ARTICLES

Canadian Charities Operating Outside of Canada: What You Need to Know

*Terrance S. Carter**

A. Introduction

Many Canadian registered charities[1] pursue charitable purposes abroad by conducting activities such as disaster relief, poverty reduction, education programs, community economic development, child sponsorships and missionary programs. As well, some diaspora communities often raise funds and resources to help their compatriots back home who are in need. Charities that are, or want to become involved, in foreign activities, though, as well as their legal counsel, are often unaware of the various legal issues that are involved in pursuing charitable activities outside of Canada. In this regard, legal counsel may be called upon to provide assistance in the following areas:

- Incorporating and applying for registered charity status in order to conduct activities outside of Canada;
- Complying with the *Income Tax Act* ("ITA")[2] and the requisite requirements of the Charities Directorate of Canada Revenue Agency ("CRA") in relation to foreign activities;
- Reviewing the T3010 *Registered Charity Information Return* in relation to foreign activities; and
- Preparing for or responding to a CRA audit in relation to its foreign activities.

While CRA recognizes that charities operating abroad face complex problems and work in dangerous environments,[3] CRA still requires that charities conducting charitable activities[4] outside of Canada be able to evidence direction and control over its programs, comply with ITA reporting requirements, and be aware of applicable compliance issues when operating in foreign jurisdictions. These requirements can be challenging for larger charities, let alone for small charities just commencing foreign operations.

This article provides an overview of the various issues charities must consider before embarking on foreign operations in order to ensure appropriate compliance with the requirements for charities operating outside of Canada.

B. Preliminary Issues

When creating a plan to undertake charitable activities outside of Canada, there are a number of preliminary issues that a charity will need to consider. Three of these issues in particular are discussed in the CRA Guidance on Foreign Activities entitled *Canadian Registered Charities Carrying Out Activities Outside Canada* ("CRA Guidance"):[5]

1. If the organization is pursuing charitable registration in order to respond to a disaster or a humanitarian crisis, will it be able to meet the basic requirements that every applicant must meet when applying for charitable status?
2. If the organization is planning to carry out its charitable programs through intermediaries, is it prepared to disclose the identity of

Organismes de bienfaisance Canadiens œuvrant à l'étranger : ce qu'il faut savoir

*Terrance S. Carter**

De nombreux organismes de bienfaisance enregistrés canadiens poursuivent des buts caritatifs à l'étranger, tels que secours en cas de catastrophe, réduction de la pauvreté, éducation, développement économique communautaire, parrainage d'enfants ou programmes missionnaires. En outre, certaines communautés canadiennes d'origine étrangère recueillent des fonds et des ressources pour aider leurs compatriotes nécessiteux dans leur pays. Cependant, les organismes de bienfaisance ignorent souvent les divers problèmes juridiques qui se posent quand ils mènent des activités caritatives à l'extérieur du Canada.

L'Agence du revenu du Canada « ARC » reconnaît que les organismes de bienfaisance qui œuvrent à l'étranger sont confrontés à des problèmes complexes et travaillent dans des environnements dangereux. Elle n'en exige pas moins qu'ils puissent démontrer que leur orientation et le contrôle de leurs programmes respectent les exigences de la Loi de l'impôt sur le revenu « LIR » en matière de déclaration, et qu'ils tiennent compte des exigences pertinentes de la conformité quand ils œuvrent dans des ressorts étrangers.

Pour structurer les dispositions selon lesquelles un organisme de bienfaisance œuvrera dans un ressort étranger, il n'existe pas de solution optimale passe-partout. L'avocat conseillant l'organisme

doit personnaliser les options disponibles et indiquer quelles pratiques exemplaires et mécanismes de diligence raisonnable lui conviennent, ainsi que la mesure dans laquelle il doit établir une documentation sur ses activités pour pouvoir démontrer sa conformité aux indications de la LIR et de l'ARC. Un organisme de bienfaisance qui fait d'emblée preuve de prudence dans la conduite de ses activités étrangères peut connaître beaucoup de succès et éviter d'exposer inutilement sa responsabilité et d'encourir des coûts par suite d'une action en justice ou d'un contrôle par l'ARC de ses activités étrangères.

Cet article présente une vue d'ensemble des diverses questions que les organismes de bienfaisance doivent prendre en compte avant de se lancer dans des activités à l'étranger, afin d'assurer leur conformité aux exigences applicables aux organismes de bienfaisance œuvrant à l'extérieur du Canada.

En outre, l'article examine les diverses options de collaboration avec un intermédiaire, y compris les mandats, les coentreprises, les coopératives et les contrats de biens et de services. L'article aborde aussi les questions liées au contingent des versements et diverses autres questions, comme la conformité aux lois des ressorts étrangers, la lutte au terrorisme et au blanchiment d'argent, la cession de biens réels à des donataires non reconnus et le renforcement des capacités.

** Terrance S. Carter, B.A. (1975), McGill; LL.B. (1978), École de droit Osgoode Hall, agent de marques de commerce, est associé directeur de Carters Professional*

the intermediaries in the charity's T3010 *Registered Charity Information Return* when doing so may put the intermediaries at risk?

3. As well, if the organization is planning to implement its charitable program through intermediaries, will the organization be able to evidence the direction and control that CRA requires?

In relation to the first issue, CRA recognizes that following a natural disaster, "many organizations want to provide immediate assistance and relief to those affected."[6] While CRA may prioritize such applications, the applicants must still meet the same requirements as every other applicant in order to obtain registered charity status. These requirements include being able to "show how they will make sure that they are carrying on their own activities as required by the ITA and also that they will direct and control the use of their resources"[7] as discussed later in this article. The directors of an applicant for registered charity status should also be mindful that the instability common to disaster areas may pose risks to a charity's assets, including its employees and volunteers. As a result, CRA recommends that organizations consider working with existing registered charities or other qualified donees[8] that have the experience and capacity to execute such activities.[9]

In relation to the second issue, a charity that works with foreign intermediaries must name its foreign intermediaries and their country code of residence on Schedule 2 to the T3010 *Registered Charity Information Return* ("T3010"). This information is published on CRA's website, which is publicly accessible.[10] For charities working in hostile environments, publication of this information could endanger the charity and its foreign intermediaries. Some commentators have suggested that CRA will permit a charity to leave this section of the T3010 blank if the charity attaches a covering letter explaining its reasons and agreeing to provide its foreign intermediaries on request.[11] Others have suggested sending the list of foreign intermediaries in a sealed envelope with an explanation why the list should be kept confidential. The difficulty with these approaches, however, is there is no assurance that CRA will keep the information confidential, given that Bill C-25 (2006) permits CRA to share any information it receives with other Canadian government agencies, such as the Royal Canadian Mounted Police or Canadian Security Intelligence Service, as well as foreign governments and agencies.[12]

In relation to the third issue, an applicant for registered charity status that intends to carry out its charitable program through an intermediary should be able to demonstrate that it will maintain direction and control over its resources by including a draft agreement between the charity and its intermediary with its application for charitable status.[13] The CRA Guidance notes this "is often a good way to show the CRA that the relationship the applicant will enter into with its intermediary will enable the applicant to meet all requirements for registration."[14] Therefore, omitting a draft agreement could delay the application process. The same comment would apply to an existing registered charity that is embarking on conducting activities outside Canada and is seeking pre-approval from CRA of this new activity.

C. Carrying on Foreign Activities

The ITA does not distinguish between whether charitable activities are conducted inside or outside of Canada, so long as the charity complies with the ITA and the activities are in furtherance of its charitable purposes. A charity can act outside Canada by:[15]

1. Making gifts to qualified donees;[16] or
2. Carrying out its charitable activities through its staff, directors, members, volunteers or intermediaries.

1. Gifts to Qualified Donees

The simplest way for a charity to carry on activities outside of Canada is to make a gift to a "qualified donee" that has the experience and capacity to achieve the charity's desired objective. Under the ITA, "qualified donees" are organizations that can issue official donation receipts for gifts from individuals and corporations, as well as receive gifts from other qualified donees.

A "qualified donee" can be any one of the following entities:[17]

- A person that is registered by the Minister as
  - o A housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(*i*), that has applied for registration;
  - o A municipality in Canada;
  - o A municipal or public body performing a function of government in Canada that has applied for registration;
  - o A university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada; or
  - o A foreign organization for a 24-month period that includes the time at which Her Majesty in right of Canada has made a gift to the foreign organization, if
    - (a) the foreign organization is a charitable organization that is not resident in Canada; and
    - (b) the Minister is satisfied that the foreign organization 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[18]
- A registered charity (including a national arts service organization);
- A registered Canadian amateur athletic association; or
- Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations.

A registered charity designated by CRA as a charitable organization can gift up to fifty percent of its income to qualified donees, other than income disbursed by way of a gift the making of which is a political activity, and still be considered under the ITA to be carrying on its own charitable activities.[19] Generally, for a registered charity designated by CRA as a public foundation, more than fifty percent of its income each year will be gifted to qualified donees. In doing so, a charity, whether it is a charitable organization or a public foundation, should satisfy itself when gifting to another registered charity or other qualified donee that the recipient organization includes objects or purposes that are complementary to its own in order to ensure that its charitable purposes will be fulfilled when making the gift.

Corporation et conseiller auprès de Fasken Martineau DuMoulin s.r.l. en matière de bienfaisance. Texte adapté avec la permission de Carswell, division de Thomson Reuters Canada Limitée, extrait de l'ouvrage intitulé Corporate and Practice Manual for Charities and Not-for-Profit Organisations, de Jane Burke-Robertson, Terrance S. Carter et Theresa L.M. Man, dont la publication est prévue en 2013. L'auteur tient à reconnaître et remercier Dean E. Blachford, B.A., B.C.L., LL.B., de son aide dans la révision de cet article.
Courriel : tcarter@carters.ca

With the exception of those qualified donees that are actually located outside of Canada (*i.e.* prescribed universities, the United Nations and its agencies, and foreign organizations to which Her Majesty has made a gift), gifting to qualified donees may not be a practical option for Canadian registered charities that wish to carry on activities outside of Canada. The more realistic use of gifts to qualified donees would be where a registered charity makes a gift to a qualified donee that is located in Canada, such as a registered charity that is a national or provincial office of a religious denomination in Canada. However, the recipient qualified donee would itself become obligated to disburse the funds received for the intended foreign activity, either through its own staff and volunteers, or through intermediaries that they choose to work with, thereby necessitating that they be able to evidence the requisite direction and control required by CRA. As such, the need to evidence direction and control

would simply have been transferred to another qualified donee, not eliminated.

When a registered charity does make a gift to a qualified donee, it will now be important to consider whether to include a written direction that the gift cannot be used for political purposes by the recipient qualified donee. Otherwise, as a result of changes introduced in the Budget 2012 (Bill C-38) concerning gifts to qualified donees,[20] there would remain a possibility that CRA might conclude that it was "reasonable to consider" that a purpose of the gift was to support the political activities of the recipient qualified donee, thereby necessitating that the gift be included within the allowable limit that can be expended on political activities of both the sending charity and the recipient qualified donee.[21]

2. "Own Activities" Test

With the exception of gifts to qualified donees, the ITA requires a registered charity to devote all its resources "to charitable activities carried on by the organization itself,"[22] a requirement CRA calls the "own activities" test. A charity's resources include all physical, financial, and material resources, as well as its intellectual property and staff.[23] A charity can conduct foreign activities through its staff, directors, members, volunteers, or an intermediary, defined by CRA as "an individual or non-qualified donee that is separate from the charity, but that the charity works with to carry out its activities."[24]

The CRA Guidance directs that "[w]hen working through an intermediary, a charity must direct and control the use of its resources,"[25] and outlines a number of arrangements that could provide the charity with the necessary direction and control. It is the charity's responsibility to select the arrangement that will be most suitable for the entirety of the foreign activity. Regardless of which arrangement the charity selects, it must ensure it is not simply operating as a "conduit" for its intermediary. CRA defines a conduit as "a registered charity that receives donations from Canadians, issues tax-deductible receipts, and funnels money without direction or control to an organization to which a Canadian taxpayer could not make a gift and acquire tax relief."[26] CRA warns that a charity that conducts itself in this manner could jeopardize its charitable status.[27]

The CRA Guidance also points out that CRA does not consider all activities funded by the Canadian International Development Agency ("CIDA") to be charitable at common law.[28] A charity that has CIDA funding must therefore ensure its project is consistent with its own charitable purposes and not just the terms of its CIDA funding agreement. CRA recommends that charities contact the Charities Directorate if they are uncertain about CIDA-funded projects.

3. Options in Working With Intermediaries[29]

Before deciding to work with an intermediary, CRA recommends that the charity investigate the intermediary's status and activities to assure itself that the intermediary has the capacity to carry out the charity's activities and will use the charity's resources as the charity directs.[30] The four most common types of intermediary arrangements are: agency, joint venture participant, co-operative participant and contract for goods and services.

a) Agency Arrangement

A charity can appoint an agent outside of Canada to carry out specific tasks and can transfer monies or other charitable resources to the agent. Agents can be organizations (unincorporated associations, corporations or partnerships) or individuals, and are not required to be qualified donees under the ITA or their country's equivalent of a charity.

CRA gives the following example of a registered charity, established to relieve poverty in a developing country, hiring an agent with experience carrying out these types of activities in that country. In the example, the parties enter into an agreement setting out the details of the activity, their respective roles and responsibilities and how the activity will be carried out. The charity gives the agent authority to make day-to-day operational decisions on behalf of the charity, while the charity supervises matters, instructs on the use of its resources and reviews the agent's regular detailed reports on its use of the charity's resources.[31]

The Federal Court of Appeal commented on the use of agents by registered charities in *Canadian Committee for the Tel Aviv Foundation v. R.*:

> [p]ursuant to subsection 149.1(1) of the Act [ITA], a charity must devote all its resources to charitable activities carried on by the organization itself. While a charity may carry on its charitable activities through an agent, the charity must be prepared to satisfy the Minister that it is at all times both in control of the agent, and in a position to report on the agent's activities.[32]
>
> The court also stated that "[u]nder the scheme of the Act [ITA], it is open to a charity to conduct its

> overseas activities either using its own personnel or through an agent. However, it cannot merely be a conduit to funnel donations overseas."[33]

This last point was reiterated by the Federal Court of Appeal in *Bayit Lepletot v. Minister of National Revenue,* wherein the court found the charity could carry on its charitable works through an agent, "but it must be shown that the agent is actually carrying on the charitable works. It is not sufficient to show that the agent is part of another charitable organization which carries on a charitable program."[34] This means that the agent must be conducting the activities on behalf of the organization, not on its own behalf. Where the agent is expending the charity's funds and there is no appropriate ongoing regulation or approval, there is no assurance that the agent is, at all times, acting on behalf of the charity.

Before embarking on an agency arrangement, there are a number of issues for a charity to consider. First, engaging an agent could expose the charity to liability. The law of agency deems actions of the agent to be the actions of the principal, making the principal vicariously responsible for the faults of the agent.[35] Charities do not enjoy "immunity" from such liability simply because they are charities.[36] The courts can impose vicarious liability on a charity where a plaintiff establishes: 1) the relationship between the charity and the agent was sufficiently close, and 2) the wrongful act was sufficiently connected to the conduct authorized by the employer or principal.[37]

Agency relationships can raise insurability issues for the charity since some insurers may have concerns about the vicarious liability resulting from the activities of the agent. It is therefore important for a registered charity to advise its insurer in writing concerning the nature and extent of its agency relationships and receive written confirmation that the charity is fully insured for the agent's activities.[38]

The use of an agent can also be problematic because the funds that a Canadian charity provides to its agents will not count towards the charity's 3.5% disbursement quota[39] until the agent actually spends those funds on charitable work. If the agent does not spend those funds in the fiscal year in which the charity provides the funds, the charity has to wait until the funds are spent on charitable activities before being able to use the amount towards meeting its disbursement quota.[40]

Another concern with an agency arrangement is that the agent is required to keep the funds received from the charity segregated from those of the agent.[41] In this regard, the CRA Guidance also refers to the need for segregation of funds, albeit as a "strong recommendation" only, by stating that "[w]hen carrying out activities through an intermediary, the following steps are *strongly recommended*:... Arrange for the intermediary to keep the charity's funds separate from its own, and to keep separate books and records" [emphasis added].[42] As a result of this need for segregation, where a charity appoints an agent to carry out its charitable work, the assets provided to the agent for the identified projects and held in a segregated account would continue to be assets of the charity and would need to be reflected in the financial statements of the charity until they were expended. However, leaving the monies transferred to the agent on the charity's financial statements where the funds have not yet been expended by the agent could prejudice future fundraising by the said charity. That is, it might lead some donors to conclude that the charity has more funds available to it than is, in fact, the case.

While CRA does not require a charity to complete an agreement with its agents, an agreement is recommended in order to demonstrate direction and control over the activity. In addition to the minimum standards that the CRA Guidance provides for written agreements, the agency agreement should, where possible, require the agent to indemnify the charity from any liabilities arising from the performance of the agent's obligations under the agreement. Agency agreements should also, where appropriate, require the agent to:

- Comply with anti-terrorism legislation (both in Canada and in other jurisdictions in which the agent operates);
- Submit to a specified conflict resolution mechanism in the event of a dispute or controversy;
- Consent to the collection, use and disclosure of personal information about the agent as may be required;
- Protect the personal information of other organizations and individuals which is collected, used, or disclosed by the charity and which the agent may become aware of;
- Protect any confidential information about the Canadian charity that the agent may become aware of;
- Waive any right to pursue a claim or action against the charity, its board, officers, members and volunteers and to indemnify such persons as a result of any action or inaction of the agent or by anyone for whom the agent is responsible for at law; and

- Articulate the consequences flowing from the termination of the agreement.[43]

Neither the ITA nor the courts have specified the form that the written agency agreement must take.[44] CRA has indicated that charities can create more than one agreement, each serving a different purpose. For example a charity can have an agency agreement covering the general terms of a relationship and another outlining specific arrangements for a particular activity.

As well, an agency agreement can constitute a one-time agreement or a master agreement for a long term relationship, which can be supplemented by designations accompanying each transfer of funds or resources. These designations, however, would need to refer back to the master agency agreement and the master agreement would need to permit the charity to withhold funds if it is unsatisfied with the agent's performance.

The charity should also limit its liability for the actions of the agent by stating that the agency agreement provides authority to the agent only for activities that are conducted in pursuit of the charity's charitable objects.[45] This means a charity is not able to authorize its agent to conduct activities that are *ultra vires* its charitable purposes.

b) Joint Venture Participant Arrangement

A charity can also carry on activities outside of Canada jointly with other organizations that are not qualified donees or with individuals through a joint venture participant arrangement, or joint ministry arrangement in the case of religious organizations. Under these arrangements, the participants pool their resources to accomplish their goals in accordance with a joint venture agreement. A joint venture participant arrangement can be complex, however, making them difficult for many foreign intermediaries to understand and comply with.

CRA gives an example of a joint venture arrangement where a charity joins with a foreign organization with a similar purpose. The charity and foreign organization enter into an agreement and collaborate to provide charitable activities. The charity provides approximately 40 per cent of the funding and, as such, its representation on the joint venture's governing board is approximately 40 per cent of the voting rights. As long as the joint venture only uses the charity's resources for the agreed upon activities, the arrangement should be acceptable to CRA.[46]

The CRA Guidance also states, however, that a charity in a joint venture participant arrangement "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."[47] How this is to be accomplished, though, is not made clear in the CRA Guidance. From a practical standpoint, it will generally involve charities entering into joint ventures establishing a form of joint venture committee or governance body. CRA has warned that if a charity can be voted down by other joint venture participants, the charity will have difficulty establishing that it is carrying on its own activities.[48]

The CRA Guidance provides the following list of factors that CRA will use to determine whether a charity is carrying out its own activities and exercising sufficient control over the joint venture:

- Presence of members of the Canadian charity on the governing body of the joint venture;
- Presence of the Canadian charity's personnel in the field;
- Joint control by the Canadian charity over the hiring and firing of personnel involved in the venture;
- Joint ownership by the Canadian charity of foreign assets and property;
- 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;
- Signature of the Canadian charity on loans, contracts, and other agreements arising from the venture;
- Review and approval of the joint venture's budget by the Canadian charity, availability of an independent audit of the venture, and the option to discontinue funding when appropriate;
- Authorship or joint authorship by the Canadian charity of such things as procedures manuals, training guides, and standards of conduct;
- On-site identification of the joint venture as being the work, at least in part, of the Canadian charity.[49]

One of the potential benefits of a joint venture arrangement is that it can allow a smaller charity to participate with other organizations, sometimes large foreign organizations, in charitable projects through the pooling of monies and resources. Provided that the smaller charity is able to direct and control the resources it contributes, its monies should not have to be segregated from those of the other joint venture participants. However, as noted above with agency

arrangements, while the CRA Guidance refers to agency agreements as an example of a situation where segregating funds would be strongly recommended, it is possible that CRA will also expect segregation of funds as part of other arrangements put in place between a charity and a foreign intermediary. Therefore, while there is no basis at law to require segregation of funds between the charity and the intermediary for arrangements other than an agency arrangement, CRA may require the segregation of funds as one of the means of showing the charity's direction and control of its own resources in order to establish that the charity meets its own activities test. However, while CRA has made the segregation of funds a "strong recommendation" for all arrangements with intermediaries as opposed to only for an agency relationship, CRA has not referenced any legal authority to support their "strong recommendation" in this regard.

Other elements that should be considered (although not necessarily all mentioned in the CRA Guidance) for possible inclusion in a joint venture agreement are:

- The proper legal name of all members of the joint venture;
- The charitable object(s) to be accomplished in pooling the resources of the joint venture;
- An undertaking that the member contributions will be used only for activities in pursuit of charitable purposes as defined by the laws of each participants' jurisdiction;
- The appointment, control and functioning of the management committee or governing body for the joint venture;
- The voting rights of each member;
- A budget approval process;
- Identifying who owns/controls any capital assets;
- Reporting requirements;
- Location of bank account, books and records (note: the Canadian charity's books and records must be kept at the Canadian address that the charity has on file with CRA);
- The method of adding or removing members to the joint venture;
- Compliance with an anti-terrorism legislation; and
- Provisions for the disposal of capital assets if a member wishes to leave the joint venture.[50]

Often, the joint venture committee or governing body contemplated under the terms of a joint venture arrangement is either never established or discontinued during the joint venture. If either of these scenarios occurs, the transfer of monies by the Canadian charity to the joint venture project could be found by CRA on an audit to be inconsistent with the requirement that the charity direct and control its resources. This could lead to sanctions, penalties and even loss of charitable status.[51]

c) Co-operative Participant Arrangement

A charity can also conduct activities outside of Canada through a co-operative participant arrangement. The CRA Guidance defines a co-operative participant as, "an organization that works side-by-side with a registered charity to complete a charitable activity."[52] A co-operative partnership differs from a joint venture in that there is no pooling of resources or sharing of responsibility for the project as a whole, but rather the charity and the co-operative participant each take on responsibility for only parts of the project. With this type of arrangement, even though each organization might be responsible for only a certain aspect of the project, the charity must direct and control its own activities and use of its resources.

CRA provides an example of a co-operative participant arrangement where a charity that is registered to provide care for the sick joins with a foreign organization to build and operate a medical clinic. The charity agrees to provide qualified nursing staff at the clinic, but will not help with construction of the building or buying medicine.[53]

Unlike appointing an agent or using a contract for service, the use of a co-operative participant arrangement is not meant to satisfy the "own activities test" found in the CRA Guidance. Rather, the charity is using its own resources to carry on its own activities.[54] Collaboration with the other organization is less a matter of establishing a relationship between a Canadian charity and an intermediary for the purpose of carrying on the activities of the charity outside of Canada, and more a matter of record-keeping so that the Canadian charity can evidence to CRA that it has taken responsibility for a particular aspect of the project. However, there is a noticeable absence of any guidelines in the CRA Guidance in relation to which books and records are required for arrangements involving co-operative participants.

Downsides to the co-operative participant arrangement include the possibility of joint and several liability for all partners involved. As well, issues with the charity's disbursement quota may arise if the Canadian charity contributes to the administrative costs of the co-operative project, as CRA is unlikely to accept these

expenses as part of the charity's disbursement quota.[55]

d) Contract for Goods and Services

A charity can also carry out activities outside of Canada by entering into a contractual arrangement with an intermediary that is not a qualified donee. CRA permits a charity to contract with an organization or individual outside of Canada to provide goods and services necessary to accomplishing its charitable purpose. The difference between using a contractor for the delivery of goods and services and an agency arrangement is that a contract for goods and services provides for consideration flowing both ways between the parties, while a written agreement establishing an agency relationship is merely the appointment of an intermediary.[56]

CRA gives the example of a contract for goods and services, describing a charity that wants to set up activities to help people with mental health issues in a foreign country but does not employ any counsellors. The charity enters into a contract with a private, for-profit company that will provide the professional counsellors. All the terms and conditions of their relationship are drafted into the contract. The charity is responsible for monitoring the use of its resources as the company carries out the activity.[57]

Some charities may prefer a contract for goods and services over an agency arrangement because the vicarious liability concerns associated with agency relationships do not extend to contracts for goods and services. Any third party liability in a contractual arrangement is generally limited to the contractor and, as such, should not flow back to the charity. However, if the charity exercises too much day-to-day control over the contractor, a court might find that a *de facto* agency relationship existed, resulting in the charity possibly being found vicariously liable for the actions or inactions of the contractor despite the declared nature of the relationship being one of contract.

Notwithstanding this limitation, a contract for goods and services may be preferable over other arrangements described above because an insurer for a charity may feel more comfortable where the charity is choosing to utilize a contractual relationship due to the risk of vicarious liability in other arrangements.

Another advantage of using a contract for goods and services is that once the charity has transferred funds to the contractor, those funds are considered spent on the charitable activities for disbursement quota purposes. This is the case even if the contractor does not spend the monies in the same fiscal year as when it was donated by the charity.[58]

4) Disbursement Quota Considerations

A charity must calculate its 3.5% disbursement quota[59] the same way whether the charitable activity is undertaken in Canada or in a foreign country through an intermediary.[60] CRA's position in this regard is that

> [a]ll the amounts a charity spends on directly carrying out its charitable activities will go towards meeting its disbursement quota, whether the activities were carried out in Canada or in a foreign country. …A charity should report all amounts spent by its intermediaries as if they had been spent by the charity itself.[61]

CRA provides an example of a charity working jointly with a foreign organization in a situation where the Canadian charity contributes $10,000 annually to a joint project of which $9,000 is to cover expenditures on charitable activities. The remaining $1,000 is spent on administrative costs. In this example, the charity may apply the $9,000 it spent on charitable activities towards its disbursement quota, but cannot apply the $1,000 it spent on administrative costs and instead must record the $1,000 as an administrative expenditure on the charity's T3010.[62] It is therefore important that a charity account for all of its charitable and administrative expenditures, as well as its expenditures on fundraising and political activities incurred while carrying on an activity through an intermediary. These records will allow the charity to properly allocate its expenditures in its annual T3010 *Registered Charity Information Return*.

5) Evidencing Direction and Control for the "Own Activities" Test

In the arrangements discussed above, a charity must exercise a sufficient degree of direction and control over the use of its funds and resources in order for the charity to satisfy its "own activities test."[63] The charity must make the decisions and set the parameters on significant issues related to the charitable activity, including:

- 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; and
- When the activity will begin and end.[64]

While the "own activities test" has been criticized as fostering inefficiency and unduly restricting the ability of registered charities to take part in foreign activities,[65] registered charities must nevertheless be aware of how they can operate in compliance with this requirement. In this regard, the charity will need to retain copies of documents that support the expenditures by its intermediaries and be able to confirm that those expenditures are monitored, controlled and directed by the charity. If the charity does not direct and control the use of its resources as required, then it risks the imposition of sanctions under the ITA, including financial penalties and revocation of charitable status.[66]

In this regard, the CRA Guidance outlines six "measures of control" that CRA will look for as evidence that there is a sufficient degree of direction and control. The nature and number of measures that a charity adopts to direct and control the use of its resources should correspond with 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; and
- The capacity and experience of the intermediary.[67]

The six measures of control (as described in more detail below) that CRA recommends adopting include:

a) Written agreements;

b) Description of activities;

c) Monitoring and supervision;

d) Ongoing instruction;

e) Periodic transfers; and

f) Separate activities and funds.[68]

CRA states that agreements will generally need fewer of these control measures if the resources, because of their nature, can only be used for charitable purposes and there is a reasonable expectation that the intermediary to whom the resources have been transferred will use them only for those charitable purposes.[69] This statement represents CRA's support for the longstanding informally recognized "charitable goods policy."[70] This policy is that the transfer of goods that inherently can only be used for charitable purposes does not necessarily require a written agreement.[71] CRA confirmed its willingness to apply the "charitable goods policy" in its Registered Charities Newsletter No. 20 – Fall 2004:[72]

> **Q. Are There Any Circumstances Under Which a Canadian Registered Charity Can Transfer Property Directly to a Non-Qualified Donee?**
>
> A. As above, a charity cannot simply transfer funds to an organization that is not a qualified donee, since this does not qualify as carrying on its own activities.
>
> However, the Charities Directorate will consider a transfer of property reasonable where the nature of the property means that it can only be used for a charitable purpose. For example, it is generally reasonable to assume that a copy of the Bible will be used for religious activities, that medical equipment will aid the sick, and that student books will be used for educational purposes in a school.
>
> In some cases, where the property could be used for something other than charitable purposes, it may nonetheless be unreasonable to expect the charity to maintain control of assets. The Charities Directorate will consider such situations on a case-by-case basis when requests are received in writing.

However, before there can be a lessening of the measures of control, and in particular a lessening of the need for a written agreement, CRA will take into account all relevant circumstances, but at a minimum, the following three conditions must all apply:

- The nature of the property being transferred is such that it can reasonably only be used for charitable purposes (for example, medical supplies like antibiotics and instruments, which will likely only be used to treat the sick, or school supplies like textbooks, which will likely only be used to advance education); the CRA notes that the transfers of money are not acceptable, and always require ongoing direction and control;
- Both parties understand and agree that the property is to be used only for the specified charitable activities; and
- Based on an investigation into the status and activities of the non-qualified donee receiving the property (including the outcome of any previous transfers by the charity), it is reasonable for the charity to have a strong expectation that the organization will use the property only for the intended charitable activities.[73]

If all of these three conditions are fulfilled, then a charity will be able to meet its own activities test by directing and controlling the use of its resources without the requirement for an agreement.[74] Registered charities, though, must still keep adequate records even when relying on the charitable goods policy to distribute

resources other than funds abroad.[75]

At the other end of the spectrum, if the charity is transferring money or other resources to an intermediary whose status and activities are uncertain, the charity will need as many of the above mentioned control measures as possible. A discussion of each of these measures of control is set out below:

a) Written Agreements

Although there is no formal requirement in the CRA Guidance or under the ITA for a written agreement,[76] CRA recommends that a charity have one with each of its intermediaries. CRA views complete, detailed, written agreements with any intermediary to be an effective way to help meet the "own activities test." In Appendix F of the CRA Guidance, a checklist of basic elements of a written agreement (referenced below) is included to help charities create an effective written document:

- exact legal names and physical addresses of all parties;
- a clear, complete, and detailed description of the activities to be carried out by the intermediary, and an explanation of how the activities further the charity's purposes;
- the location(s) where the activity will be carried on (for example — physical address, town or city);
- all time frames and deadlines;
- any provision for regular written financial and progress reports to prove the receipt and disbursement of funds, as well as the progress of the activity;
- a statement of the right to inspect the activity, and the related books and records, on reasonably short notice;
- provision for funding in instalments based on satisfactory performance, and for the withdrawing or withholding of funds or other resources if required (funding includes the transfers of all resources);
- provision for issuing ongoing instructions as required;
- for agency agreements, provision for the charity's funds to be segregated from those of the intermediary, as well as for the intermediary to keep separate books and records;
- If any of the charity's funds or property are to be used in the acquisition, construction, or improvement of immovable property, the title of the property will vest in the name of the charity. If not, there will be:
  - provision indicating how legal title to that property shall be held (in the name of a local charity, government agency, municipality, or non-profit organization established to provide benefits to the community at large);
  - provision for the intermediary to get reasonable assurances from the property holder, owner, or landlord, as the case may be, that the property will continue to be used for charitable purposes for the benefit of the public;
- for joint ventures, provisions that enable the charity to be an active partner, with a proportionate degree of direction and control in the venture as a whole, as well as assurances of the following:
  - the charity's resources are devoted to activities that further its purposes; and
  - the charity maintains and receives financial statements and records for the entire project on a regular basis;
- effective date and termination provisions; and
- signature of all parties, and the date.

Appendix F of the CRA Guidance notes, though, that the checklist regarding written agreements is not the only evidence that CRA will consider, and states that "[e]ven when a charity and intermediary create an agreement that contains the elements contained in the checklist, either the charity or the CRA can refer to and rely on other relevant evidence to establish the nature of the relationship between the parties to the arrangement." CRA further states that simply entering into an agreement is not sufficient to prove that the charity meets the "own activities test." The charity must actually show that it has "a real, ongoing, active relationship with its intermediary."[77]

The CRA Guidance does state, though, that there are times when the complications of a formal written agreement may outweigh the benefits of an agreement. In this regard, CRA gives an example of where money spent on a one-time activity is $1,000 or less, other forms of communication may instead be used to satisfy the "own activities test" in such circumstances.[78] These include faxed written instructions, copies of bank transfers, minutes of meetings, receipts and invoices, and written reports. If the transfer is to be repeated on an ongoing basis, CRA recommends that a written agreement be used.

Charities that have a head body outside of Canada are sometimes required to make payments to the head body in the form of tithes, royalties, memberships, or similar transfers. In these situations, the requirements for direction and control of resources by the Canadian charity will still apply. This

means that 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. In this regard, the Canadian charity must be sure that it is receiving goods and services that are equivalent in value to the amounts that it is sending to the head body. CRA states that it will generally accept that a charity with a head body outside of Canada usually benefits from access to resources from that head body, such as policies, communications, and training material.[79] As well, if a charity transfers a small amount of money to its head body outside of Canada and the charity has access to internationally produced materials, the CRA Guidance states that it will not require additional evidence of benefits to the charity, such as a written agreement.[80] CRA defines "small amount" to be "whichever amount is less – 5% of the charity's total expenditures in the year or $5,000."[81]

b) Description of Activities

The CRA Guidance recommends that charities keep statements of activities as evidence that the charity is able to give "a clear, complete, and detailed description of the activity."[82] The CRA Guidance lists the sort of details that should be included in the description of activities:

- exactly what the activity involves, its purpose and the charitable benefit it provides;
- who benefits from the activity;
- the precise location(s) where the activity is carried on;
- a comprehensive budget for the activity, including payment schedules;
- the expected start-up and completion dates for the activity, as well as other pertinent timelines;
- a description of the deliverables, milestones and performance benchmarks that are measured and reported;
- specific details concerning how the charity monitors the activity, the use of its resources and the intermediary carrying on the activity;
- the mechanisms that enable the charity to modify the nature or scope of the activity, including discontinuance of the activity if the situation requires;
- the nature, amount, sources, and destination of income that the activity generates, if any; and
- any contributions that other organizations or bodies are expected to make to the activity.[83]

c) Monitoring and Supervision

The CRA Guidance explains that monitoring and supervision involves a charity receiving timely and accurate reports which will allow it to verify that its resources are being used for its own activities. The CRA Guidance provides examples of some of the reporting methods that may be used so that a charity can demonstrate its control and how it has met its "own activities test." The suggested methods are:

- progress reports;
- receipts for expenses and financial statements;
- informal communication via telephone or email;
- photographs;
- audit reports; and
- on-site inspections by the charity's staff members.[84]

CRA notes that the monitoring and supervision methods that a charity uses are likely to vary depending on factors, such as the size, nature, and complexity of an activity.[85] In this regard, the CRA Guidance provides an example of a registered charity in an arrangement with a foreign organization to act as the charity's agent in using the charity's funds to work with the local residents of a developing country to prevent deforestation. The agent sends bi-monthly progress reports back to the charity, including a financial breakdown of the resources used, a written description of the activities undertaken and their results, and photographs. Upon winding up of the charity's activity, the agent presents a written report showing the project's conclusion.[86]

d) Ongoing Instruction

It is important that the charity and its intermediary are clear on what activity is to be undertaken at the outset, usually through a detailed description of the activity before it is commenced. According to the CRA Guidance, the charity should also be providing ongoing instructions to the intermediary. CRA states in its Guidance that written records of any ongoing instructions, minutes of meetings, or arranging to have a director/trustee, volunteer or employee of the charity work for both bodies are some of the ways to show that a charity has given ongoing direction to the intermediary and continues to control the activities. CRA cautions, however, that arranging to have a director/trustee, volunteer, or employee work for both groups may not be enough on its own to show that the charity is maintaining control over the use of its resources by the intermediary.[87]

e) Periodic Transfers

There is only one small paragraph in the CRA Guidance dealing with measures involving periodic transfers. It simply states that a charity should

retain the right to discontinue the transfer of funds and to have unused funds returned if the charity is not satisfied with the reporting, progress or outcome of an activity. This would obviously be an essential term to include in any agreement entered into with an intermediary, as well as providing for payments on a periodic basis as opposed to a lump sum.

f) Separate Activities and Funds

As noted above in relation to the different types of intermediary relationships, the CRA Guidance highlights the importance of a charity, when carrying on activities through an intermediary, to be able to distinguish between its own activities and those of its intermediary: "[a] charity cannot simply pay the expenses an intermediary incurs to carry on the intermediary's own programs and activities. Doing so draws into question whether the activity is truly that of the charity."[88] CRA also confirms that for certain types of arrangements, such as agency relationships, the charity's funds would need to be physically segregated.[89]

6) Other Considerations

a) Complying with Laws in Foreign Jurisdictions

In the Guidance, CRA reminds registered charities that they must comply with Canadian law, whether it be inside or outside of Canada. However, CRA also states that while the ITA does not require charities to comply with foreign laws while operating abroad, charities are not exempt from the laws of the jurisdictions in which they are operating. As such, the CRA Guidance encourages Canadian charities to be aware of local laws, and how they are enforced within the jurisdiction in which they are operating before carrying out their charitable programs abroad.[90] Being aware of local laws will help ensure that the public benefit[91] provided by the charitable programs is not offset by harm that may result to those carrying on the charity's activities, to the charity's beneficiaries, or to anyone else.

b) Anti-terrorism and Money Laundering Issues

Charities that operate outside of Canada, particularly in conflict zones, need to consider their obligations under Canada's anti-terrorism legislation and ensure that they are not operating in association with individuals or groups that are engaged in, or that support, terrorist activities. To help charities identify vulnerabilities to terrorist abuse, CRA has created a checklist to follow as part of the charity's good management practices.[92]

In addition to the usual avenues that are available to revoke the charitable status of a registered charity under the ITA, the *Charities Registration (Security Information) Act*[93] enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity. Under subsection 4(1) of the *Charities Registration (Security Information) Act*, a "certificate" can be issued against an existing charitable organization or an applicant for charitable status where there are "reasonable grounds" to believe the organization has made, makes or will make resources available, directly or indirectly, to an entity that has engaged or will engage in a "terrorist activity" as defined in subsection 83.01(1) of the *Criminal Code*.[94] Given this risk, registered charities operating in conflict areas should consider adopting an anti-terrorism policy to establish appropriate due diligence procedures to ensure the charity does not directly or indirectly facilitate terrorist activities.

c) Transferring Capital Property to Non-Qualified Donees

A charity may find that it is not practical or even possible for it to own real or other capital property in a foreign country. For example, some countries do not permit foreign ownership of real property, thereby making it difficult, if not impossible, for a charity to acquire and maintain land and buildings that are used to carry out the charity's activities in a foreign country. The charity may therefore be compelled to transfer ownership of capital property to a foreign non-qualified donee. However, transferring ownership of real or other capital property to a non-qualified donee is a complex matter that the CRA Guidance provides specific direction on.

In Appendix B of the CRA Guidance, CRA acknowledges that, in some countries, foreign ownership of real property is not allowed. However, notwithstanding the commentary by CRA in Appendix F of the CRA Guidance concerning how legal title to property in a foreign country may be held in the name of a non-qualified donee provided that there are reasonable assurances that the property will continue to be used for charitable purposes for the benefit of the public, CRA states in Appendix B that, "[a]s a rule, transferring ownership of capital property to any non-qualified donee, including a local organization or government body, is not permitted. This is because land and buildings might be used for non-charitable purposes."[95]

Appendix B of the CRA Guidance, though, does state that transfer of

capital property to non-qualified donees might be acceptable in any one of the following three situations:[96]

- the country in which the charity is operating does not permit foreign ownership of capital property; or
- the capital property is transferred only as part of a development project[97] to relieve poverty by helping a community to become self-sufficient; or
- the charity can show that it has made every reasonable effort to gift the capital property to another qualified donee, and has made every reasonable effort to sell the capital property for its fair market value, but has not been successful.

Based upon the above, it would seem that the more general and permissive commentary concerning the owning of capital property set out in Appendix F of the CRA Guidance will need to be read subject to the more restrictive requirements set out in Appendix B of the CRA Guidance, although it is not clear whether CRA requires a conjunctive reading of these separate sets of requirements.

Appendix B of the CRA Guidance goes on to state that a charity is expected to make sure that the non-qualified donee that it is transferring the property to has a "mandate that is consistent with ensuring the continued charitable use of the property,"[98] a requirement that presumably would need to be set out in an agreement between the charity and the non-qualified donee. Appendix B also states that the charity should obtain documentation from the non-qualified donee stating that the capital property in question will be used for charitable purposes as well as that there be "reasonable assurances that the property will, for its expected useful life, benefit the whole community."[99] Again, these recommendations would presumably need to be set out in an agreement between the charity and the non-qualified donee.

Finally, Appendix B of the CRA Guidance explains that the charity should "to the best of its ability, assess the risk that the capital property might be used inappropriately."[100] CRA explains that if the risk of inappropriate use of the capital property is greater than the anticipated benefit to be provided, the charity should not transfer the ownership of the property. Although not stated in the CRA Guidance, it would be best that the due diligence undertaken in this regard be documented in the records of the charity.

Given the complexities involved in transferring capital property to a non-qualified donee, the recommendation at the end of Appendix B that charities should contact the Charities Directorate to consider available options is a recommendation that would need to be carefully canvassed with a charity before the charity embarks on a transfer of capital property outside of Canada to a non-qualified donee.

d) Capacity Building

For the purposes of the CRA Guidance, CRA defines "capacity building" as "working in partnership with an organization, community, or other group of people to develop the skills, tools, and resources necessary to address their own problems."[101] Charities that engage in capacity-building typically do not simply transfer resources to a recipient, but rather build a long-term reciprocal relationship with another group or community. CRA allows capacity-building activities as long as the charity continues to meet all requirements of the ITA, such as making sure that the activity of the recipient only furthers the charitable purposes of the charity and maintaining direction and control over its own resources, as well as meeting the public benefit test.[102]

D. Record Keeping for Charities Operating Outside of Canada

The CRA Guidance reminds charities that they must keep adequate books and records that are located in Canada, and recommends that they be kept in either English or French, failing which, the charity could be subject to sanctions under the ITA, including the loss of charitable status.[103] The books and records must allow CRA to check whether a charity's funds are either being spent on its own activities or are being gifted to a qualified donee, whether the charity is directing and controlling the use of its resources, and whether there are grounds to revoke a charity's status. Also, books and records must contain enough information to allow CRA to determine if the charity is operating in accordance with the ITA. A charity that fails to keep adequate books and records may be subject to various sanctions under the ITA, including having its registration revoked.[104]

To show that the charity is in compliance, the ITA does not require that a charity provide original source documents, such as receipts for purchases.[105] CRA recommends that a charity obtain original source documents whenever possible, but acknowledges that war, natural disaster, lack of access to telephones or the Internet, low literacy rates, legal restrictions, or other conditions may make it impossible to do so. Where it is not possible or practical to obtain original source documents, a charity should be able to explain why it cannot obtain them, and make all

reasonable efforts to get copies and/or reports and records from staff and intermediaries to support its expenditures, and show that it has made such efforts. The charity will also have to show when, how, and in what amounts funds were transferred to intermediaries.[106]

E. Risk Management for Charities Operating Outside of Canada

While a charity may be able to scrupulously follow the requirements and recommended practices noted above, those requirements and practices only apply with regard to a registered charity's compliance requirements under the ITA and CRA Guidance, but do not deal with general issues involving risk management. In this regard, charities operating outside of Canada need to be aware that there are risks other than those that jeopardize their charitable status when they decide to become involved in carrying on foreign operations. However, there is no single set of "best practice" risk management guidelines that can be applied to all registered charities that operate outside of Canada. The *Principles of International Charity,* developed by the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors in 2005 ("Working Group Guidelines"), is instructive on this issue when it states that: "[t]he board of directors of each individual charitable organization is responsible for establishing a culture of compliance with laws and regulations and for empowering the organization to adopt suitable governance practices."[107]

Some general risk management guidelines that could be considered in establishing a "culture of compliance" for a charity include the following:

1. Due Diligence and Insurance

Directors of a registered charity have a fiduciary responsibility to safeguard the charity's assets, which include the staff and volunteers of the charity. While CRA does not provide any guidance concerning risk management, a few international sources have offered some helpful commentary to this end. The Working Group Guidelines, referenced above, notes that, "[m]ore than ever before, service providers must pay attention to the safety of their staff."[108] The Working Group Guidelines state that one of the most important aspects of protecting staff is, "developing understanding and acceptance by the community."[109] As well, the Charity Commission for England and Wales also highlights in the Charity Commission Guidance[110] that staff and volunteers of charities can often be caught up in war zones because of the work they do, but could also face harm in the form of natural disasters and disease, in addition to kidnapping or arrest. The Charity Commission therefore recommends that all staff and volunteers working in dangerous environments receive basic security training.[111] Prior to deploying a charity's own employees or volunteers overseas, it may also be advisable to consult with Canada's Department of Foreign Affairs, Trade and Development, or the US State Department in the alternative, to determine if there are advisory warnings regarding travel in the deployment area.[112]

From an insurance perspective, project directors and aid workers of charities in a foreign country are now just as likely to face the prospect of being kidnapped as senior political figures.[113] Therefore, it may be advisable to consider the purchase of kidnapping and ransom insurance coverage. It is also important that individual staff members take steps to verify the extent of their medical coverage on travelling outside the country, since provincially insured medical expenses incurred by travellers are often very limited in each province.

For example, a resident in Ontario must ordinarily be present in Ontario for a period of 153 days in a twelve month period,[114] outside of which their health insurance will lapse. In addition, if the illness, disease, condition or injury arose before leaving Canada, or it is not acute or unexpected, the provincial health plan will not cover it.[115] As such, the Ontario Ministry of Health and Long-Term Care encourages individuals to purchase additional health insurance every time an individual leaves Canada to ensure that they have sufficient supplemental coverage.[116] As a result, charities may want to consider insisting on mandatory travel insurance for all representatives and participants involved in foreign activities and/or obtaining such coverage itself.[117]

Lastly, although most charities in conducting foreign activities will not own any real property in the location in which they are operating, it is still common for a registered charity to have temporary equipment, such as computers, video camcorders, telecommunications equipment and construction equipment. Therefore, if the charity owns or rents equipment it uses in conducting activities overseas, they should contact their insurance broker to arrange a "Worldwide Property Floater" in order to cover the above listed equipment which may be of considerable value.[118] For real property that a charity owns in a foreign country, the charity should advise its insurer in writing for liability purposes, but it may also be required to secure a local

insurance provider in the foreign country.

2. Handling of Cash in Foreign Operations

CRA will normally ask that a charity make use of conventional banking systems when they are available in a foreign country. While CRA does not specifically address situations in which banks are not available in the CRA Guidance, the Charity Commission notes that local customs and practice will be important in considering cash security. A formal policy should be in place between the charity and its intermediaries regarding custody and banking of the funds.[119] It is also recommended that accounts should be opened in the name of the charity and not in the name of a staff member or director.[120]

In addition, where there is a high risk to the funds, such as the possibility of the local banking system collapsing, the board of directors should ensure that the amount of funds kept in the banking system of that country is kept to a minimum.[121] The Charity Commission strongly advises against the employees of a charity personally transferring significant amounts of cash from one location to another location, while allowing small cash amounts to be carried by staff and volunteers to cover working needs is acceptable.[122] It is recommended that disbursements be made by cheque or wire-transfer where possible, with detailed internal records, even for small cash transfers,[123] as even a small amount of cash being misappropriated can be cause for significant risk to the charity and its reputation.

3. Trade-mark Protection

When working with intermediaries in conducting foreign activities, the Canadian registered charity also needs to be proactive in protecting its trade-marks outside of Canada. Trade-marks can be not only very valuable assets of the charity that are worth protecting, but also the cause of liability exposure in a foreign jurisdiction for the Canadian charity. Charities conducting foreign activities may want to consider the following issues regarding the use and licensing of their trade-marks with intermediaries operating in foreign jurisdictions:

- Ensuring that all trademarks are owned by the registered charity's office in Canada (assuming that the Canadian charity is the entity that is legally entitled to obtain worldwide trade-mark protection) through registration of the trade-marks in the applicable foreign jurisdiction;
- Ensuring that trade-marks are licensed to the intermediary or affiliate by way of a written trade-mark license agreement; and
- The charity will need to be vigilant in monitoring any unauthorized use or registration of the charity's trade-marks in foreign jurisdictions.

Misappropriation or unauthorized use of a charity's trade-marks in a foreign jurisdiction can cause great harm to the charity's reputation, goodwill and intellectual property, be a liability concern if the action or omission of the third party is done under the identity of a trade-mark belonging to the Canadian charity, and can also lead to fraud or theft of the charity's identity. As well, enforcing or re-establishing the brand and trade-mark rights after the fact can be both complicated and expensive, most likely requiring the charity to retain local counsel in bringing legal action in the foreign country.

F. Conclusion

Registered charities that seek to conduct activities outside of Canada need to be aware of the diverse range of issues, as well as options, available to them in order to effectively undertake their foreign operations. As indicated above, in structuring the arrangements by which the registered charity can operate in a foreign jurisdiction, no single "best solution" exists. The lawyer advising the charity will need to individually customize the options available and advise the charity on what best practices and due diligence mechanisms are appropriate for it, as well as the extent to which the charity must record and document its activities in order to be able to show that it is in compliance with the ITA and CRA Guidance. A registered charity that is careful from its inception concerning how to best proceed in carrying out foreign activities can achieve a great deal of success in carrying out its programs outside of Canada and avoid unnecessary liabilities and costs if CRA was to conduct an audit of its foreign activities or in the event that legal action was to be commenced as a result of those activities.

Addendum: This article is current as of June 30, 2013.

[*] *Terrance S. Carter, Honours B.A. (1975), McGill; LL.B. (1978), Osgoode Hall Law School; Trade-Mark Agent, is a managing partner of Carters Professional Corporation, and counsel to Fasken Martineau DuMoulin LLP on charitable matters. E-mail: tcarter@carters.ca* *Adapted by permission of Carswell, a division of Thomson Reuters Canada Limited, from the work titled Corporate and Practice Manual for Charities and Not-for-Profit Corporations, by Jane Burke-Robertson, Terrance S.*

Carter, and Theresa L.M. Man, publication forthcoming in 2013. The author would like to acknowledge and thank Dean E. Blachford, B.A., B.C.L., LL.B., for his assistance in the editing of this article.

Endnotes

[1] CRA defines a "registered charity" as "An organization that has applied to the CRA and received approval as meeting the requirements for registration as a charity, and has been issued a charitable registration number. A registered charity is exempt from paying income tax and can issue official donation receipts for gifts it receives. However, if a registered charity is under suspension, it no longer has receipting privileges during the suspension period. A registered charity is designated by the CRA as a charitable organization, a public foundation, or private foundation." See Canada Revenue Agency, *Charities Glossary*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/glssry-eng.html>.

[2] *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*].

[3] See e.g. Canada Revenue Agency, *Charities in the International Context*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/ntrntnl-eng.html>.

[4] The ITA does not define "charitable," and as such, the common law definition is applied. One part of that definition is that a tangible benefit be conferred, directly or indirectly, on the public (i.e. the "public benefit test"). See Canada Revenue Agency, Policy Statement CPS-024, "Guidelines for Registering a Charity: Meeting the Public Benefit Test" (10 March 2006), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html>.

[5] Canada Revenue Agency, *Canadian Registered Charities Carrying Out Activities Outside Canada*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html> [*CRA Guidance*].

[6] *Ibid* at Appendix A.

[7] *Ibid.*

[8] For more information on qualified donees, see *Gifts to Qualified Donees*, below.

[9] *CRA Guidance, supra* note 5 at para 3.

[10] See Canada Revenue Agency, *T3010 Registered Charity Information Return*, Schedule 2 "Activities Outside Canada," online: Canada Revenue Agency <http://www.cra-arc.gc.ca/E/pbg/tf/t3010/>. The publicly available list of qualified donees is in accordance with the changes that were proposed by Budget 2011 and the subsequent implementation of those changes in Bill C-13. See Bill C-13, *An Act to implement certain provisions of the 2011 budget as updated on June 6, 2011 and other measures*, 1st Sess, 41st Parl, 2011 [*Budget 2011*]. Budget 2011 amended subsection 149.1(15)(b) of the *ITA* to include qualified donees and Canadian amateur athletic associations as entities required to be identified on a list established by the Charities Directorate of the CRA.

[11] Arthur BC Drache, Robert Hayhoe, and David P Stevens, "Charities Taxation, Policy and Practice – Taxation," (Toronto: Carswell, 2009) at 12.6.

[12] Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, 1st Sess, 39th Parl, 2006 (assented to 14 December 2006), SC 2006, c12 [*Bill C-25*]. This Bill's amendments have significantly expanded the nature of the information concerning the transaction and the parties involved. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* refers to this information which is retained for up to five years as "designated information," which may potentially be disclosed to both foreign and domestic government agencies. See *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17. See also Terrance S Carter and Sean S Carter, "New Anti-terrorist Financing Law Has Direct Impact for Charities" (24 January 2007), online: Carters Professional Corporation <http://www.carters.ca/pub/alert/ATCLA/ATCLA12.pdf>.

[13] *CRA Guidance*, *supra* note 5 at para 1.2 and 7.2. See also *Budget 2011*, *supra* note 10.

[14] *CRA Guidance, ibid* at para 7.2.

[15] *Ibid* at para 5.

[16] Section 149.1(1) of the *Income Tax Act* provides that qualified donees are organizations that can issue official donation receipts for gifts that individuals and corporations make to them under paragraphs 110.1(1)(a) and (b) and 118.1(1). See *ITA*, *supra* note 2, s 149.1(1).

[17] *Ibid*. and at ss 149.1(6.4).

[18] This part of the definition of "qualified donee" was amended by Budget 2012 which was tabled in the House of Commons as Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012 (assented to 1 January 2013), SC 2012, c 19 [*Bill C-38*]. Previously, part (a)(v) of the definition of "qualified donee" in section 149.1(1) of the *Income Tax Act* read "A charitable organization outside Canada to which Her Majesty in right of Canada has made a gift in the 36 month period that begins 24 months before that time."

[19] *ITA*, *supra* note 2, ss 149.1(6) states that "A charitable organization shall be considered to be devoting its resources to charitable activities carried on by it to the extent that … (b) in any taxation year, it disburses not more than 50% of its income for that year to qualified donees."

[20] Canada, Minister of Finance Hon. James M Flaherty, *Jobs, Growth and Long-term Prosperity: Economic Action Plan 2012*, (Ottawa: House of Commons, 2012) [*Budget 2012*]. Budget 2012 was tabled in the House of Commons as Bill C-38, *supra* note 18.

[21] Budget 2012 and subsequent introduction of Bill C-38 states that when a charity makes a gift to a qualified donee and if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee, that gift will be considered an expenditure made by the charity on political activities. As a result, the gift would count against both the donor charity and the recipient organization's existing limits allowed for

political activities. See Bill C-38, *supra* note 18. See also *Budget 2012*, *ibid*; and Canada Revenue Agency, *Transparency and Accountability*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/gncy/bdgt/2012/qa01-eng.html>.

[22] *ITA*, *supra* note 2 at ss 149.1(1) "charitable organization."

[23] Canada Revenue Agency, Summary Policy CSP-R13, "Resources" (9 June 2003), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-r13-eng.html>.

[24] *CRA Guidance*, *supra* note 5 at para 5.2.

[25] *Ibid* at para 6.

[26] *Ibid* at para 5.5.

[27] *Ibid*.

[28] *Ibid* at para 9.

[29] The use of an intermediary is not exclusively for carrying out activities outside of Canada. In this regard, charities can deal with non-qualified donees in Canada as well. CRA has published guidance on this. See Canada Revenue Agency, *Using an Intermediary to Carry out a Charity's Activities within Canada*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>.

[30] *CRA Guidance*, *supra* note 5 at para 6.

[31] *Ibid* at para 6.2.

[32] 2002 FCA 72 at para 40.

[33] *Ibid* at para 30.

[34] 2006 FCA 128 at para 5.

[35] Gerald Fridman, *Canadian Agency Law*, 2d ed (Markham: LexisNexis Canada, 2012) at Part I.

[36] See *Bazley v Currey*, [1999] 2 SCR 534 (The Supreme Court of Canada rejected the argument that non-profit organizations should be shielded from tort liability in the public interest). See also *John Doe v Bennett*, 2004 SCC 7 at para 24 (Supreme Court of Canada confirmed that non-profit status in itself would not be sufficient grounds to obviate a finding of vicarious liability). See also Terrance S. Carter, "Strategies for Protecting Charitable Assets Through Multiple Corporate Structures," (Paper delivered at The Canadian Institute's 8th National Summit: Institutional Liability for Sexual Assault, Abuse & Harassment, 31 March 2008), online: Carters Professional Corporation <http://www.carters.ca/pub/article/charity/2008/tsc0331.pdf >.

[37] *Ibid*.

[38] Terrance S. Carter and Jacqueline M. Demczur, "Carrying on Charitable Activities Outside of Canada through the Use of Agents and Contractors for Service" Charity Law Bulletin No 136 (March 28, 2008), online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/charity/2008/chylb136.htm>.

[39] As a result of the federal Budget 2010, and subsequent introduction of Bill C-9, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures*, 3rd Sess, 40th Parl, 2010, the disbursement quota for registered charities is limited to 3.5%. This is the minimum amount a registered charity is required to spend each year on its own charitable activities or on gifts to qualified donees. The disbursement quota calculation is based on the value of a charity's property not used for charitable activities or administration. If the average value of a registered charity's property not used directly in charitable activities or administration during the 24 months before the beginning of the fiscal period exceeds $100,000 (for public and private foundations the amount is $25,000), the charity's disbursement quota is 3.5% of the average value of that property over the 24 months. The previous complicated 80% disbursement quota has been repealed.

[40] Carter and Demczur, *supra* note 38.

[41] GHL Fridman, *The Law of Agency*, 7th ed (Toronto: Butterworths, 1996) ("…requires for its proper performance that the agent should be in a position to know what he must pay the principal, and that the principal should be able to see whether the agent has fulfilled his duty. Hence the agent is obliged to keep the principal's property and money separate from his own and from other people's property, to keep proper accounts, and to be ready to produce them on demand to the principal, or a proper person appointed by the principal" at 173).

[42] *CRA Guidance*, *supra* note 5 at para 1.2.

[43] Carter and Demczur, *supra* note 38.

[44] *CRA Guidance*, *supra* note 5 at Questions and answers, Q.2.

[45] Canadian Council of Christian Charities, *2010 Charities Handbook: The Comprehensive Guide for Charities,* (Elmira: Canadian Council of Christian Charities, 2010) at Chapter 3: Operating a Charity.

[46] *CRA Guidance*, *supra* note 5 at para 6.3.

[47] *Ibid*.

[48] *Ibid*.

[49] *Ibid* at Appendix E.

[50] See e.g. Canadian Council of Christian Charities, *supra* note 45 at Appendix B.

[51] *CRA Guidance*, *supra* note 5 at paras 6 and 6.3.

[52] *Ibid* at para 6.4.

[53] *Ibid*.

[54] Canada Revenue Agency, Guidance CG-004, "Using an Intermediary to Carry out a Charity's Activities within Canada" (20 June 2011) at para 4.4, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>.

[55] See "Disbursement Quota Considerations," below.

[56] Donovan W.M. Waters, Mark R. Gillen, & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) at 52 and 62.

[57] *CRA Guidance*, *supra* note 5 at para 6.5.

[58] Carter and Decmzur, *supra* note 38.

[59] Bill C-29, *supra* note 39.

[60] *CRA Guidance*, *supra* note 5 at para 10.

[61] *Ibid*.

[62] *Ibid*.

[63] *Ibid* at paras 5.1 and 5.2.

[64] *Ibid* at para 7.

[65] Canadian Bar Association National Charities and Not-for-Profit Law Section, *CRA Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities* at 3, online: Canadian Bar Association <http://www.cba.org/cba/submissions/pdf/09-56-eng.pdf>.

[66] See e.g. *ITA*, *supra* note 2, ss 149.1(2).

[67] *CRA Guidance*, *supra* note 5 at para 7.1.

[68] *Ibid*.

[69] *Ibid* at para 5.2.

[70] See *Canadian Magen David Adom for Israel v Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 323.
[71] For more information on the "charitable goods policy" see Drache, Hayhoe and Stevens, *supra* note 11 at 12-12.
[72] Canada Revenue Agency, online (2004) No 20 Registered Charities Newsletter <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-20/news20-e.html>.
[73] *Supra* note 5 at para 5.2. (modified on June 14, 2012).
[74] *Ibid*. For more information on "direction and control," see "Evidencing Direction and Control for the "Own Activities" Test," below.
[75] Drache, Hayhoe and Stevens, *supra* note 11 at 12.5.
[76] *CRA Guidance*, *supra* note 5 at para 7.2.
[77] *Ibid*.
[78] *Ibid*.
[79] *Ibid* at Appendix C.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid* at para 7.3.
[83] *Ibid*.
[84] *Ibid* at para 7.4.
[85] *Ibid*.
[86] *Ibid*.
[87] *Ibid* at para 7.5
[88] *Ibid* at para 7.7.
[89] See text accompanying note 41, *supra*, concerning segregation of funds.
[90] *CRA Guidance*, *supra* note 5 at para 4.1.
[91] For more information on "public benefit," see note 4, *supra*.
[92] Canada Revenue Agency, *Checklist for charities on avoiding terrorist abuse*, online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/vtb-eng.html>. For additional information on the Checklist, see Terrance S. Carter and Nancy E. Claridge, "CRA's New Anti-terrorism Checklist – A Step in the Right Direction" (29 April 2009), online: Carters Professional Corporation <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>.
[93] SC 2001, c 41, s 113.
[94] RSC 1985, c C-46.
[95] Appendix B, *supra* note 5.
[96] *Ibid.*
[97] *Ibid*. The CRA Guidance defines a development project as "generally one where the turning over of property to a local organization is integral to giving a deprived community the means to break free of the cycle of poverty and disease. This may include, for example, projects such as school and hospital buildings."
[98] *Ibid*.
[99] *Ibid*. Reference may also be made to the Canada Revenue Agency Guidance CG-014: *Community Economic Development Activities and Charitable Registration* (26 July 2012) for additional considerations that may have application to specific fact situations by analogy. The Guidance is available online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cmtycnmcdvpmt-eng.html>.
[100] *Ibid*.
[101] *CRA Guidance*, *ibid* at Appendix D.
[102] *Ibid*.
[103] *Ibid* at para 8.
[104] *ITA*, *supra* note 2, ss 188.2(2)(a), ss 230, ss 230.1, ss 248(1). See also Canada Revenue Agency, Summary Policy CSP-B01, "Books and Records" (25 October 2002), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-b01-eng.html>.
[105] *CRA Guidance*, *supra* note 5 at para 8.1.
[106] *Ibid*.
[107] Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, *Principles of International Charity* at 7, online: United States International Grantmaking Council on Foundations <http://www.usig.org/PDFs/Principles_Final.pdf> [*Principles of International Charity*].
[108] *Ibid* at 11.
[109] *Ibid*.
[110] Charity Commission of England and Wales, *Charities Working Internationally* at 11, online: Charity Commission of England and Wales <http://www.charity-commission.gov.uk/Library/guidance/cwitext.pdf> ["Charity Commission Guidance"].
[111] *Ibid* at 13. In Canada, some groups, such as RedR, provide courses for humanitarian workers who are exposed to dangerous environments to introduce what is a standard and recognized approach to managing security within the sector. See www.redr.org for more information.
[112] Ken Hall, "Risk and Insurance for Overseas Missions and Relief & Development Organizations," online: Robertson Hall <http://www.robertsonhall.com/pdf/RiskandInsuranceforReliefandDevelopmentOrganizations.pdf>.
[113] *Ibid.*
[114] See Ontario Ministry of Health and Long-term Care, *Public Information* at "Absences Outside Canada," online: Ontario Ministry of Health and Long-term Care <www.health.gov.on.ca/english/public/pub/ohip/travel.html>.
[115] *Ibid* at "What does OHIP cover while I'm out of the country?."
[116] *Ibid* at "When I travel outside of Canada, will OHIP pay the same medical expenses that are covered in Ontario?"
[117] Hall, *supra* note 112 at 4.
[118] *Ibid* at 2.
[119] "Charity Commission Guidance," *supra* note 10 at 5-6.
[120] *Ibid*.
[121] *Ibid* at 5.
[122] *Ibid*.
[123] *Principles of International Charity*, *supra* note 107 at 7.