

## **Response to CRA Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities**

This paper is the response of Canadian Council of Christian Charities (CCCC) to Canada Revenue Agency's (CRA) proposed *guidance* that will update and replace RC4106 *Registered Charities: Operating Outside Canada*. CCCC is an umbrella organization of over 3,000 member charities.

### Focus

The CRA guidance focuses on registered charities in Canada that are carrying on their own activities outside of Canada. The emphasis is on various means of demonstrating *control & direction* of these activities, particularly when using an intermediary.

Our comments are provided in the order the items are presented in the guidance.

### **Carrying on activities outside Canada** (paragraphs 12-15)

Regarding the need to have a written agreement with an intermediary, we support the change of the term "preferable" to "strongly recommends". This is a positive change since it is closer to current CRA practice of being reluctant to approve a new charity or close an audit without such a written agreement. We also support the notion that any prospective new charity should first consider working with existing charities, before launching a new organization.

Helpful in this guidance are the comments and new Appendix 'A' on responding to natural disasters. CCCC supports the emphasis on responding to emergencies and disasters through existing charities rather than hurriedly trying to create a new one. CRA intimates that priority is given to these applications, however, it is difficult to see how a charity could be registered in time to make a meaningful contribution in the wake of a disaster.

### **Local Laws** (16-19)

There is a brief, but helpful reminder to charities operating outside Canada, that they need to be aware of and comply with the local laws of the foreign jurisdiction in which they are operating. However, the rationale given by CRA for complying with local laws is so as to not offset the "public benefit" provided by the charity. It then provides a link to CPS-024 *Meeting the Public Benefit Test*. It seems to us that a reference to CPS-024 is out of context. It is not clear how the "fourth head of charity" relates to a Canadian charity's need to be aware of the laws in the locality it is operating. Regardless of how important this policy document is, referring to a test for qualifying as a charity seems out of place.

### **What is charitable in Canada abroad?** (20-21)

The reference to the public benefit test is followed by the reminder that because an activity is charitable in Canada, does not necessarily mean CRA will consider it charitable in another

country. This reminder is repeated from RC4106. Since this section is referring to fundamental principles of what a charity is, perhaps CPS-024 is better placed in this section.

#### **Canada's anti-terrorism legislation (22-24)**

Anti-terrorism is a new priority since RC4106 was published. This new section, therefore, is an appropriate reminder of a registered charity's obligations under this act.

#### **How can a charity operate? (25)**

Paragraph 25 provides a more succinct summary of the two ways (qualified donee, own activities) a charity can operate than presented in RC4106. Because of the fundamental importance of this principle and the frequency that it is missed by charities, this is a more helpful presentation.

#### **Making gifts to qualified donees (26-28)**

Generally well understood by charities, a brief summary is still appropriate. The new note on Ontario's narrower definition of qualified donee, is undoubtedly helpful to Ontario charities, since the Public Guardian and Trustee expects qualified donees to have similar objects as the funding charity.

#### **Carrying out charitable activities (29-33)**

To enhance the flow of the paper, we suggest amending the title of the section to *Charities carrying out their own charitable activities*. The new summary of what constitutes a "resource" is helpful. The section might be enhanced visually by use of bullets: "A charity can use:

- its staff, or
- an intermediary.

Reference is made in paragraph 33 to capacity building which is covered in Appendix 'B'. In our view this is an appropriate way for the guidance to deal with this complex issue.

#### **Choosing an intermediary (37-40)**

We suggest that the section on Agents be included in the Table of Contents.

Generally, the examples provided throughout the paper are helpful, as is the one here on Agents. Having said that, we wonder if certain scenarios, that are implied here could be spelled out in a revised format. The sample seems to reinforce the principle that a charity can fund part of a program or organization through an agent without necessarily running the whole operation. An elaboration would provide clarity.

#### **Joint venture participants (41-46)**

This somewhat expanded description of a joint venture is helpful, as is the inclusion again of a list of guidelines for a JVA; this time presented as an Appendix 'C'.

The example provided is very straightforward. It would be more helpful to have an example that contains more detail of acceptable activity and one that involves capital assets. Many charities are involved in entire building projects and some in partial projects. An example with these

common scenarios would be helpful.

### Co-operative participants (47-48)

The expanded example provides useful additional information. Although it is presumed, the example does not confirm that, if the charity provided *some* of the nursing staff, it would meet the 'own activities test'. (See comments under paragraphs 37-40.)

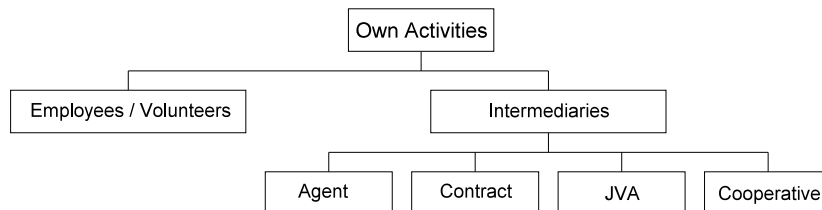
### Contractors (49-50)

It is not clear when a charity would hire a contractor versus engaging an agent to provide goods or services for the charity. The wording in this brief section implies a contract would be with a "for-profit" company. It is not clear if this is just an example of a contract relationship or if this is the only way it can occur. We suggest CRA provide more detail here, particularly, if it provides a distinction from an agency agreement.

### Carrying on a charity's own activities through an intermediary (51-56)

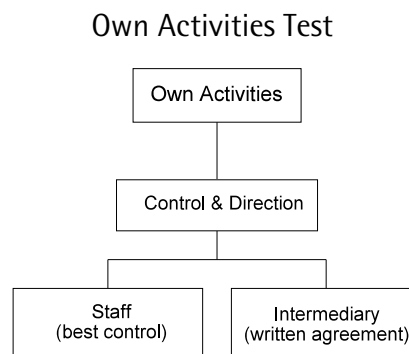
Here the concept of "own activities test", introduced in RC4106 is expanded. This test refers back to the fundamental principle introduced in paragraph 25 (carrying out "own charitable activities). This is critically important because using intermediaries is not valid unless the charity (to use CRA's words) "actually controls the activities and not the intermediary".

The "own activities test" is not so much a test as a series of measures. In many cases, it would be difficult for a charity to determine a "pass/fail" for itself. It may be more helpful to approach this as a scale of the multi-layered measurement that it is. In other words, the likelihood of the way charities carry out activities being considered acceptable would generally increase with the number of appropriate measures that are in place.

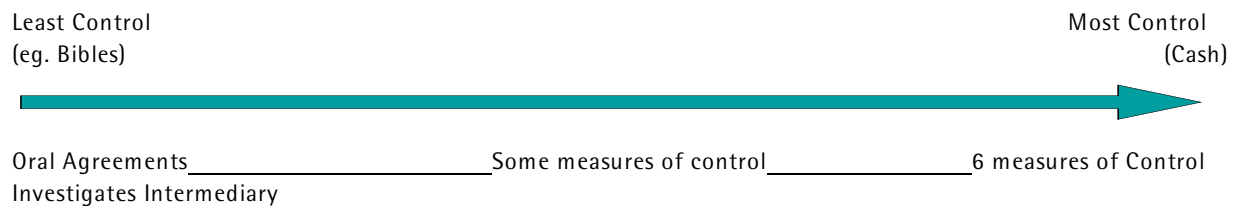


### Measurements of Control

The chart above illustrates how we understand how "own activities" can be carried out. The chart below, is an illustration of how the "own activities test" would be applied. CRA may wish to consider whether a graphic presentation of these multi-layered concepts might help with the clarity of the concepts.



The range of controls required might be illustrated this way:



Paragraphs 53-56 plus the new example describe the concept of a conduit. This is a helpful section as it clearly addresses a common problem that many charities fall into.

### **Control and direction of resources (57-84)**

It is appropriate, given that control & direction is foundational to how a charity can operate outside of Canada, that this section be greatly expanded. The paper clearly outlines six "measures of control" that a charity must consider when using an intermediary.

Paragraphs 61 to 68, as an introduction to a description of the measures, outlines the continuum of how many controls are needed with a 2 point approach to how to minimize the number of measures required. The first point reiterates what came to be known as the "charitable goods policy" although CRA does not use that term. The concept is a helpful one that saves a heavy administrative burden for charities, especially small ones. However, beyond the few examples presented, it is difficult to think of goods that could *only* be used for charitable purposes. If CRA has examples of other items, that too would be helpful to know.

The special note after paragraph 63 is helpful because it emphasizes the need for "as many measures of control as possible" when transferring money to an intermediary and, at the same time, shows the application of measures to any one situation is subjective. Therefore we would conclude that a charity must use its judgement to determine if the measures it is using seem 'reasonable'.

The example after paragraph 65 provides a straightforward illustration of how minimum controls can work. It would be helpful to have at least one more example, where more controls (measures) are needed. Paragraph 66 and 67 are understandable disclaimers for the fact every situation is different and the transfer of ownership of real or capital property is even more complex. Nevertheless, an example where a Canadian charity has successfully taken on certain, but not all aspects of a project outside Canada would help.

Paragraph 67 does refer to Appendix 'D' (Transferring capital property to non-qualified donees). This is a good summary of what is required when a charity is in the position of unavoidably having to transfer property to a non-qualified donee. The Appendix is helpful and clearly

presented, although, as with RC4106, provides limited developmental program examples of the kinds of projects where these steps are appropriate (namely, wharves, bridges, schools, hospitals). It would be helpful to have more examples of what constitutes development (eg. churches/orphanages?). Also, examples of 'non-developmental' activities would be helpful.

## SIX MEASURES OF CONTROL AND DIRECTION

### **1. Written agreements (69-75)**

The six control measures are expanded on along with more examples beginning with "Written Agreements". Paragraph 72, accompanied by an example, introduces a new practice that will be of great help to those charities wishing to address a need in a small way on a one-time basis. Allowing a one-time transfer, even of a small amount (\$1,000 or less), to a non-qualified donee is a welcome accommodation.

Although a template is not provided, paragraph 75 refers to a consolidated checklist (Appendix 'E') that is a good addition to the paper. There are no special provisions for a co-operative agreement or contract. As mentioned earlier, it might be helpful to elaborate on those particular differences.

### **2. Description of activities (76-77)**

The list of documentation needed to properly describe activities undertaken by the charity will serve as a helpful checklist, particularly for organizations applying for charitable registration.

### **3. Monitoring and supervision (78)**

The new example is helpful in describing what is often a weakness in how foreign agreements are monitored.

### **4. Ongoing instruction (79-81)**

Of all the new examples provided in this consultation, this one example seems somewhat unrealistic. We would presume that technical problems "in the field" would generally have to be solved by the intermediary, with the charity only approving recommended changes or new funding.

### **5. Periodic transfers (82)**

No comments

### **6. Separate activities and funds (83-84)**

No comments

### **CIDA /Keeping books and records in Canada (85-97)**

While not excusing a lack of proper records, it is helpful to have CRA acknowledge that sometimes it is difficult to obtain records and reports. We would hope that CRA would continue its reasonable approach to Books & Records. To that end, we assume the list of documents in

these sections are examples of documents that could be acquired and not a prescribed list. Our concern here is organizations could be overwhelmed with paperwork and administration. The guidance should acknowledge that the Federal Court of Appeal (*eBay Canada Limited et al v. Minister of National Revenue* 2008 FCA 348) have said that the records only need to be accessible in Canada.

#### **Foreign activities and a charity's disbursement quota (98-100)**

Charities often forget that not all of its expenditures on activities outside Canada can be classified as charitable. Administration expenses must be accounted for separately. This section serves as a good reminder.

#### **Conclusion**

This guidance will be helpful to charities, particularly those that are applying for charitable registration status with CRA. The expanded guidance, additional samples, reference to specific Federal Court of Appeal decisions and the extensive footnotes will provide a better basis for charities to determine what is necessary to properly operate activities outside of Canada. We have noted some areas where we think further clarifications or additional examples are needed. We appreciate the opportunity to respond to this guidance.