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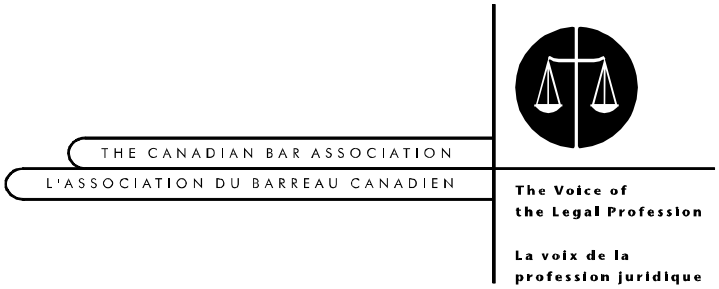

COMPARING THE ABILITY OF CANADIAN AND AMERICAN CHARITIES TO OPERATE AND FUND ABROAD – TIPS ON FOREIGN ACTIVITIES BY CANADIAN CHARITIES

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Introduction

Canadian tax law makes it difficult and complicated for Canadian registered charities to carry on foreign activities or fund activities of foreign charities. Canadian tax law rules permit a Canadian registered charity to carry on activities anywhere in the world, so long as the Canadian charity carries on its own activities and does not merely fund the charitable activities of another. However, it is perfectly acceptable for a Canadian registered charity to carry on its own activities through foreign intermediaries if appropriate formalities are observed.

This paper is not designed to provide a policy critique of the current rules for Canadian charities operating abroad,[5] or even to describe in detail the applicable Canadian tax law rules.[6] Rather, we will describe the Canadian rules in summary form, contrast[7] them with the much more flexible US rules[8] and provide guidance, based on our experience advising charities and

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5 Robert B. Hayhoe, "A Critical Description of the Canadian Tax Treatment of Cross-Border Charitable Giving and Activities" (2001), 49 *Canadian Tax Journal* 320.

6 Robert B. Hayhoe, "Cross-Border Operations by Canadian Registered Charities,"(2004), 52 *Canadian Tax Journal* 942 (hereinafter "Hayhoe International"). The first draft of some portions of this paper were based on excerpts from Hayhoe International.

7 Robert B. Hayhoe and Stuart J. Lark, "Comparing the Ability of Canadian and U.S. Charities to Fund and Operate Abroad" (2004), 46 *Exempt Organization Tax Review* 201

8 For more detail on the U.S. Rules specifically, see Joannie Chang, Jennifer Goldberg and Naomi Schrag, "Cross Border Charitable Giving" (1997), 31 University of San Francisco Law Review 563.

representing them in Canada Revenue Agency ("CRA") Charities Directorate audits on cross-border issues.

Canadian Tax Limits on Foreign Activities

The *Income Tax Act* (Canada) (the "Act") requires that a registered charitable organization devote all of its resources to charitable activities carried on by the organization *itself*.[9] For this purpose a charitable organization is considered to be devoting its resources to charitable activities carried on by it to the extent that it disburses not more than 50% of its income in a year to "qualified donees".[10] Similarly, the Act requires that a registered charitable foundation be operated exclusively for charitable purposes. This also includes the gifting of money to "qualified donees" as well as charitable activities carried on by the organization itself.

Qualified Donees

Qualified donees are defined to be primarily other registered charities, certain international organizations and other Canadian entities to which Canadians may make deductible or creditable donations as well as foreign charities to which the government of Canada has made a donation in the last twelve months.[11] The CRA Charities Directorate maintains an updated list of foreign charities which it is willing to recognize officially as having received a recent gift from the Federal Crown[12] - suffice it to say that the list is a very short one.

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9 See "Charitable Organization" in subsection 149.1(1).

10 Subsection 149.1(6).

11 See paragraph 110.1(1)(a)(b) and (c).

12 Information Circular 84-3R5, *Gifts to Charitable Organizations Outside Canada* as updated by periodic attachments.

Foreign Gifts

While a Canadian registered charity is permitted to carry on its charitable activities outside Canada, the effect of these provisions is that it must carry on its international activities itself and cannot simply fund foreign charities. This is in contrast to the ability to make gifts to other Canadian registered charities and leave the donee to use the funds in its own charitable activities. As we will develop below, it is also in stark contrast to the situation in the U.S. where charities are permitted to fund foreign charities. Indeed, in a recent 2002 amendment to the Act, a provision was added to expressly prohibit a registered charity disbursing money by way of gift to anyone other than a qualified donee except when made in the course of its charitable activities (e.g. giving away food, medicine or cash to the needy or poor)[13].

Foreign Activities

A Canadian registered charity will be considered to be carrying on its overseas charitable activities if they are carried on directly by it and its employees, or under a contract of service with a related or unrelated entity or other individual, a contract of agency or another form of contract for joint participation by way of joint venture or partnership.[14]

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[13] Subsection 149.1(2)(c) was added to address the suggestion that a registered foundation could, after meeting its disbursement quota for the year, make foreign charitable disbursements: Arthur B.C. Drache, "A Pyrrhic Victory?" (2000) 8 *Canadian Not-for-Profit News* 77.

[14] References to joint ventures and partnership in this area are not always clearly defined and are sometimes confused. It is possible (indeed usual in the circumstances) to have two parties enter into a joint venture agreement which provides that each will contribute efforts and resources to a particular project or activity but does not create a new legal entity. It is also possible to establish a joint venture entity such as a new corporation whose shares are owned by or memberships held by each of the joint venturers (although an agreement is still recommended in order to avoid the CRA suggestion that the new joint venture corporation is simply another entity that is not a qualified donee) . Similarly, the term "partnership" is sometimes used to refer to a legal entity that is a partnership between two or more persons under which provincial partnership law sets out the respective rights and obligations and relationships of the partners beyond what may be provided for in their partnership agreement. In other instances, partnership appears to be used in the non-legal sense of partnering with another – it is in this sense that the CRA typically refers to partnership in the charity context (given that partnership in the legal sense implies carrying on *business*).

The CRA has published a number of relevant publications dealing directly or indirectly with charities operating outside Canada.[15] While nothing is mandated in law in this area beyond what is described above, CRA's positions are useful to aim to comply with and be seen to be complying with to the greatest extent possible in a manner that does not interfere with the charity's chosen method of most efficiently delivering particular overseas programs, projects and aid, particularly since the Federal Court of Appeal has given a great deal of deference to the CRA's published policies in recent revocation appeals dealing with cross-border funding.

Canadian courts have had to deal with the issue of Canadian charities funding overseas activities on three occasions, most recently in March of this year.[16]. In each of these cases the Federal Court of Appeal upheld the revocation of the registration of Canadian charities engaged in Canadian fundraising support for charitable activities carried on in Israel by affiliated charities. The Court seems to have based its decisions in part upon its conclusion that there was insufficient evidence of adequate direction and control, monitoring and accountability by the Canadian charity to say that the activities were carried on by the foreign charity on the Canadian charity's behalf and regarded the funding as essentially gifts to the foreign charity.

Charitable Goods Policy

There are only two exceptions to the requirement that a Canadian registered charity not make gifts to persons other than qualified donees. The first is an exception to the 2002 amendment prohibiting gifts to non-qualified donees - that exception merely permits a charity to make a gift in the course of charitable activities carried on by it. For example, it may give food,

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[15] CRA Guide RC4106: *Registered Charities Operating Outside Canada* < http://www.cra.gc.ca/E/pub/tg/rc4106/README.html>; *Registered Charities Newsletter No. 20* <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-20/README.html>.

[16] Bayit Lepletot v MNR, 2006 FCA 128; Canadian Magen David Adom for Israel v The Queen, (2002) DTC 7353; and Canadian Committee for the Tel Aviv Foundation v The Queen, (2002) DTC 6843.

pharmaceuticals, blankets or cash. While not expressed to be limited to gifts to individuals, there is a concern that a charity is not operating in the ordinary course of its business if it is making contributions financial or otherwise to other charitable organisations. The other more helpful exception is what the CRA refers to as its "charitable goods policy". The charitable goods policy is described (in part) in CRA Policy Statement RC 4106 dealing with the transfer of property in development projects and in Registered Charities Newsletter No. 20 as recognizing that there are certain goods which by their very nature when given to foreign charitable enterprises will be presumed to be dedicated entirely to charitable use. Examples include medical equipment, Bibles, and schoolbooks. The charitable goods policy has not been judicially sanctioned although it was considered in the *Magen David Adom* case without being approved of or questioned.

Intermediate Sanctions

Before the 2004 federal budget, the only penalty for a gift other than to a qualified donee or in the course of charitable activities was revocation of charitable registration, a very serious consequence, and therefore not often imposed. Now, with the 2004 Federal Budget, and the accompanying new intermediate sanctions, there are different penalties for different offences.[17] In particular, for a first offence of making a gift other than as permitted above, the specific penalty is 105% of any gift made not to a qualified donee (110% for the second offence).[18] As well, registration can be revoked as well as or in addition to either of the above penalty taxes.

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[17] For more detail, see R.B. Hayhoe and M.S. Owens, "The New Tax Sanctions for Canadian Charities: Learning from the U.S. Experience" (forthcoming 2006), 54:1 *Canadian Tax Journal*.

[18] Subsection 188.1(4)

US Tax Limits on Foreign Activities

The U.S. Internal Revenue Code[19] provides that an organization may qualify for tax-exempt status as a charitable organization under I.R.C. Section 501(c)(3) only if it is organized and operated "exclusively" for exempt purposes. Regulations provide that an organization will be regarded as operated exclusively for exempt purposes if it engages "primarily" in activities that further exempt purposes.[20]

U.S. law does not require that a charity engage in exempt activities directly. That is, a charity may qualify for federal tax exemption even if its activities are limited solely to grantmaking, so long as the grantmaking program primarily furthers exempt purposes.

There is no distinction between domestic and overseas charitable activities in this regard. A charitable organization may qualify for tax-exemption under U.S. law on the basis of engaging in exempt activities directly, even if those activities are conducted entirely overseas,[21] or by making grants for exempt purposes exclusively to overseas organizations.

Whether the grant recipient is a domestic or an overseas organization, the U.S. grantmaking charity must take reasonable steps to determine and document that the grant will be used for exempt purposes. As part of its due diligence, particularly in the case of overseas grants, the

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19 26 U.S.C. (the Internal Revenue Code of 1986, as amended).

20 Treas. Reg. § 1.501(c)(3)-1(c)(1). Exempt purposes include not only charitable purposes, but also religious, scientific, educational, and literary purposes, as well as testing for public safety, the prevention of cruelty to children or animals, and fostering national or international amateur sports competition. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(d)(1)(i).

21 *See* I.R.S. Rev. Rul. 71-460, 1971-2 C.B. 231; *Bilingual Montessori School of Paris*, 75 T.C. 480 (1980).

U.S. grantmaker must take steps to determine that the grant will not be used to provide material support or resources to be used in terrorist acts or by terrorist organizations.[22]

A U.S. charity may in theory make a grant to any type of organization, whether charitable or not, so long as the U.S. charity retains control and discretion to ensure that the grant will be used to further exempt purposes.[23] As a practical matter, however, many U.S. charities choose to make grants only to other organizations that the U.S. Internal Revenue Service ("IRS") has determined to be qualified I.R.C. Section 501(c)(3) charities, in order to simplify administrative and record-keeping burdens.

U.S.-Canada Treaty and I.R.S. Notice 99-47

The Convention between the United States and Canada with Respect to Taxes on Income and on Capital (the "Treaty") helps to facilitate grants from U.S. charities to Canadian registered charities. Article 21(1) of the Treaty provides a reciprocal income tax exemption for "religious, scientific, literary, educational or charitable organizations" resident in the treaty states.[24]

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[22] A full discussion of the U.S. laws concerning terrorist financing by charities that has developed since the September 11, 2001 terrorist attacks is beyond the scope of this paper. The steps that a U.S. charity must or should take to prevent having any of its assets used to further terrorist activities is the subject of considerable national debate. All U.S. charities making overseas grants should at a minimum be familiar with the U.S. Department of the Treasury revised "Anti-Terrorist Financing Guidelines: Voluntary Best Practices of U.S.-Based Charities" (December 2005), available at http://www.treas.gov/offices/enforcement/key-issues/protecting/charities-intro.shtml. For a practical approach to procedures to avoid financing terrorist activities, see "Principles of International Charity" (April 2005), available at http://www.cof.org/files/Documents/International_Programs/2005Publications/Principles_Final.pdf. Other helpful resources are available at http://www.usig.org/legal/anti-terrorism.asp.

[23] *See* Rev. Rul. 68-489, 1968-2 C.B. 10.

[24] A similar provision appears in the Convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Income Taxes between the United States and Mexico ("U.S.-Mexico Treaty") at Article 22(1).

Under I.R.S. Notice 99-47 (the "Notice"),[25] which implements the Treaty provision, a "recognized religious, scientific, literary, educational or charitable organization" that is organized under Canadian law and that CRA has recognized as a registered charity, will automatically be deemed to qualify as a tax-exempt charitable organization under I.R.C. Section 501(c)(3). The Canadian registered charity is not required to apply for this status. The Notice provides that the U.S. recognition of exemption will remain in effect until the U.S. determines that the Canadian charity fails to satisfy the requirements for exempt status under U.S. law. The CRA has a corresponding policy position accepting all U.S. 501(c)(3) charities as being equivalent to registered charities.[26]

The net result is that a U.S. charity may generally rely on a determination by CRA that a Canadian entity is a registered charity for purposes of ensuring that a grant to a Canadian entity will further exempt purposes.[27]

Special Rules for U.S. Private Foundations Making Grants to Canadian Charities

The matter is rather more complex for certain kinds of U.S. charities, however. U.S. tax law divides all charities into two categories, so-called private foundations, and non-private foundations (commonly known as "public charities").[28]

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[25] 1999-2 C.B. 391. For a discussion from the IRS perspective, see Michael Seto and Mary Jo Salins, "Exemption of Canadian Charities under the United States-Canada Income Tax Treaty," (2001) *IRS Continuing Profession Education Exempt Organizations Technical Instruction Program Text for FY 2001.*

[26] CRA document no. 9900795 (21 April, 1999). This is a significant concession on CRA's part as the qualifications for 501(c)3) status are broader that those for Canadian charitable registration: Arthur B.C. Drache, "Competent Authority Guidelines" (1999) vol. 7, no.12 *Canadian Not-For Profit News* 95.

[27] For a detailed discussion, see LaVerne Woods, "IRS Notice 99-47: A Help or a Hindrance for Foundation Grants to Canadian Charities?" (May 2000) *The Exempt Organization Tax Review* 203.

[28] *See* I.R.C. § 509(a).

Public charities may generally make grants to Canadian registered charities without any significant increase in their administrative compliance burden. Public charities should obtain documentation of the Canadian charity's tax status, use a written agreement setting out the purposes of the grant, and obtain a report from the grantee, but this is likely no more than the public charity would do for grants to domestic charities.

Private foundations, on the other hand are subject to a strict regime concerning their grantmaking to both U.S. and overseas organizations.[29] All U.S. charities are presumed to be private foundations, and are therefore subject to the strict regime, unless they meet one of a limited number of tests for qualification as a public charity.[30] U.S. charities fulfill their exempt purposes primarily or exclusively through grantmaking are often private foundations, and this category of U.S. charitable organization represents a significant source of potential funding for Canadian charities.

A private foundation may make a grant to an organization, whether domestic or foreign, that the I.R.S. has determined to qualify under I.R.C. Section 501(c)(3), and which is classified as a public charity (rather than as a private foundation). In order for a private foundation to make a grant to any other type of organization, including an I.R.C. Section 501(c)(3) charitable

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[29] *See* I.R.C. § 4945(g).

[30] Organizations that meet the tax law's definition of a church, school, hospital, or scientific research organization will be classified as public charities. *See* I.R.C. §§ 170(b)(1)(A)(i), (ii), (iii). Organizations that meet one of three complex "public support" tests, which look to the nature and source of the charity's funding, will also be public charities. *See* I.R.C. §§ 509(a)(1), 170(b)(1)(A)(vi), 509(a)(2); Treas. Reg. §§ 1.170A-9(e), 1.509(a)-3. Certain "supporting organizations" that have a structural relationship with another public charity will also qualify. *See* I.R.C. § 509(a)(3).

organization that is classified as a private foundation, the grantor must follow specific procedures for making the grant, known as "expenditure responsibility."[31]

The expenditure responsibility rules, in brief overview, require that the foundation (1) perform reasonable due diligence regarding the grantee to see that the grant will be used to further the intended exempt purposes; (2) enter into a written grant agreement with the grantee containing specific provisions; (3) obtain reports from the grantee on how the funds are spent; and (4) report the grant to the I.R.S. on its annual information reporting return.[32] While not complex, the expenditure responsibility rules tend to deter private foundations – particularly smaller foundations without professional staff – from making grants to organizations other than public charities, whether domestic or foreign.

The Notice, in addition to setting out the very helpful presumption that all Canadian registered charities are qualified I.R.C. Section 501(c)(3) charitable organizations, makes the almost equally unhelpful presumption that all Canadian registered charities are private foundations under U.S. tax law, unless they demonstrate otherwise.[33] As a result, in most cases when a U.S. private foundation seeks to make a grant to a Canadian registered charity, the U.S. foundation will be required to follow the expenditure responsibility rules. This tends to complicate U.S. private foundation grantmaking across the northern U.S. border.

There are two other options besides following the expenditure responsibility procedures that may enable a U.S. private foundation to make a cross-border grant to a Canadian registered charity.

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[31] *See* I.R.C. § 4945(d)(4), (h).

[32] *See* I.R.C. § 4945(h); Treas. Reg. § 53.4945-5(b, (e).

[33] In contrast, under the U.S.-Mexico Treaty, Mexican charitable organizations are treated as public charities, U.S.-Mexico Treaty 1992 Protocol, Art. 17(b).

First, the Notice specifically contemplates that a Canadian registered charity may seek a determination from the I.R.S. that it qualifies under the U.S. public charity rules.[34] A private foundation may make a grant to a Canadian charity that the I.R.S. has determined to be a public charity in the same manner as it may make a grant to a domestic public charity.

Applying to the I.R.S. for a public charity determination is rarely an attractive option for a Canadian charity, however, unless the charity is in a position to receive a good deal of funding from U.S. foundations on a regular basis, and can easily demonstrate that it meets one of the tests for public charity status. While in theory the Canadian charity's application should be a simple matter, because the Canadian charity is presumed to qualify under I.R.C. Section 501(c)(3) and the only question at issue is the application of the relatively mechanical public charity test, in practice it may not be so simple. The unusual nature of such applications and the evident lack of formal procedures for processing them has meant that such applications often encounter confusion and delays in processing.

Alternatively, it is possible for a U.S. private foundation to make an "equivalency determination" with respect to the Canadian charity's qualification as a public charity under U.S. tax law. First, a foundation manager must make a "reasonable judgment" that the grantee is an organization described in I.R.C. Section 501(c)(3). This should be an easy matter when the recipient is a Canadian registered charity that is presumed to be qualified under I.R.C. Section 501(c)(3) under the Notice. Second, the foundation must make a "good faith determination," based on an

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[34] Foreign charities, whether Canadian or otherwise, may apply for and, if qualified for, receive a determination from the Internal Revenue Service that they are qualified under IRC § 501(c)(3) and that they are classified as a public charity. *See* Rev. Rul. 66-177, 1966-1 C.B. 132. Foreign charities, even if so qualified, as not eligible to receive tax-deductible contributions from U.S. donors, however, other than to the limited extent provided under the Treaties with Canada, at Article 21(5), and Mexico, at Article 22(2), (3). S*ee* I.R.C. § 170(c)(2)(A).

affidavit by the grantee or an opinion of counsel, that the grantee qualifies as a public charity.[35] The U.S. foundation will likely need to obtain substantial, detailed financial information in order to make the determination of public charity status. Often, the Canadian charity will not have maintained the necessary information, because it is not required under Canadian law.

The I.R.S. has attempted to streamline the equivalency determination process by developing an affidavit for use in making the "reasonable judgment" and "good faith determination."[36] The affidavit essentially provides a form that the foundation may use in collecting information from the grantee. The primary advantage of the affidavit is that a foundation may rely on an affidavit that a grantee has prepared for another U.S. foundation, so long as the facts and financial data are up to date. This may eliminate some duplication of effort by both grantees and their funders. It does not eliminate the need for detailed financial information in most cases, however. U.S. foundations often find that it is simpler to use the expenditure responsibility process, particularly if they already have such a process in place for grants to domestic organizations that are not public charities.

Practical Guidance on Canadian Charities Operating Abroad

As discussed above, the rules for Canadian charities operating abroad are more stringent than the corresponding American rules. However, it is still possible in most cases for a Canadian charity to carry on foreign activities, even those carried on through intermediaries. The remainder of this paper will provide some guidance on how charities can do so.

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[35] Treas. Reg. §§ 53.4945-6(c)(2)(ii); 53.4945-5(a)(5).

[36] *See* Rev. Proc. 92-94, 1992-2 C.B. 507.

Regardless of how a Canadian charity chooses to seek to comply with the applicable CRA administrative position on Canadian charities carrying on foreign activities, there are certain CRA requirements that, in our experience, should always be addressed. The key aspects that the CRA will expect in order for a charity to be able to demonstrate that another is carrying on activities on behalf of the Canadian registered charity in whole or in part include:

> the Canadian charity's decision-making power to participate, financially or otherwise, in a project proposed by another;
>
> whether the project is developed by the Canadian charity or proposed by another and in which the Canadian charity chooses to participate, adequate safeguards are in place, preferably contractually, to ensure that the Canadian charity's contributions are in fact used in the approved project. This would include:

- approval of a clearly defined project;
- approval of a clearly defined budget;
- approval required for expansion of the project or of the budget for the project if the Canadian charity's commitment is to increase as a result;
- appropriate rights of monitoring, reporting and auditing completion of the project, success of the project and the project's finances and financial records;
- any unspent funds or unused resources made available by the Canadian charity are to be used at the Canadian charity's further direction or returned to the Canadian charity.

There is no requirement that all of this be evidenced in a single agreement between the Canadian charity and the other party or parties. A registered charity should be able to satisfy the CRA with documented evidence on these many points by referring them to a number of different requirements applicable to the programs and projects under review.

Although the CRA does recognize in RC 4106 that appropriate cross-border legal arrangements between Canadian registered charities and foreign charities can be found to exist on the basis of unwritten agreements, we have not seen the CRA actually permit this approach in practice for many years. Thus, it is certainly recommended that written arrangements be in place. Written evidence is always the best evidence that the requirements were in place and were complied with. It is also recommendable to have each particular project or program governed by a single omnibus agreement such as an agency agreement or memoranda of understanding both in order to better assure compliance within the Canadian charity and to be able to more readily satisfy a CRA auditor.

To the extent that the Canadian charity is operating overseas primarily with the aid of affiliates governed by an international organisation's documented policies and requirements as to governance, financial accountability, performance audit, interim reporting, etc., individual agreement or memoranda of understanding may, in some circumstances, not need to be particularly detailed provided compliance with international policies is also expressly required of the other party or parties.

Contract

The CRA, in RC4106, states that:

> Contractors

> A registered charity can also carry out its charitable activities by contracting with an organization or individual in another country to provide needed goods and services.
>
> Example
>
> Before providing irrigation equipment for an agricultural project, a Canadian registered charity:
>
> commissions a soil analysis from a local university;
>
> contracts with a for-profit business in the country to deliver, install, and maintain the equipment; and
>
> contracts with a government agency to provide instructional or other services required to make the project a success.
>
> Before engaging agents or contractors, it is important that the registered charity have a clear idea of the charitable project or program it is trying to achieve, and how it will be conducted from beginning to end. This will allow the charity to give precise instructions to its agents or contractors.

The above discussion makes clear that, in the view of the CRA, contracts for services are best used for discrete activities. It is clear that where a service could be purchased commercially by a charity, it would be appropriate for the charity to purchase that same service outside of Canada whether from a charity or from a commercial provider. However, the more interesting unresolved issue is the extent to which it is possible to use a fee-for-service approach to carry out a core charitable activity.

It is also very important to ensure that when services are purchased from a foreign charity, they relate only to activities carried on and outside of Canada. If the Canadian charity pays for services related to its activities in Canada, there can be relatively expensive inadvertent negative GST and withholding tax consequences.

Agency

One of the most common ways for a Canadian registered charity to carry out activities abroad through a foreign entity is pursuant to an agency agreement. The CRA expects Canadian charities operating abroad through agency agreements to obtain detailed records as set out in more detail below. Furthermore, the CRA generally takes the position that the agency assets

must be kept segregated from the assets of the foreign charity (such as in a separate bank account) [37]. The legal basis for this requirement is not clear.[38]

Agency relationships are a good way of handling Canadian funding of particular projects. An agency relationship may also be appropriate where there are organizations from several different countries and accounting practices or governance realities do not permit a joint venture agreement. Albeit fairly complicated, an agency agreement may be drafted to allow for multiple parties wherein, for example, the Canadian organization principal has different agents doing work and keeping project records in different countries.

Joint Venture

For the CRA to accept this kind of arrangement, the Canadian organization must be a substantial participant in the decision-making process.[39] The CRA suggests generally that the Canadian organization's participation be proportionate to the amount of funding the Canadian organization contributes, but this can become cumbersome if the relative contributions of the parties vary over time. A more practical approach, one that does not require periodic re-adjustment, sets up a "double majority" whereby the Canadian and foreign representatives hold votes separately in order to achieve a majority as a whole. This effectively provides each group with a veto.

In addition to participation in decision-making, the CRA has very stringent record-keeping expectations for joint venture agreements. It expects that regular reports, both financial and operational, be kept *in Canada*.[40] Having reports and records available on-site outside of Canada

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37 RC4106.

38 Hayhoe International, supra note 6, argues that there is no legal basis for this requirement.

39 For details on what is expected by the CRA see Guide RC4106..

40 As required by subsection 230(2).

is not sufficient; the required financial and operational records must be sent back to Canada on a semi-regular basis.

Given the Canadian participation and record-keeping requirements, it is often advisable to limit the scope of a joint venture agreement as much as possible. For example, if an international group of charities includes organizations from many countries, including Canada, it may be possible for the Canadian charity to only enter into a joint venture arrangement with one other entity and only for the particular Canadian-funded projects. It is usually advisable to limit the joint venture to a smaller subset of activities and only keep records on those, although this may prove difficult if the usual project recordkeeping and decision-making does not support this segregation.

Joint Partnership

A Canadian registered charity may also operate jointly with others through a "cooperative partnership."[41] In Guide RC4106, the CRA distinguishes a cooperative partnership from a joint venture on the basis that in a cooperative partnership, different parties take responsibility for different aspects of a charitable project. The CRA cites the example of a Canadian charity joining with a number of entities (some of which may be business or non-profit organizations) to provide medical care in a particular community; the CRA agrees that the Canadian charity could take responsibility for only one aspect of the project. Another example is that of a Canadian registered charity entering into a cooperative partnership to provide a foreign hospital with diagnostic equipment to be used in the hospital by hospital staff.[42]

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[41] A "co-operative partnership" is not really a partnership because it does not constitute the carrying on of business in common with a view to a profit (see the Partnership Act, RSO 1990, c.P. 5, as amended).

[42] David G. Amy, "Foreign Activities by Canadian Charities" (2000), 15 *The Philanthropist* 41 at 52.

A co-operative partnership is not designed to address the "own activities" requirement that limits a Canadian registered charity to carrying on foreign activities as its own activities. The contribution of property or other resources to a cooperative partnership is the use of the charity's resources for its own activities regardless of whether there is an agreement.[43] Instead, the use of a cooperative partnership agreement is only a matter of buttressing the evidence or records of the charitable activities that are carried on by the Canadian registered charity.

Conclusion

The Canadian tax rules applicable to registered charities funding charitable activities outside Canada are relatively complicated. By contrast, the corresponding US rules appear better designed to facilitate international philanthropy – or at least to present fewer obstacles to cross-border grantmaking. Nevertheless, properly applied, the Canadian legal rules and the administrative position of the CRA do permit international philanthropy if structured carefully.

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[43] In contrast to the case of a joint venture or agency relationship, where, in order to meet the "own activities" test, it is necessary to either appoint an agent or agree with a joint venturer.