeping Books and Records in Canada .....	9
<b>III.</b>	<b>MISCELLANEOUS .....</b>	<b>11</b>
	A. Exception to Written Agreement Requirement.....	11
	B. Sub-Agency.....	11
	C. Terrorism.....	11
	D. Program Related Investments .....	12
	E. The “Warning” in RC 4106.....	13
	F. Payments to Related Bodies .....	13
	G. Application of Guidance – Pre-Registration .....	14
	H. Application of Guidance – Within Canada .....	14
<b>IV.</b>	<b>CONCLUSION .....</b>	<b>14</b>



# **CRA Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities**

## **I. INTRODUCTION**

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. This submission was prepared by the National Charities and Not-for-Profit Law Section of the Canadian Bar Association (the CBA Section). Members of the CBA Section include lawyers across Canada who advise or serve on the boards of charitable and non-profit organizations. The CBA Section welcomes the opportunity to participate in the Canada Revenue Agency *Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities*<sup>1</sup> (the Guidance).

The CBA Section believes that the Guidance will greatly assist charities by clarifying CRA's views of the applicable law and policy issues. This consultation provides an opportunity for CRA and the legal community to work together to produce guidelines that are appropriate to carrying out charitable activities and in the best interests of all parties involved.

The Guidance updates RC4106 with many helpful clarifications and examples. Highlights include an exception to the requirement for a formal written agreement where the amount disbursed is below a certain threshold, a concrete list of "measures of control" which clarifies CRA's expectations for a charity operating through an intermediary, clarification of compliance with local laws, and elaboration of the forms of intermediary relationship

---

<sup>1</sup> Canada Revenue Agency, *Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities*. Available online at <http://www.cra-arc.gc.ca/tx/chrts/plcy/cnslttns/ccrc-eng.html>.

available. The Guidance also recognizes the important role that foreign activities play in the Canadian charitable sector, and is written in a more easily understandable style. The CBA Section trusts that its constructive commentary will supplement the enhancements to RC4106 in the Guidance.

The submission is in two sections. The first deals with policy concerns surrounding the Guidance's emphasis on direction and control and related issues. The second addresses miscellaneous issues including capacity building and the Guidance's scope.

## **II. POLICY**

### **A. General**

The CBA Section assumes that the overall objective of the Guidance and of charities regulation in general, is to ensure that money donated to charities is used exclusively for charitable purposes. The CBA Section believes that the Guidance's insistence on a Canadian charity's direction and control over a foreign intermediary goes further than necessary to meet the exclusivity requirement in the *Income Tax Act (ITA)*. . The degree of direction and control outlined in the Guidance is not necessary to ensure that a charity is performing its "own activities" at law.

The restrictive nature of the "own activities" test is evidenced both by the policies of other countries, which are generally less restrictive than Canada's, and by an analysis of the underlying policy objectives of the Guidance which lend themselves to being served more effectively and efficiently by other means.

### **B. The "Own Activities" Test**

The *ITA* requires charitable organizations to devote all their resources to "charitable activities carried on by the organization itself". The Guidance refers to this as the "own activities", test. Our comments relate to CRA's interpretation of this test. While we question the legislated requirement that a charitable organization carry on only its own activities, we acknowledge that CRA only interprets and applies the *ITA* and Finance Canada is responsible for the content. As such, CRA must work within the "own activities"

test. However, CRA has latitude in how it works with that test and we submit that CRA can take more latitude.

The s. 149.1(1) definition of a “charitable foundation” does not include an “own activities” test. Rather, the *ITA* defines charitable foundations as corporations or trusts that are “operated exclusively for charitable purposes” and are not charitable organizations. Subsections 149.1(3) and (4) require foundations to expend amounts equal to their disbursement quota on “charitable activities carried on by [them]” and gifts to qualified donees in each taxation year. However, because these amounts are less than “all of their resources”, the “own activities” test will not necessarily apply to charitable foundations in all the situations described in the Guidance. This important statutory distinction between charitable foundations and charitable organizations should be reflected in the Guidance.

CRA’s interpretation of the requirement that a charity perform its own activities unduly restricts Canadian charities’ ability to partake in charitable endeavours abroad. Given the rule’s assumed purpose of ensuring that charitable funds are spent responsibly and for exclusively charitable purposes, the Guidance runs counter to this objective in some respects. It does so by prescribing a system which tends to foster inefficiency and creates unnecessary administrative costs by mandating complex written agreements, imposing onerous reporting requirements, and restricting a foreign intermediary’s discretion as to how best to carry out a charitable activity in that foreign country. While we appreciate the need to ensure that charitable funds are used for charitable purposes, and are not channeled through Canadian conduits to parties such as terrorist organizations, it is possible to achieve these objectives without the strict rules currently enforced by CRA.

A policy aimed more narrowly at requiring Canadian charities to receive assurances that Canadian money is only spent on particular charitable activities would be easier for Canadian charities to apply and would eliminate some of the inefficiency fostered by the current approach of requiring unnecessary levels of direction and control. These assurances could take a number of forms. A shift in focus from general “direction and control” to careful monitoring could ease the requirements on Canadian charities while performing the same function. Monitoring could be coupled with enhanced contractual protections. For

example, the Guidance suggests that a written agreement provide for withdrawing or withholding funds from an intermediary. The agreement could also contain a term suggesting a *return* of funds to the charity if funds are being used improperly.

Another form of assurance which could reduce the requirement for direction and control could be a foreign entity's relationship with the Canadian International Development Agency (CIDA). The CBA Section acknowledges, as stated in paragraphs 85 and 86 of the Guidance, that CIDA funding does not automatically establish the recipient's activities as being charitable. However, there may be overlap between the terms of a CIDA agreement on reporting and oversight, and the requirements described in the Guidance. To the extent that overlap exists, we recommend that paragraphs 85 and 86 be expanded to allow the terms of a CIDA agreement (and subsequent verification by CIDA auditors) to be accepted as complying with the Canadian charities' obligations.

Paragraph 56 of the Guidance, which deals with Canadian charities subordinate to international organizations, does not appear to take into account the reality of some international structures with ongoing arrangements in place which otherwise ensure that funds will be used for charitable purposes. To use the language of the Guidance, this is a situation where the Canadian charity can trust the intermediary it is working with, such that the degree of direction and control required should be minimized. We recommend that this paragraph be amended to allow for a lesser degree of direction and control in certain circumstances,

Canada currently has some of the most restrictive provisions in the developed world for allowing domestic charities to participate in foreign charitable activities. The requirements on Canadian charities working abroad should be eased, to bring Canada's policy more in line with that of other nations and to create an atmosphere more conducive to global philanthropy. In the US, for example, the IRS permits charities to make grants to foreign organizations which would not qualify as "qualified donees" in Canada, provided steps are

taken to ensure that the funds are used for charitable purposes.<sup>2</sup> Many European countries also have less restrictive rules more conducive to a global approach to philanthropy. The Netherlands, for example, does not restrict charities from making donations to foreign entities.<sup>3</sup> The UK is similarly less restrictive in general in its treatment of foreign activities.<sup>4</sup>

The assumed policy objectives of the Guidance also support a more permissive application of the “own activities” test. The Guidance’s purpose, stated in the introduction, is to help charities comply with the *ITA*. However, in stating CRA’s interpretation of the *ITA* requirements, and for practical purposes the Guidance establishes not only how to comply with the *ITA*, but also how CRA defines compliance. While not possessing the force of law, CRA’s interpretation of the *ITA* will no doubt be persuasive, both to Canadian charities and to courts. The Guidance notes that Canadian charities make “important and valuable contributions throughout the world”, and acknowledges that engaging in foreign activities presents significant challenges and requires substantial effort. Further, most activities which are charitable in Canada are also charitable abroad. We see no reason to apply the “own activities” test in an overly restrictive manner, provided funds from Canadian charities are responsibly applied to activities considered charitable within Canada. To do so diminishes the ability of the Canadian charitable sector as a whole to engage in meaningful global philanthropy.

As noted in the Guidance at paragraph 35, there is case law relating to the interpretation of the “own activities” test. While the Guidance does not have authority to contradict the judgments, CRA still has room to implement a broader interpretation of what constitutes a charity’s own activities, because the cases referenced in the Guidance turn in large part on their respective facts. In *Canadian Committee for the Tel Aviv Foundation v. Canada*, 2002 FCA 72 [Tel Aviv], the court held that the charity did not exercise sufficient direction and control over its agent. However, the agency agreement between the parties had been largely

---

<sup>2</sup> Where the recipient is a foreign charity, a U.S. public charity may make a direct grant provided the foreign charity could qualify for section 501(c)(3) status: Joannie Chang, Jennifer I. Goldberg, and Naomi J. Schrag, “Cross-Border Charitable Giving” (Spring 1997), 31 *University of San Francisco Law Review* 563-615.

<sup>3</sup> Ineke A. Koele, “Netherlands” (1997), vol. 37, no. 9-10 *European Taxation* 354-58, at 358.

<sup>4</sup> C.R.J. Marlow, “United Kingdom” (1997), vol. 37 no. 9-10 *European Taxation* 366-71.

ignored by the charity, despite an earlier undertaking to Revenue Canada to comply with the agreement's terms. In other words, the issue was more that undertakings by the charity and the agency agreement between the charity and foreign intermediary were violated, than that the terms of the agency agreement accorded with the requirements of the *ITA*. There were also other contraventions of the *ITA*, including improper handling of donation receipts.

In both *Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)*, 2002 FCA 323 [Canadian Magen] and *Bayit Lepletot v. Canada (Minister of National Revenue)*, 2006 FCA 128, the Court held that there was insufficient evidence to show direction and control of the charity over its supposed agent/intermediary. In our view, these cases inappropriately restrict the common law of agency. For example, paragraph 6 in *Tel Aviv* states, in part:

The Minister's concern with respect to control of the agent's activities is not directed to proof of the agency relationship but rather to the issue of whether the charitable works are the appellant's charitable works or someone else's.

With respect, once proof of an agency relationship is established, the works of the agent are the own activities of the charity/principal, by function of law. Neither case truly deals with the formation or existence of the agency relationship and, as such, we believe CRA has the prerogative to allow an agent more discretion in carrying out the activities of the principal, provided a valid agency relationship has been formed and the terms of the agreement are followed.

### **C. Direction and Control**

Even assuming that requiring a charity to devote all its resources to its “own” charitable activities is not open for discussion, the Guidance’s direction and control requirements go beyond what is necessary to ensure that a charity is performing its own activities at law. This is particularly so for certain “forms” of relationships with intermediaries listed in the Guidance as potential structures through which a Canadian charity may carry out its own activities.

One potential intermediary relationship is the contractor model. The CBA Section recommends that paragraphs 49 and 50, discussing the contractor model, be expanded to detail some of the wide range of circumstances in which a contractor could be used. In

many cases, it may be easier to use a contractor than to act through an agent or a joint venture agreement, particularly if the reporting/receipting requirements in relation to contractors are eased (as discussed below).

The Guidance, in line with case law<sup>5</sup>, acknowledges that a charity may conduct its activities through an agent. At law, once an agency relationship is established, the actions of the agent are the actions of the principal. Regardless of the degree of direction and control, the existence of an agency relationship satisfies the only requirement of the *ITA*, that a charity conduct its “own activities”. Beyond that, the degree of direction and control which a principal is required to exercise over its agent is largely a function of CRA policy.

Regardless of the “form” of relationship with the intermediary, but particularly in an agency relationship, trusted intermediaries should have *some* discretion in the use of funds –, certainly more than in the Guidance as drafted – provided the Canadian charity has reasonable assurances that the funds will be used exclusively for charitable purposes. The Guidance states that an intermediary is typically used because it has “a particular skill, knowledge of a region, or specialized equipment”. Indeed, the purpose of using an intermediary is that the Canadian charity, for whatever reason, is unable to perform the activities itself, or cannot do so as efficiently. Thus, the greater the degree of direction and control required, the less reason there is for a charity to act through an intermediary in the first place. The Guidance, as drafted, places such overwhelming emphasis on telling an intermediary exactly what to do and how to do it that there is little discernable difference between a charity using its own staff and operating through an intermediary. The CBA Section proposes that the direction and control requirements be relaxed, particularly in the case of agency.

The idea of reducing the requisite degree of direction and control is particularly appropriate where the intermediary happens to be a foreign charity – that is, an entity that would qualify as a registered charity if resident in Canada. The operations of such entities are usually subject to strict foreign legal obligations and extensive foreign regulatory oversight. These

---

<sup>5</sup> Canadian Committee for the Tel Aviv Foundation v. Canada, 2002 FCA 72, 2002 D.T.C. 6843 at para. 7.

considerations should satisfy to some extent CRA concerns about appropriate use of charitable resources. The procedures in paragraphs 61 to 66 of the Guidance should be sufficient to ensure that charitable funds are being used for charitable purposes, *regardless* of the nature of the resources being transferred. In other words, the fewest “measures of control” should be required where a Canadian charity is transferring resources to a foreign charity, provided the Canadian charity investigates the status and activities of the foreign charity (including its goals and purposes, history, reputation, and media reports) and as a result, has a reasonable expectation that the resources will be used for charitable purposes. Reasonable assurances should be received to the same effect, perhaps in the form of a written agreement, but one which does not require the Canadian charity to exercise the same painstaking degree of direction and control contemplated at present.

The Court in *Canadian Magen*, despite holding that the charitable goods policy did not apply in that particular instance, did not set out guidelines for its general application. The Court’s role was to determine whether the Minister erred in saying that the charitable goods policy did not apply. There was evidence in that case both that the foreign entity would not use the goods exclusively for charitable purposes, and did not in fact do so. For instance, the foreign entity had created a document stating that its radio network was immediately available to the Israel Defence Forces in times of crisis, indicating a close relationship with the military. The Court did not restrict the application of the charitable goods policy to gifts in kind, nor did it prescribe the degree of evidence necessary to show that a foreign entity will use the resources for exclusively charitable purposes. We therefore believe that CRA can extend the application of this policy, and that it would be helpful to do so where the recipient is an established foreign charity.

The note in paragraph 64 stating that a charity should be aware of “all the intermediary’s operations” is overly broad and should be clarified. In some circumstances it will not be practical for a Canadian charity to familiarize itself with all the intermediary’s activities. For example, a charity that assists disabled persons may enter into an agreement with a foreign hospital that carries out a wide variety of services to people with different medical conditions. In this case, it would likely not be necessary, nor practical, for a charity to know about every aspect of the foreign hospital’s operations.

An issue that arises with respect to the reduction of the direction and control requirement is trust law. The administration of charitable property is governed by trust law principles, one of which is that trustees are not to delegate their management responsibilities. There may be a concern that a grant to a non-qualified donee is an unlawful delegation of direction and control. However, a trustee would not be “delegating” in these circumstances if the trust was drafted with appropriate objects permitting grants to foreign charities. If these grants violated the duty not to delegate, then all grants, whether to qualified or non-qualified donees, would violate this duty. This is because trust law is indifferent as to whether the recipient was a qualified donee under the *ITA*. In other words, if a charitable trustee may make gifts to qualified donees without exercising direction and control (which is permitted), nothing in trust law prevents gifts to non-qualified donees, provided the resources gifted are used exclusively toward activities considered charitable under Canadian law.

One final issue is “monitoring and supervision”, listed in the Guidance as one element of direction and control. The monitoring and supervision requirements, as currently drafted, are redundant and should either be removed from the Guidance or clarified. The only description of what constitutes “monitoring and supervision” is that the charity must receive timely and accurate reporting to allow it to exercise control over use of its resources. The “Keeping books and records in Canada” section already states that the charity should receive “timely financial and progress reports”, with supporting documentation of expenditures. Related is the example in paragraph 80, on written instructions in the context of ongoing instruction. However, it collaterally implies a degree of involvement on the part of the charity that may not necessarily be required. The example should be clarified in this regard.

#### **D. Keeping Books and Records in Canada**

The Guidance’s insistence on maintaining books and records in Canada is outdated given today’s technology, logistically impractical given the nature of many foreign activities, but and inconsistent with the 2008 Federal Court of Appeal decision in *eBay*.<sup>6</sup> The purpose of the books and records requirement<sup>7</sup> is to ensure that CRA has enough information to

---

<sup>6</sup> *eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 348 [eBay].

<sup>7</sup> *Income Tax Act* s.230(2).

determine whether the charity is in compliance with the *ITA*. This purpose is fulfilled equally well by electronic records on a server outside Canada as by paper records deposited in a Canadian filing cabinet.

The judgment in *eBay* noted that documents available in Canada via computer are just as accessible as documents physically located in a Canadian office.<sup>8</sup> Given this, we believe that for the purposes of the Guidance, books and records in electronic form are sufficient, wherever located. Instantly-accessible documents are practically “located” in Canada, regardless of the location of the server. Allowing use of electronic documents is further supported by the prevalence of online procurement and billing. If an intermediary makes a purchase, receives an invoice and pays that invoice online, must the intermediary print that documentation and mail the “originals” to the Canadian charity? Must balance sheets prepared by an intermediary on a computer be printed and mailed to the Canadian charity, when that Canadian charity could access them instantly over the internet? In this age, the distinction between electronic access and paper copies is largely artificial.

In a related vein, regardless of CRA’s position on *eBay*, the requirement to produce background documentation outlined in paragraph 96 should not apply to contractor intermediaries. This is particularly so for receipts and vouchers. Providing source documentation is antithetical to the nature of a contract for service. While it is understandable that the Canadian charity require proof that the work contracted for has been completed, and there may be rare instances where contractors should be required to provide receipts, the contractor is not an employee of the charity and as a general rule should not be required to provide all original and supporting documents. As a matter of law, this requirement creates a concern that the courts may find that a master servant relationship exists notwithstanding documentary indication of an independent contractor relationship. This could result in a significant increase in the potential tort law exposure of Canadian charities.

---

<sup>8</sup> *eBay*, supra note 4 at para. 44.

### III. MISCELLANEOUS

#### A. Exception to Written Agreement Requirement

The Guidance provides a minimum threshold for the written agreement recommendation, so direction and control over one-time disbursements under \$1000 may be demonstrated by other forms of communication. The CBA Section welcomes this helpful exemption that was not present in RC4106. It is admittedly difficult to estimate the costs of creating a written agreement and to weigh these against the value of the disbursement. However, a logical conceptual yardstick for calculating the minimum threshold should be the disbursement quota. For instance, it is illogical to force charities to create a written agreement, where to do so would generate administrative expenses (i.e. the cost of producing the agreement) in excess of 20% of the total amount of the funds disbursed. All else being equal, such a donation would *prima facie* violate the disbursement quota rules. With this in mind, even disbursements of \$1000 do not justify the expense of creating a specific written agreement, and we recommend that the minimum threshold be raised to \$5000.

#### B. Sub-Agency

In our experience, CRA currently allows sub-agency and sub-contracting, and we recommend that this practice be acknowledged in the sections on Agents and Contractors. This would be consistent both with current CRA practice and with the purposes behind the use of foreign intermediaries, provided that whatever direction and control requirements are applicable to intermediaries are adhered to in the same manner throughout the delegation.

#### C. Terrorism

While the Guidance refers to the Charities Directorate Web page for more information on the *Charities Registration (Security Information) Act*, we recommend that this section also refer to CRA's recently released "Checklist for Charities on Avoiding Terrorist Abuse", since there is little explanation or resource material referenced on this issue in the Guidance.

Another issue related to terrorism is the recent addition to the annual information return (T3010B) of the requirement to list all foreign intermediaries. As this information is not within the "confidential" section of the form, the names of all foreign intermediaries will be published on the Charities Directorate website. This may create a dangerous state of affairs,

particularly in volatile regions – where charitable work is often most needed – since association with a Canadian charity may make a local organization the target of terrorists or extremists. We recommend that the Guidance address this issue, stating that CRA is prepared to accept a cover letter explaining the situation along with an offer to provide the list to the CRA upon request, in lieu of divulging information which in many cases must be kept confidential for the safety of the participants.

#### **D. Program Related Investments**

Despite discussing certain issues relating to self-sufficiency, such as capacity building and transfers of capital property, the Guidance largely ignores the issue of microfinance. The publication of the new Guidance provides CRA with an opportunity to address this evolving area and adapt its policies to the way in which microfinance is currently practiced. The issue is addressed to a degree in an older CRA publication<sup>9</sup>, but the CBA Section submits that the Guidance would be incomplete without some discussion of microfinance, and that CRA reconsider its policy on “program related investments” as the term is used in the US.

The older RC4143 permits micro-enterprise under the “relief of poverty” head of charity, and generally limits the amount of any individual loan to \$10,000. These loans are made directly by the charity itself. Thus, the ability of a Canadian charity to assist with micro-enterprise on an investment-style basis. In many countries, microfinance lending is now considered “banking” and requires a banking licence and significant capital – something which the prohibition on program related investments prevents a Canadian charity from carrying out.

In the context of micro-enterprise, the CBA Section recommends that CRA allow something similar to “program related investments” (PRI), which are widely used by charitable organizations in the US. Rather than attempting to establish a loan program through a foreign intermediary, which would be exceedingly cumbersome given the direction and control requirements as currently drafted, a Canadian charity could make capital loans or investments to non-qualified donees, provided steps are taken to ensure that recipients only

---

<sup>9</sup> Guide RC4143, Registered Charities: Community Economic Development Programs [RC4143].

use the funds for charitable purposes. PRIs in the US are typically used to invest in projects such as community revitalization, low-income housing and micro-enterprise development, among others.<sup>10</sup>

By easing the direction and control requirements in this instance, Canadian charities could make PRIs to pre-existing entities in foreign countries with the experience and infrastructure in place to ensure that PRI are used efficiently and effectively. In the context of microfinance, an experienced foreign entity will be in a better position to ensure that charitable funds are used for proper charitable activities than a Canadian charity. Allowing these types of loans is consistent with the Guidance's statements with regard to capacity building, which specifically acknowledge the value of micro-loans in relieving poverty.

### **E. The "Warning" in RC 4106**

RC4106, the predecessor to the Guidance, contains a warning regarding the potential liability that may arise on the part of a charity for the acts of its agent. Some version of this warning should be included in the Guidance, since a charity's liability for the acts of its agent (or, for that matter, any intermediary) may vary considerably depending on the terms of the written agreement and the degree of direction and control exercised by the Charity. It is also submitted that the Guidance include a provision advising a charity to seek independent legal advice before deciding on the form of the intermediary relationship.

### **F. Payments to Related Bodies**

RC4106 contains a provision allowing payments of titles, royalties and membership fees to related foreign bodies, which is not included in the Guidance. This provision should be included in the Guidance, and the threshold for what constitutes a "small amount" (the limit under which CRA will assume the charity is receiving value) should be increased. The old threshold was the lesser of 5% or \$5000. We recommend that the dollar figure be increased to \$10,000.

---

<sup>10</sup> David S. Chernoff, "Program-Related Investments: A User-Friendly Guide", adapted from a speech delivered at the 2005 annual conference of the Council of Foundations in San Diego, CA: Chicago, IL: John D. and Catherine T. MacArthur Foundation, 2005. Available online at <http://www.community-wealth.org/> (date accessed: 3 September, 2009).

## **G. Application of Guidance – Pre-Registration**

The Guidance purports to apply not only to registered charities, but to applicants for charitable status. This stipulation was not in RC4106. The CBA Section recommends that the Guidance clarify the extent of its application. If, as stated in the Guidance in paragraph 74, CRA is simply suggesting that an applicant provide information concerning its intentions regarding activities and relationships in which the charity will partake once it is registered, this should be clarified. However, the Guidance is not designed to be fully enforced on applicants for charitable status in every respect. For instance, an applicant should be able to make a one-time foreign grant prior to being registered, as this would not violate the *ITA*, and the funds donated were presumably not initially received on a tax-exempt basis.

## **H. Application of Guidance – Within Canada**

Similarly, the Guidance states that it applies to all charitable activities carried on within Canada. While this proposition is not as ambiguous as the previous one, the CBA Section recommends adding “where applicable”, since some provisions will likely apply differently in the context of working with a Canadian intermediary. For instance, Appendix D relating to transfers of capital property to foreign non-qualified donees is in large part inapplicable in a Canadian context. Similarly, sections relating to CIDA and compliance with local laws are irrelevant to Canadian charities performing activities within Canada. The title of the Guidance is also inaccurate if it also applies to activities within Canada. The title should indicate to charities that the Guidance applies to any dealings with non-qualified donees, regardless of where they are situated.

Finally, with respect to its legal effect of the Guidance, the CBA Section recommends stating that the Guidance is just that and does not have the force of law, but is intended to help charities comply with the *ITA*. This could be added to paragraph 5 which states that the Guidance is intended to assist with compliance.

## **IV. CONCLUSION**

The additional clarification provided by the Guidance is generally helpful in assisting charities seeking to operate abroad and the CBA Section commends the CRA for the Guidance. The CBA Section submits that the goal of ensuring that Canadian charitable

funds are used for charitable purposes when spent outside Canada can be met, consistent with existing law, without the degree of direction and control suggested by the Guidance. The Guidance should also relax the CRA's position on electronic recordkeeping. Finally, the submission sets out a number of other miscellaneous areas where the guidance contained in the submission could be refined.

The CBA Section appreciates the opportunity for dialogue with the CRA on this and other issues. If the CRA has any questions arising out of this submission, the CBA Section would be pleased to discuss them further.