Foreign Activities by Canadian Registered Charities: Challenges and Options for Reform

The following paper is the culmination of The Philanthropist'*s series* "Canadian Charities Working Internationally," *which began in March 2015. In it, Toronto charity lawyer Andrew Valentine outlines the challenges with the current "direction and control" rules that apply to Canadian charities working abroad. He also presents proposals to reform the system, ranging from simple administrative amendments to full blown legislative reform, including grants to foreign organizations to further the charitable purposes of the Canadian charity.*

International charitable activities exist in a politicized space due to an excess of "bogeyman" issues. Money laundering and terrorist financing top the list. Valentine's balanced and persuasive account shows that Canada Revenue Agency administrative policy reinforced through the courts has increased complexity without necessarily decreasing risks to the misuse of charitable funds. Canada's rules are out of step with the US and UK, and this exceptionalism puts Canadian international charities at a disadvantage to those of other major jurisdictions. This paper, backed up by the other articles in the series, highlights that reform is possible and could be more prudent than the current system. – Malcolm Burrows

This paper will review some of the compliance challenges faced by Canadian registered charities operating overseas and consider ways in which they might be lessened while still ensuring appropriate transparency and accountability. It will review options, both at the level of administrative enforcement of the rules as currently written, as well as with a view to possible legislative change.

The legal background

Legislative framework

Canadian law recognizes that an activity may be charitable whether conducted inside Canada or around the world.[1] The legislative requirements for status as a charity do not depend on the location of the charitable activities or the charitable beneficiaries. A charity can be formed exclusively to carry on activities outside Canada and is equally eligible for registration as a charity that operates entirely within Canada, if its purposes and activities – wherever conducted – fall within one or more of the "four heads of charity." The rules in the *Income Tax Act* (Canada) (the "Act" or "ITA") applicable to registered charities do not distinguish between charitable activities carried out in Canada and those carried out abroad.

In order to qualify for charitable registration, an organization must meet the definition of "charitable organization," "public foundation" or "private foundation." The definition of "charitable organization" in subsection 149.1(1) contains several elements. For the purposes of this article, the following portion of the definition is relevant:

"Charitable organization," at any particular time, means an organization, whether or not

incorporated,

(a) All the resources of which are devoted to charitable activities carried on by the organization itself . . .

Public foundations and private foundations must both meet the definition of "charitable foundation" in subsection 149.1(1),[2] which provides:

"charitable foundation" means a corporation or trust that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization.

In addition to the requirements set out in these definitions, the Act also contains specific requirements for how registered charities may operate and on how they may use their resources. For charitable organizations, the Act deems gifts to qualified donees not exceeding 50% of the charitable organization's income for the year to be a devotion of resources to charitable activities carried on by the organization.[3] The Act also provides that the government can revoke a charity's registration where the charity:

Makes a disbursement by way of a gift, other than a gift made

(i) In the course of charitable activities carried on by it, or

(ii) To a donee that is a qualified donee at the time of the gift;[4]

These rules have been interpreted by the Canada Revenue Agency (CRA) to require that registered charities are only permitted to spend their resources in one of two ways: on grants to qualified donees or on their "own" charitable activities.

These requirements apply equally in the domestic and foreign contexts. However, they have practical implications that arise most frequently where activities outside Canada are concerned.

The main feature that distinguishes foreign charitable activities is the frequent reliance on third parties to carry out or facilitate charitable activities on the ground. While some Canadian charities operate overseas through employees or volunteers that are directly accountable to the Canadian charity, most Canadian charities operate at least in part by sending funds and other resources to local organizations in the target region with established infrastructure, personnel, and local knowledge. Many Canadian charities – including many large and sophisticated charities – are not set up to carry out foreign charitable activities directly.

Most organizations outside Canada do not constitute "qualified donees" under the definition in the ITA. As a result, a Canadian charity must be able to establish that activities carried on with its resources outside Canada are activities "carried on by the organization itself."

Assuming that the Canadian charity will not operate directly through its own staff and volunteers, the only way that the charity is currently able to meet the own activities test is by entering into a structured arrangement with a foreign organization (called an "intermediary") under which the organization conducts local activities on the Canadian charity's behalf.

The CRA has established numerous administrative requirements that must be met by a charity in order for activities conducted through an intermediary to be found to be the "own activities" of the charity. The main criteria are as follows:

The arrangement must cause the activities of the intermediary to constitute the activities of the charity (e.g., through an agency relationship, or a joint venture in which the parties conduct activities jointly), or the arrangement must provide for "direction and control" on the part of the Canadian charity, which includes:

- Initial and ongoing instructions from the Canadian charity on the project to be conducted;
- Ongoing oversight, including narrative and financial reporting from the foreign intermediary to confirm the proper use of the Canadian charity's funds; and
- Periodic transfers of funds conditional on the Canadian charity being satisfied that funds previously provided have been spent properly.

Courts reviewing CRA's application of these requirements to registered charities have generally affirmed this basic framing of the test as well as CRA's exercise of discretion in applying it.[5] That said, a few comments are worth making.

The Act says nothing about "direction and control." It states simply that a charitable organization must devote its resources to charitable activities carried on "by the organization itself." The requirement to show "direction and control" has been effectively read into the Act by CRA and the courts, and has in fact been made the primary determinant of whether charities meet the "own activities" requirement. CRA's interpretation of the "own activities" requirement focuses more on the presence or absence of direction and control than on the nature of the formal legal relationship between the charity and its intermediary. CRA states that it will recognize various forms of intermediary relationship – agents, joint venturers, contractors, etc. – as meeting this requirement *provided that there is direction and control.*

This interpretation at least arguably goes beyond the wording of the Act. The words of the Act focus on whether the charity is carrying on an activity "itself." As a matter of law, a charity can achieve this through an agency relationship, which at common law imputes the activities of an agent to its principal and does not require the kind of direction and control that CRA requires.[6] It is clear, however, that CRA will not accept that a charity is meeting the "own activities" test unless it exerts a high level of operational control over its agent.

It is also noteworthy that the CRA has applied the "own activities" requirement equally to charitable foundations and charitable organizations. The Act only requires charitable foundations to be constituted and operated for exclusively charitable purposes: they are not subject to a requirement to devote resources to activities carried on by the organization itself. Prior to 2002, when amendments to the Act took effect to make foundations subject to revocation for making a gift to a non-qualified donee "other than in the course of charitable activities carried on by it," there was no statutory basis for requiring charitable foundations to meet the "own activities" test in the same way as charitable organizations.[7] Nonetheless, CRA has long interpreted the Act this way, and the amendment to the Act to codify this position means that foundations are equally restricted in their ability to make grants to non-qualified donees.

Challenges and difficulties with the Canadian rules

The current rules create several related difficulties faced by registered charities that operate internationally. These difficulties flow primarily from the prevailing interpretation of the own activities test and the requirement that a charity maintain direction and control.

Inconsistency with other jurisdictions

One difficulty created by the Canadian rules is the fact that the own activities requirement in the context of foreign activities is conceptually unique among other developed nations. While charities in other jurisdictions are subject to regulatory requirements to monitor and be accountable for the use made of any foreign grants, the requirement that the grantor charity must exercise operational control such that the activity conducted with the transferred funds will constitute the "own activities" of the transferor is very unusual and not well understood.

A comparison with the approach taken in the United States and the United Kingdom – both of which have mature and sophisticated systems of charity regulation – highlights both the similarities and outlier aspects in the Canadian approach.

In the US, private foundations are permitted to make grants to foreign entities if the funds are used for exempt purposes and the foundation maintains expenditure responsibility.[8] In order to maintain expenditure responsibility, the foundation is required

. . . To exert all reasonable efforts and to establish adequate procedures --

(1) To see that the grant is spent solely for the purpose for which made,

(2) To obtain full and complete reports from the grantee on how the funds are spent, and

(3) To make full and detailed reports with respect to such expenditures to the Secretary.[9]

The US Treasury Regulations provide further guidance on the interpretation of these requirements.[10] In order to satisfy the requirement to take reasonable efforts to see that the grant is used solely for the purpose for which it was made, a foundation is required to conduct a "limited inquiry" focusing on the identity, prior history and experience of the grantee and its managers.[11] The foundation must also enter into a written agreement that includes a requirement that the grantee (1) repay any funds that are not used for the purpose of the grant, (2) provide annual reporting on the use of the funds, and (3) maintain records of receipts and expenditures and make its books and records available to the foundation.[12] The foundation must also report to the IRS on the grant.

In the UK, the Charity Commission has released guidance on charities working internationally and making grants to foreign entities.[13] This guidance confirms that charities may transfer funds to foreign partners provided that a partner uses the funds exclusively to further the UK charity's purposes, and provided that appropriate pre-grant due diligence is conducted, along with monitoring and reporting on the use of the funds. The Commission also released a draft guidance for comment in February 2016 dealing specifically with grants to foreign organizations that are not charities.[14] It confirms that the UK permits such grants if charities use them in activities that the charity could, in principle, carry out directly, and so long as appropriate

monitoring and reporting occurs.

Thus, both the US and UK regulatory systems impose monitoring and accountability requirements that bear some similarity to the “direction and control” requirements in Canada. These requirements serve appropriate public policy goals: to ensure that charitable funds are used to further the charitable purposes for which they were given, and to ensure that appropriate systems of accountability and transparency are in place to verify this.

However, in going beyond a requirement that charities maintain accountability for the use of any grants to ensure they are used in appropriate charitable activities, the Canadian rules require a dramatically different conceptual framework for how charities transfer funds to non-qualified donees. Canadian charities are not permitted to make a “grant” to an overseas organization, even if the grant is restricted for specific charitable programs and the charity maintains the elements of direction and control that CRA requires. Canadian charities must instead send funds pursuant to arrangements that are unfamiliar and counter-intuitive to many local NGOs that are accustomed to receiving grants from other funding entities. The Canadian charity must maintain not only accountability over the use of funds, but ongoing operational control.

The difference in the Canadian approach is not mere semantics. It requires Canadian charities to educate their overseas project partners as to the nature of their relationship and the fact that the project partner stands in a position of subordination with respect to the use of the Canadian charity’s resources. This consumes time and resources that charities could otherwise use directly in the charitable project. It also invites errors, which increases the compliance risk to the Canadian charity. Where an overseas partner communicates to a Canadian charity using language from the “granting” paradigm, this creates evidence that could cause CRA to question whether the Canadian charity has made a gift to a non-qualified donee.

There is value in consistency. It provides a common language and common conceptual framework when organizations collaborate across jurisdictions. International NGOs understand and are familiar with accountability to grantors in the context of foreign grants. However, many stakeholders struggle to understand the conceptual Canadian approach and the extent of control demanded by the Canadian rules. An approach that is better harmonized with international practice would allow for much greater efficiency in the transfer and use of Canadian funds overseas.

Difficulties for Canadian charities operating as part of international networks

The Canadian rules are particularly problematic for charities that operate as part of an international network of affiliated charities. There are many examples of these types of international structures, which are often controlled outside Canada, including:

- International relief and development organizations that coordinate their worldwide charitable efforts through an international head office;
- Religious organizations (e.g., Roman Catholic Church) that are subject to an international ecclesiastical hierarchy that is controlled outside Canada; and
- “Friends of” charities that are established specifically to support the activities of a related organization overseas.

These examples are not exhaustive and there are of course differences in how they operate,

but certain salient features are common. In each case, the Canadian charity operates within the context of a broader worldwide network of organizations with a common charitable mission, and with the intention that the international structure will exercise some measure of "top down" control and coordination. A head office – usually located outside Canada[15] – that receives funds from multiple affiliate offices in developed countries and coordinates the expenditure of these funds on projects in developing countries often exercises such control.

Versions of this model have many benefits and allow for more efficient expenditure of resources on charitable activities in several ways:

- By avoiding a situation in which each affiliate office operates wholly independently, this approach avoids duplication of efforts, infrastructure, management, etc., on the ground;
- By reducing administrative inefficiency and duplication, this allows a greater percentage of overall funds to be utilized in direct activities; and
- By allowing affiliates to combine their resources on various projects, it ensures that organizations can optimize the amount of resources spent on each project.

Because of the Canadian rules, however, it is extremely cumbersome for Canadian charities to operate within an international network and coordinate activities with other international affiliates while remaining compliant with the own activities requirement in the ITA. The difficulties are not unique to Canadian charities operating through an affiliated network, but arise very frequently in this context. Two such difficulties are particularly worthy of note.

(1) Unrealistic expectations around direction and control

CRA has interpreted the own activities requirement to mean that a Canadian charity must exercise a high degree of direction and control in the planning and execution of projects for which it will contribute funds. CRA's published guidance on foreign activities (the "Guidance") states that:

The charity must be the body that makes decisions and sets parameters on significant issues related to the activity on an ongoing basis, such as the following:

-- how the activity will be carried out

-- the activity's overall goals

-- the area or region where the activity is carried out

-- who benefits from the activity

-- what goods and services the charity's money will buy

-- when the activity will begin and end[16]

Although the Guidance acknowledges that a charity may accept "advice" from an intermediary and that the charity need not make every decision, it states that the charity must be able to "intervene" in any decision. It expects the Canadian charity to communicate very detailed initial project instructions and provide "clear, complete, and detailed instructions to the intermediary

on an ongoing basis.”

These requirements are often unrealistic, and assume a balance of power, funding and influence that does not align with the practical realities of the relationships involved. In terms of their size and contributed resources, Canadian charities are often not the dominant member within an international network. In many cases, Canadian charities are given the option of providing funds for projects that have been planned and/or coordinated by the head office and will be carried out in accordance with policies and procedures that are uniform across the network. This does not confer the kind of ongoing direction and control on the Canadian charity that the Guidance expects. Furthermore, for organizations whose international hierarchy is grounded in a specific philosophy or belief system, as with many religious organizations, the insistence that a Canadian branch assume control over international activities may be contrary to the organization’s core beliefs.

This places Canadian charities in an invidious position. They must frequently propose agreements with the head office and other entities in the network that would impose controls that are inconsistent with the international governance structure (and which in many cases would not be granted to entities that make greater financial contributions within the network). This requires complex adaptations to the international policies and processes to accommodate the Canadian rules. Failing this, the Canadian charity must either decline to participate or risk CRA sanctions.

CRA in fact acknowledges this problem in the Guidance, which states:

The same requirements for the direction and control of resources apply to charities that are offshoots of head bodies outside Canada. In other words, a charity may not simply send gifts of money to a non-qualified donee, even if that non-qualified donee is the charity's head body.

However, <u>having the head body act as an intermediary for a charity is also often not practical, since the nature of the relationship may prevent the charity from instructing its head body in how to use the money</u>. In these cases, the charities must be sure they are receiving goods and services equivalent in value to the amounts they are sending [Emphasis added].[17]

The Guidance goes on to state CRA will permit charities transferring “small amounts” to a head body (defined as 5% of the charity’s total expenditures up to $5000). Beyond this, however, a charity must either demonstrate direction and control or be able to demonstrate specific value received for the contribution. For most Canadian charities, this exception is of little practical value.

(2) Limitations on provision of partial funding

A related problem is that Canadian charities are highly limited in their ability to provide partial funding for projects conducted through an international coordinating office. Charities that operate within such networks frequently wish to provide funding to support international projects, but are not in a position to fund the entirety of the project. As such, a crucial issue is the extent to which the Canadian tax rules allow charities to pool their resources with those of other charities for use in a common charitable project.

The Guidance, unfortunately, makes this exceedingly difficult. CRA often takes the position that

where a Canadian charity is providing a portion of the total costs of a project being conducted through a foreign organization, the Canadian charity is simply acting as a conduit to fund the activities of the foreign organization and is not carrying out its own activities. The only way recognized by the Guidance for such a pooling of funds is through a "joint venture" that conforms to very specific requirements.

CRA states that in order for a Canadian charity to demonstrate direction and control in the context of a joint venture, the charity must be able to "establish that its share of authority and responsibility over a venture allows the charity to dictate, and account for, how its resources are used."[18] CRA states that this typically requires the establishment of a separate governing board or committee for the project on which the Canadian charity has representation in proportion to its funding contribution. It is also clear that CRA expects a very high degree of ongoing involvement by the Canadian charity in the context of a joint venture.[19]

In many cases, a joint venture approach is not feasible, often because the Canadian charity is not contributing a sufficient proportion of the funding to have adequate representation on the joint venture board to establish any meaningful control. It is also unrealistic, for the reasons set out above, to expect that a Canadian charity can exercise the kind of ongoing control and involvement in day-to-day decision-making and operations suggested by the Guidance.

Thus, in order to comply with the Act, Canadian charities must generally either decline altogether to provide funding for projects for which they cannot provide total funding, or endeavour to identify components of a larger project for which the Canadian charity can provide total funding. This often results in significant inefficiency in the use of the Canadian charity's funds and in the implementation of the overall project. It also makes fundraising difficult because it limits the number of foreign projects for which a Canadian charity may seek support.

This issue arises very frequently. As noted, many international networks seek to operate by pooling resources from multiple sources. As such, the inability to provide partial funding efficiently is a major impediment to Canadian charities seeking to maximize the good done with their resources.

Inconsistency with international development philosophy

The own activities requirement is also inconsistent in many cases with the philosophy underlying the development projects that the charity wishes to support. A growing number of charities adopt a policy of "partnership" with local NGOs and local communities.[20] Charities seek to empower local organizations and communities and to treat them as equals when engaged in development work.

The structures required by the own activities test and the requirement for strict direction and control are not consistent with this philosophy. The rules require that the charity treat local NGOs as subordinates that provide services to the Canadian charity, in contrast to the philosophy embraced by the international development community. This tension is expressed in an interview with Julia Sánchez, President of the Canadian Council for International Cooperation:

Question: The current CRA rules require that Canadian organizations retain "direction and control" of their resources. How is this principle understood by Canadian

international CSOs [civil society organizations]?

I think our sector understands that we are fully accountable for those funds that we raise and disburse. We are accountable not only to the CRA but to our donors, the thousands of individuals who donate to international development charities. We are accountable for the good stewardship and the programmatic impact of those funds. It is not a question of not wanting to be accountable.

…

But I would say that, more importantly, the approach that international development organizations use in working with their partners on the ground is a misfit with terms such as "direction and control." We don't direct and we don't control. We would never use that language or concepts like that with our partners. It is not how we do development. On the contrary, we use terms like solidarity, empowerment, and support. So there is a bit of a clash, if you will, of underlying motivators. We need to acknowledge it and hopefully see if there is anything we can do about that.[21]

By requiring an approach that demands that the Canadian charity control a project, it makes it difficult for such charities to carry out their development work effectively and in a manner consistent with current development philosophy. As noted, it is not a matter of charities or their project partners not wanting to be accountable for the use of the funds. It is a matter of Canadian organizations needing greater flexibility to structure relationships with local partners – that treat them as empowered equals acting in their own right and not under the control of a paternalistic Canadian funder.

Uncertainty

One of the challenges facing Canadian registered charities operating internationally is a lack of certainty as to where the compliance "line" falls in different situations. The Act does not prescribe any specific requirements with respect to direction and control, and while CRA has released some guidance, charities are often subject to considerable uncertainty as to how to apply the requirements for direction and control in practice.

This problem often arises when Canadian charities negotiate the terms of an intermediary arrangement with an overseas partner. Many of the requirements set out in the Guidance exceed what overseas partners are accustomed to or administratively able to accommodate without significant additional expense. As a result, it is common for overseas partners to push back or seek to negotiate less onerous reporting or accounting requirements. In this context, it is crucial that charities have reasonable certainty in knowing where "the line" is and where there is room to negotiate. At present, charities are required to make a large number of judgment calls that provide less than certain assurance of compliance. This can result in some cases in a charity foregoing a project to avoid compliance risk, or going forward without reasonable certainty.

Part of the uncertainty is the result of the fact that CRA has considerable discretion in applying the rules and its administrative positions regarding direction and control. Uncertainty also arises from a tension in the Guidance in the way that it expresses the requirements for direction and control. The Guidance acknowledges that the circumstances of any given project will vary and

appears to countenance some flexibility in the elements of direction and control that will be required. The Guidance states:

Generally speaking, the nature and the number of measures a charity adopts to direct and control the use of its resources should correspond to the circumstances of the activity, such as:

-- the amount of resources involved

-- the complexity and location of the activity

-- the nature of the resources being transferred

-- any previous experience working with a particular intermediary

-- the capacity and experience of the intermediary[22]

Read in isolation, this suggests a practical approach to the direction and control requirements. The Guidance states that CRA "recommends" the elements that are set out in the remainder of the Guidance. However, much of the balance of the Guidance is written in terms that appear less flexible.

Consider, for example, the requirement stated in the Guidance that an intermediary should keep the funds of a Canadian charity in a separate account. The Guidance states that "in any situation where an intermediary is managing an ongoing activity on the charity's behalf, the money received from the charity should be kept in a separate bank account."[23] This is frequently a sticking point in negotiations related to overseas activities. Project partners, while willing to track and account separately for the use of the Canadian charity's funds, often do not want to establish a separate bank account due to the added administrative costs (particularly where the Canadian charity's contribution is small). Can the Canadian charity take account of this practical reality and accept separate tracking of its funds without a separate bank account? The general language above suggests that the charity could take account of the amount of resources involved, and the capacity of the intermediary, and accept this as reasonable in the circumstances. However, the Guidance, when addressing the specific issue of separation of funds, appears only to accept alternative approaches "if it is impossible to keep the charity's funds separate," due to rudimentary or inaccessible banking systems.[24] It does not countenance alternative approaches due to considerations of impracticality and efficiency. Which standard can the charity rely on? On the face of the Guidance, it is unclear.

Other areas of uncertainty exist in the Guidance. What level and frequency of reporting will be considered acceptable? How much detail must be included in the description of a project? Are written agreements really optional? Despite the direction provided in the Guidance, charities struggle to develop structures that provide certainty of compliance while still being practical in the circumstances.

Administrative inefficiency and high compliance costs

The result of the Canadian rules is that Canadian charities face high compliance costs and cannot operate as efficiently as charities in other jurisdictions.

Because the own activities requirements are unusual and require the adoption of structures that are inconsistent with the ways in which project partners are accustomed to functioning and providing accountability and transparency, ongoing education is necessary to ensure ongoing compliance. This leads to further funds being spent on the preparation of legal briefs and policy documents to explain the Canadian rules to overseas entities, rather than on charitable programming on the ground.

These inefficiencies are particularly acute for charities that seek to coordinate within an international charitable network. Because the Canadian charity is under substantially more restrictive constraints than the other charities in the network, it is often necessary to establish separate protocols and processes by which the Canadian charity's funds are integrated. The efficiencies that the charity seeks by coordinating a portion of international project funding through an international head office diminish because of the Canadian restrictions.

The precise cost of these inefficiencies is difficult to estimate. One author has noted the difference in reported administrative costs as between a Canadian charity that focuses on international activities and its affiliated US head office.[25] There are of course many factors that may contribute to a difference in reported administrative costs, and it is difficult to draw conclusions on this basis alone. Anecdotally, however, any lawyer who works regularly with registered charities that are operating overseas knows that the challenges presented by the "own activities" and direction and control requirements account for a significant portion of the required planning and associated legal costs.

These inefficiencies do little to further the public policy goals of transparency and accountability. As noted, Canadian charities and their international affiliates understand the need to maintain appropriate reporting, accounting of funds and tracking of outcomes to confirm that charitable funds have been spent on charitable activities. What is not well understood outside Canada is the rationale behind the additional own activities requirement, which imposes a need to implement artificial legal structures that do nothing to further accountability but impose a substantial administrative burden that ultimately reduces the funds that go to direct charitable activities.

Barriers to entry

The current rules, with their complexity and associated compliance costs, tilt the system in favour of larger charities that have the resources and administrative sophistication to comply. This creates a barrier to entry for smaller charities that lack the resources to comply with the Canadian rules. Ideally, the system would better facilitate international charitable work by smaller charities that may have unique skills, insights or innovations. A more streamlined and simpler regulatory regime would make it easier for new and smaller charities to enter the arena, while still facilitating the work of larger charities.

Options for reform

Having reviewed some of the challenges that arise for Canadian charities conducting foreign activities, I will consider potential options for reform at both the administrative and legislative level that might alleviate some of these difficulties.

Any reform should take account of the implications to various public policy goals. Registered

charities benefit from a significant tax expenditure, and it is appropriate that there should be measures in place to ensure that they use charitable funds for their intended charitable purpose, including when used outside Canada. However, it should be possible to maintain this accountability while simplifying the compliance obligations of registered charities and making it easier for them to work with project partners overseas to accomplish their charitable mission.

Administrative Options

In the absence of specific legislative requirements regarding the meaning of carrying on charitable activities "itself," CRA has considerable discretion to interpret this requirement and the nature and extent of direction and control that will be necessary to comply. It could make changes at the administrative level to apply the current wording in the ITA to better assist charities in carrying out their work and in complying with the law.

Stakeholders made many suggestions for administrative approaches that could simplify overseas activities by registered charities when CRA first released the Guidance for consultation in 2009. For example, the National Charities and Not-for-Profit Law Section of the Canadian Bar Association made a submission on the then-proposed Guidance that addressed many of the ways in which CRA could interpret the rules to allow charities greater flexibility.[26] Many of these suggestions remain relevant.

(1) Address areas of uncertainty in the Guidance

Clarification on various issues in the Guidance would be valuable. For example, the following issues would benefit from additional published clarity:

- The Guidance is clear that a charity must provide its intermediaries with a detailed description of the project to be carried out with the charity's funds. However, aside from acknowledging that charities may receive "advice" from project partners, it is not clear to what extent the CRA expects a charity to play an active role in *developing* the project. Is it sufficient for a charity to review a project proposal and, upon determining that it is charitable in furtherance of the charity's purposes, approve the project? CRA's recent audit of the Public Television Association of Quebec (PTAQ), which involved an educational charity purporting to work through a US broadcaster to supply educational programming, suggests that where a charity selects from a "predetermined package" of programs with limited or no modification, this may be evidence of a lack of direction and control.[27]

There is no policy reason that should prevent a charity from accepting, without modification, a project proposed by an intermediary, provided that the charity is satisfied that the project is exclusively charitable and could in principle be carried on by the charity directly. This should also be consistent with the "own activities" test.[28]

- Many charities wish to support projects that are ongoing and do not have a discrete beginning and end date. How should ongoing projects be described and defined?
- Is it sufficient for a project partner to commingle Canadian funds with its own if it can track and account for the receipt and expenditure of Canadian funds separately? Can this approach be taken in circumstances where it is administratively inefficient (but not necessarily impossible) to maintain a separate bank account for Canadian funds?

It is submitted that there is no reason to require a separate bank account in all circumstances. Charities and their project partners should have the flexibility to determine the most efficient means of tracking and accounting for the expenditure of Canadian funds.

- How much flexibility is possible with respect to reporting? Is there an absolute minimum that must be provided? Is it sufficient for reporting to be provided at the end of a project only? To what extent can more informal forms of reporting (i.e. phone calls and meetings with project partners) supplement reporting?

Furthermore, what level of detail is acceptable? The Guidance provides as an example an environmental project in which "the agent sends bi-monthly progress reports back to the charity, including a financial breakdown of the resources used, a written description of activities undertaken and their results, and photographs" as well as "a final written report showing the project's conclusion."[29] The Guidance states that in such circumstances, the Canadian charity would "likely" be able to show that it had adequate monitoring and supervision. Why is it only "likely" that this would be adequate? In what circumstances would such reporting be inadequate?

It would be hoped that these issues are addressed in a way that facilitates overseas activities and does not impose unnecessarily restrictive requirements. However, clarity on these points is valuable regardless of how strictly CRA applies its position on direction and control.

(2) Adopt reasonableness standard for direction and control

Other jurisdictions are more explicit in acknowledging that charities will not be held to a standard of perfection when exercising oversight over international grants, and that reasonable efforts by a charity to ensure the proper use of its funds are sufficient. The US Treasury Regulations related to the expenditure responsibility requirements, for example, make this clear when they state:

A private foundation is not an insurer of the activity of the organization to which it makes a grant. Thus, satisfaction of the requirements of sections 4945(d)(4) and (h) and of subparagraph (3) or (4) of this paragraph, will ordinarily mean that the grantor foundation will not have violated section 4945(d) (1) or (2). A private foundation will be considered to be exercising "expenditure responsibility" under section 4945(h) as long as it exerts all reasonable efforts and establishes adequate procedures:

(i) To see that the grant is spent solely for the purpose for which made,

(ii) To obtain full and complete reports from the grantee on how the funds are spent, and

(iii) To make full and detailed reports with respect to such expenditures to the Commissioner.[30]

The Guidance could provide a similar acknowledgement to give directors and trustees some comfort in determining appropriate measures around direction and control. While the Guidance acknowledges that the precise measures required will vary depending on the circumstances, it would be valuable to recognize expressly that a reasonable and good faith effort by a charity to ensure appropriate direction and control is sufficient to meet CRA's requirements.

(3) Harmonize monitoring requirements with government funders

In some circumstances, charities operate overseas pursuant to funding agreements with Global Affairs Canada or other Canadian government agencies. In these circumstances, it should be reasonable to accept the terms of such funding agreements as satisfying the requirements for reporting and monitoring of a project. The Guidance, however, states that the terms of funding agreements from Global Affairs Canada will not necessarily meet the requirements for reporting for the purposes of the ITA.[31]

Charities should not be subject to separate and potentially conflicting obligations regarding project reporting and monitoring from two departments of the federal government. Funding agreements with Global Affairs Canada provide for direct funding from the federal government and appropriate related oversight to ensure that charities spend such funds properly. Duplication of this oversight by CRA, with potentially inconsistent requirements, creates needless administrative burden and uncertainty. It would greatly simplify the compliance obligations of registered charities to be able to rely on the accountability measures in Global Affairs Canada funding agreements as also being sufficient for the purposes of the ITA requirements.

(4) Allow greater discretion by intermediaries

As noted, it should be possible as a matter of law for a charity to establish that it is carrying own activities through the establishment of an appropriate intermediary arrangement – agency agreements in particular – with a foreign organization. All further requirements regarding direction and control are essentially administrative requirements that may be adjusted or varied as the Charities Directorate determines.

It would be possible administratively to adopt a more flexible approach to oversight by registered charities that better focuses on the key elements of accountability and transparency necessary to ensure that funds are used for charitable purposes and activities that could in principle be carried out by the Canadian charity directly, without unduly limiting the discretion of foreign intermediaries. All that should be necessary from an oversight perspective is sufficient monitoring to verify the appropriate expenditure of funds. Operational control over the expenditure – including the requirement to demonstrate involvement in the planning of a project and operational decisions – need not be required. It should be possible to give intermediaries the discretion and latitude to determine how best to fulfill the purposes within the parameters set by the charity.

Any change to CRA's administrative practices must of course be consistent with existing legislation and jurisprudence. There have been several cases in Canada addressing the requirements that apply to Canadian registered charities operating overseas. These cases have generally upheld decisions by CRA to revoke registration on the basis that a charity failed to exercise direction and control over its resources. However, these decisions should be limited to their own facts. Several of these cases involve a failure by charities to follow the specific terms of agreements that had been put in place with an agent,[32] or to have any form of agreement evidencing an agency relationship at all.[33] No court has affirmed the specific elements of direction and control that charities must meet in order for a charity to adhere to the "own activities" test. They have rather affirmed CRA's exercise of discretion in applying this standard to particular circumstances. As such, it should be open to CRA to take a less restrictive

approach.

Legislative change

In introducing the “own activities” test in the Act, Parliament does not appear to have considered the implications on foreign activities.[34] Rather, Parliament intended to distinguish between charities that pursue charitable activities directly, versus those that fund charitable activities. Thus, when assessing Parliament’s intent in creating the “own activities” requirement, it should not be assumed that the current restrictive approach is what Parliament intended.

The options below are largely variations on a theme. The principle underlying each is to simplify the compliance obligations of Canadian registered charities by allowing them to make grants to foreign entities, while maintaining appropriate transparency and accountability over the use of charitable funds outside Canada.

(1) Allow grants to foreign organizations to further charitable purposes

Parliament could revise the Act to allow any Canadian registered charity to make grants to foreign organizations in furtherance of the Canadian charity’s charitable purposes. It could do this through the creation of an exception to the “own activities” requirement, or a deeming provision confirming that the requirement to carry on charitable activities will be met where a grant is made for charitable activities that further the charity’s charitable purposes, and provided that certain measures are taken to verify the appropriate use of the funds.

The basic elements of such an approach could be as follows:

- Grants must be made subject to restrictions ensuring that the granted funds are used exclusively for charitable activities that could in principle be conducted by the Canadian charity directly;
- The Canadian charity would be required to conduct due diligence on its grantee sufficient to provide reasonable assurance that the foreign organization is trustworthy and competent;
- The Canadian charity would need to maintain appropriate monitoring and reporting sufficient to confirm the proper use of its funds; and
- The charity must have the ability to discontinue grants if the funds are not used properly.

The essence of the change would be to replace the current “own activities” approach with a system of restricted grants. This would make the Canadian regime more akin to approach taken in the US and UK and other jurisdictions.

There would be several potential benefits to this approach that could improve the efficiency of Canadian charities overseas expenditures:

- Making grants subject to restrictions is more consistent with practical reality than an approach that presumes the Canadian charity to be in a position of superiority and the intermediary to be in a subordinate role;
- This approach would bring the Canadian system more into line with the approach taken in other developed jurisdictions;

- Because the charity is no longer required to demonstrate that the project is its own activity, this approach should enable Canadian charities to make grants for charitable projects without being required to contribute the whole of the funding for the project, and without a requirement to plan or develop the project;
- This approach would reduce many of the current inefficiencies caused by the "own activities" test; and
- By ceasing to force charities to adopt the activities of the entities they fund, it would reduce the flow-through liability to which Canadian charities and their tax-subsidized assets are exposed.

There may be a concern that permitting grants to non-qualified donees reduces the accountability and control that a Canadian charity can exert over a recipient of funding. However, most if not all of the control mechanisms that can be exercised in the context of an agency or other intermediary relationship can be applied in the context of a restricted grant. The grant can be made subject to specific and binding restrictions that the funds can only be used for specific purposes. The grant can be made in instalments subject to confirmation that funds previously provided have been used appropriately. The grantor can also impose reporting or other accountability requirements on the grantee, and can include requirements that funds be returned if not used properly. The practical ability of a grantor charity to recover funds in this circumstance would depend on the resources of the grantee, but this issue applies equally where the foreign entity is appointed as agent or other intermediary and misuses the Canadian charity's funds.

This change would not sacrifice the reporting and transparency that is necessary to safeguard the Canadian tax expenditure and ensure that charities spend Canadian donations properly on exclusively charitable activities. It would simply remove certain of the more inefficient aspects of the current rules that add complexity and administrative burden. The requirement that a charity carry out activities "itself" does not serve a clear public policy goal. It prevents a charity from taking full advantage of the superior experience and skills of a foreign intermediary and it forces Canadian charities to impose overbearing levels of control that run counter to the "partnership" model of international development.

(2) Remove limitations preventing foundations from granting to foreign charities

As a variation on option (1), Parliament could remove the limitations on granting to non-qualified donees only for charitable foundations. This would preserve the distinction between charities that operate directly and those that operate by making grants.

Prior to 2002, the Act did not contain any express restrictions on foundations making grants to foreign charities, provided that the grant furthered the foundation's charitable purposes. CRA administratively applied the restriction on granting to non-qualified donees to charitable foundations, but this was only codified in the Act in 2002 with the introduction of express prohibitions on making grants to non-qualified donees. This express prohibition could be removed or replaced with a provision confirming that charitable foundations may further their charitable purposes by making grants to non-qualified donees. As above, the legislation could include a further requirement that the foundation maintain sufficient records to demonstrate that it used the granted funds for exclusively charitable purposes.[35]

Given the number of charitable organizations operating overseas, it would seem preferable to

expand granting options in a way that enables charitable organizations to operate overseas by making grants. Indeed, the focus on activities rather than purposes in the context of charitable organizations is arguably inconsistent with the decisions of the Supreme Court of Canada that have stated that the purpose for which an activity is conducted, rather than any intrinsic character of the activity, determines whether it is charitable.[36] However, if it were determined to be preferable to maintain distinction between charitable organizations and charitable foundations in the context of overseas activities, providing granting flexibility to foundations would be beneficial.

(3) Equivalency determination

Options (1) and (2) would permit grants to be made to any type of foreign entity to further a charitable purpose. A more limited approach could be taken that would permit grants only to entities that are the foreign equivalent to Canadian registered charities.

Under the US Treasury Regulations, private foundations are permitted to make grants to entities that are the foreign equivalent to US public charities on the basis of a "good faith determination" as to the equivalency of the foreign organization.[37] The US Treasury Regulations state as follows:

A determination ordinarily will be considered a good faith determination if the determination is based on current written advice received from a qualified tax practitioner concluding that the grantee is an organization described in section 509(a)(1), (a)(2), or (a)(3) (other than an organization described in section 4942(g)(4)(A)(i) or (ii)) or in section 4940(d)(2), and if the foundation reasonably relied in good faith on the written advice in accordance with the requirements of § 1.6664-4(c)(1) of this chapter. The written advice must set forth sufficient facts concerning the operations and support of the grantee organization for the Internal Revenue Service to determine that the grantee organization would be likely to qualify as an organization described in section 509(a)(1), (a)(2), or (a)(3) (other than an organization described in section 4942(g)(4)(A)(i) or (ii)) or in section 4940(d)(2) as of the date of the written advice.

It would be possible to adapt a similar process to the Canadian context. The CRA could give Canadian registered charities the ability to make a good faith determination that a foreign organization is the equivalent to a Canadian registered charity. Upon making such a determination, it could permit a Canadian charity to make a grant to the organization subject to appropriate requirements for monitoring and accountability to verify that the granted funds were used for charitable purposes.

The process in the US has been criticized for being cumbersome,[38] requiring an opinion from a tax practitioner, but would provide a means by which registered charities can make grants to other organizations while providing reasonable assurance that the organization is constituted for exclusively charitable purposes that would be charitable under Canadian law. The same requirements with respect to monitoring of the grant could be applied to ensure appropriate oversight.

(4) Expand categories of "qualified donee" for foreign granting purposes

The government could also amend the Act to allow CRA broader authority to recognize foreign

charitable organizations as qualified donees for the purposes of being eligible to receive grants from Canadian charities. This would broaden the ability of registered charities to make grants to foreign entities, while ensuring that the CRA has vetted and approved entities to receive such grants.

The Act currently provides CRA with authority to recognize certain types of foreign organizations as qualified donees, including certain charitable organizations outside Canada to which Her Majesty in right of Canada has made a gift.[39] Subsection 149.1(26) provides for the registration of such foreign charities as follows:

(26) For the purposes of subparagraph (a)(v) of the definition qualified donee in subsection (1), the Minister may register, in consultation with the Minister of Finance, a foreign charity for a 24-month period that includes the time at which Her Majesty in right of Canada has made a gift to the foreign charity, if

(a) the foreign charity is not resident in Canada; and

(b) the Minister is satisfied that the foreign charity is

(i) carrying on relief activities in response to a disaster,

(ii) providing urgent humanitarian aid, or

(iii) carrying on activities in the national interest of Canada.

This category of registered foreign charity could serve as a model for how Parliament might expand CRA's authority to register foreign charities. CRA has described its policy with respect to the administration of this provision in guidance document CG-023.[40] In order to be eligible for registration, an organization must provide the documentation to CRA to allow CRA to assess whether the organization meets the criteria for registration, namely:

- The organization must be established or created outside Canada and not resident in Canada;
- The organization must have exclusively charitable purposes and activities in accordance with Canadian common law;
- The organization must ensure that its income is not payable or otherwise available for the personal benefit of any owner, member, shareholder, trustee, or settlor of the organization;
- The organization must be the recipient of a gift from Her Majesty in right of Canada; and
- The organization must currently be undertaking at least one of the following: relief activities in response to a disaster; urgent humanitarian aid; or activities in the national interest of Canada.

The current requirement that the organization must have received a gift from the government of Canada within the preceding 24-month period serves a highly limiting function. Very few organizations are registered in this category at any given time.[41] However, Parliament could expand this approach to allow the Minister to register a broader range of organizations as qualified donees.

In its broadest form, the government could authorize the Minister to recognize as a qualified donee any organization that meets the first three criteria above. In other words, it could authorize CRA to register as a qualified donee any foreign organization that would meet the requirements for registration if it were established in Canada. This would of course have the potential to expand the number of foreign qualified donees very substantially. Further requirements could be imposed that would limit the types of organizations that are eligible. For example, CRA could gear eligibility for registration specifically towards foreign charities that are affiliated with a domestic Canadian registered charity and which operate for a common charitable purpose. This would enable major international charities to make grants of funds within their affiliated international network. CRA could grant such registrations sparingly and to organizations with well-established reputations.

If the government granted full-qualified donee status to such entities such that they would be eligible to issue official donation receipts for public gifts, this change could entail a substantial new tax expenditure. However, this would not need to be so. It would be possible to expand the category of qualified donee such that CRA would recognize these foreign organizations only for receiving grants from Canadian charities. They would not have the authority to issue tax receipts themselves, thus avoiding additional revenue loss for the Canadian government.

The registration of such qualified donees could be revocable in the event that the Minister determines that funds transferred to a registered foreign organization have not been spent properly on charitable activities. The ability to make grants to such qualified donees could be contingent on the grantor Canadian charity maintaining documentation sufficient to confirm the proper expenditure of these funds on exclusively charitable activities. To the extent that these requirements are not met, the gift would be considered a gift to a non-qualified donee, which is grounds for revocation of charitable registration of the Canadian charity. This would incent the Canadian charity to ensure that the reporting requirements are met (at least as much as under the current rules), and would provide CRA with the leverage necessary to enforce compliance.

Anti-terrorism

Any changes to the current regime must be mindful of ensuring that they do not expose charitable assets to greater risk of falling into the hands of terrorist or criminal organizations. Registered charities, like all other persons in Canada, must ensure that they do not operate in association with groups or individuals that engage in or support terrorism. Charities are subject to revocation if they make any resources available to a listed organization, in addition to penalties under the *Criminal Code*.

The changes proposed above would not remove or reduce any of these prohibitions or penalties, and it is clear that other jurisdictions that permit domestic charities to make grants to foreign entities have anti-terrorism regimes that are every bit as strict as in Canada. That said, appropriate consideration would need to be given to whether any of the changes proposed would put Canadian assets at greater risk. It would be hoped that at least some of these reforms could be adopted without increasing this risk.

Conclusion

The chief public policy goal that should guide the regulation of charitable activities outside Canada is to ensure that a charity’s resources are used to further the charity’s charitable

purposes. The Canadian rules currently contain requirements that do little to further these goals but create administrative inefficiencies that impose a deadweight loss on the sector.

The reforms proposed above would be in the interest of both Canadian registered charities and Canadian taxpayers and charitable donors, all of whom want to ensure that charitable donations are spent as efficiently as possible on charitable activities with a minimum of funds spent on administrative and legal expenses. The proposed revisions will ensure that Canadian charities maintain transparency and accountability in respect of all funds transferred to registered foreign organizations, but would avoid the inefficiencies and costs associated with the current "own activities" requirement.

[1] Canada Revenue Agency, CG-002 *Canadian Registered Charities Carrying Out Activities Outside Canada* (July 8, 2010) (the "Guidance") at section 3. This is subject to few relatively narrow exceptions – for example, support of the military is only charitable if conducted in Canada.

[2] The remaining elements of the definitions of "public foundation" and "private foundation" relate to how the entity is controlled and financed, and are not directly relevant to this paper.

[3] *Income Tax Act*, RSC 1985, C.1 (5th Supp.), paragraph 149.1(6) (b).

[4] Parallel versions of this provision apply to charitable organizations, public foundations and private foundations: *ITA*, paragraphs 149.1(2) (c), (3) (b.1) and (4) (b.1).

[5] For example, *Canadian Committee for the Tel Aviv Foundation v. R,* 2002 FCA 72 ("***Tel Aviv***"); *Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)*, 2002 FCA 323 ("***CMDA***"); *Bayit Lepletot v. Canada (Minister of National Revenue*, 2006 FCA 128; *Public Television Assn. of Quebec v. Minister of National Revenue*, 2015 FCA 170 ("***PTAQ***").

[6] Numerous commentators have noted this: see for example, Canadian Bar Association, National Charities and Not-for-Profit Law Section, "CRA Proposed Guidance of Activities Outside Canada for Canadian Registered Charities" (October 2009) at page 7. See also Cameron Harvey and Darcy MacPherson, *Agency and Partnership Law Primer*, 5th ed., (Thomson Reuters, 2016) at chapter 2, which discusses the creation of agency by express agreement and does not indicate a requirement for ongoing direction and control in order to create an agency relationship.

[7] Indeed, prior to the introduction of paragraphs 149.1(3)(b.1) and (4)(b.1), CRA acknowledged in 2000 that its then purely administrative position – that charitable foundations cannot make grants to non-qualified donees – had no basis in law, and accepted grants by a charitable foundation to foreign charities as satisfying the requirement to be made for a charitable purpose, in the context of a settlement with the Wolfe and Millie Goodman Foundation: see Robert B. Hayhoe, "A Critical Description of the Canadian Tax Treatment of Cross-Border Charitable Giving and Activities", 49(2) *Canadian Tax Journal* 320-44 (2001) at 331-32. This position was affirmed by the Federal Court of Appeal in *Prescient Foundation v. Minister of National Revenue*, 2013 FCA 120 at paras. 25-32.

[8] IRC § 4945(d) (4) (B). The foundation is not required to maintain responsibility where the

foundation makes a good faith determination that the foreign entity qualifies under certain provisions of the Code (essentially, that it is the foreign equivalent of a public charity). A good faith determination requires reliance on the advice of a qualified tax practitioner.

[9] IRC § 4945(h).

[10] 26 CFR § 53.4945-5. See Marcus S. Owens, "International Grantmaking by U.S. Foundations: The Concept of Expenditure Responsibility," *The Philanthropist* (April 14, 2015).

[11] 26 CFR § 53.4945-5(b) (2).

[12] 26 CFR § 53.4945-5(b) (3).

[13] Charity Commission for England and Wales, *Charities working internationally*, (http://forms.charitycommission.gov.uk/media/94599/cwitext.pdf).

[14] Charity Commission for England and Wales, *Draft Guidance: Grant funding an organisation that isn't a charity* (first published Feb 17 2016) (https://www.gov.uk/guidance/draft-guidance-grant-funding-an-organisation-that-isnt-a-charity)

[15] Robert Hayhoe, 'Why the Absence of Global Charity Headquarters in Canada?" *The Philanthropist* (April 27, 2015). Hayhoe comments that the current tax rules in Canada make the sensible running of an international charity headquarters impossible.

[16] Guidance, *supra*, at section 7.0.

[17] Guidance, *supra,* at Appendix C.

[18] Guidance, *supra*, section 6.3.

[19] CRA states that the following factors will be relevant in determining whether a charity has direction and control: (i) presence of members of the Canadian charity on the governing body of the joint venture; (ii) presence of the Canadian charity's personnel in the field; (iii) joint control by the Canadian charity over the hiring and firing of personnel involved in the venture; (iv) joint ownership by the Canadian charity of foreign assets and property; (v) input by the Canadian charity into the venture's initiation and follow-through, including the charity's ability to direct or modify the venture and to establish deadlines or other performance benchmarks; (vi) signature of the Canadian charity on loans, contracts, and other agreements arising from the venture; (vii) review and approval of the venture's budget by the Canadian charity, availability of an independent audit of the venture, and the option to discontinue funding when appropriate; (viii) authorship by the Canadian charity of such things as procedures manuals, training guides, and standards of conduct; and (ix) on-site identification of the venture as being the work, at least in part, of the Canadian charity.

[20] See Malcolm D. Burrows, "New Series: Canadian Charities Working Internationally, *The Philanthropist* (March 22, 2015), who notes the contrast between the Canadian Council for International Cooperation *Code of Ethics and Operational Standard*, which emphasizes a "partnership" approach to international development, and the principles of direction and control set out in the Guidance.

[21] Juniper Glass, “Do Canada’s internationally focused charities operate in an enabling environment?” *The Philanthropist* (April 20, 2015).

[22] Guidance, *supra*, at section 7.1.

[23] Guidance, *supra*, at section 7.7.

[24] Guidance, *supra*, at section 7.7.

[25] John Lorinc, “The Problems with Direction and Control” *The Philanthropist* (April 6, 2015). Lorinc cites the example of the higher administrative costs (7% versus 1%) incurred by Food for the Hungry Canada, a Canadian registered charity, as compared with a 501(c) (3) non-profit operating as part of a consortium of Christian anti-hunger charities. Lorinc quotes a representative of FH Canada who attributes higher administrative costs to the direction and control requirements.

[26] Canadian Bar Association, National Charities and Not-for-Profit Law Section, “CRA Proposed Guidance of Activities Outside Canada for Canadian Registered Charities” (October 2009).

[27] *PTAQ*, *supra*, at para. 46.

[28] The Federal Court of Appeal in *PTAQ* in fact commented that had the charity carried out the monitoring and reporting provided for in the agreements with its agent, this would have established direction and control, implying that it would have been acceptable for the charity to select predetermined projects provided that it monitored the project appropriately: *PTAQ*, *supra*, at para. 53.

[29] Guidance, *supra*, at section 7.4.

[30] 26 CFR § 53.4945-5(b)(1).

[31] Guidance, *supra*, at section 9.

[32] For example, *Tel Aviv*, *supra,* in which the Canadian charity had failed to follow the terms of an agency agreement between itself and a foreign agent, and with specific undertakings made to CRA: see paras. 30-31. In *PTAQ, supra,* the charity was also unable to demonstrate compliance in practice with the terms of the agency agreement with a US agent: see para. 55.

[33] For example, *CMDA*, *supra,* in which the Court concluded “There is no evidence in the record that there was ever an agency relationship between the appellant and MDA except the appellant's bare assertions to that effect”: para. 75.

[34] Department of Finance, *Discussion Paper: The Tax Treatment of Charities* (Ottawa: Department of Finance, 1975) at para. 12; Budget Papers, May 25, 1976, at page 4.

[35] Such a provision would to some degree be for greater certainty, as the Act includes a general requirement that registered charities must “keep books and records of account … containing … information in such form as will enable the Minister to determine whether there are

any grounds for the revocation of its registration under this Act”: ITA, paragraph 230(2)(a).

[36] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 SCR 10 at para. 152, where Iacobucci J. states: “It is really the purpose in furtherance of which an activity is carried out, and not the character of the character of the activity itself, that determines whether or not it is of a charitable nature.” See also *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency),* 2007 SCC 42 at para. 24.

[37] 26 CPR § 53.4945-5(a)(5).

[38] Patrick Boyle, Robert Hayhoe, Lisa Mellon & LaVerne Woods, “Comparing the Ability of Canadian and American Charities to Operate and Fund Abroad – Tips on Foreign Activities by Canadian Charities”, paper presented by National Charity and Not-for-Profit Law Section, Ontario Bar Association (May 2006) at pages 11-12.

[39] *ITA*, *supra*, subsection 149.1(26).

[40] CG-023 *Charitable Organizations Outside Canada that Have Received a Gift from Her Majesty in Right of Canada* (August 10, 2012).

[41] At present, only two organizations are recognized as qualified donees in this category.