Not-for-Profit Law

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CRA Issues Welcome Guidance on Foreign Activities

One would think that with Canada's long history of charity work abroad, from church missions to development assistance to disaster relief, the law in this area would be accommodating of groups wanting to undertake foreign activities. But Canada has among the most restrictive rules on overseas initiatives by registered charities of any country in the developed world.

The *Income Tax Act* (ITA) itself does not set out detailed rules specifically related to charity work abroad. Historically, however, foreign activity by charities has been tightly constrained by a combination of the strict interpretation by the Canada Revenue Agency (CRA) of provisions of general application when they concern the work of registered charities overseas and court cases that have supported and reinforced this interpretation.

Canadian law requires that registered charities use their resources for exclusively charitable ends. This entails devoting those resources either to their own activities or to making gifts to qualified donees (i.e., another registered charity or other type of entity specified in the ITA). Though central to the regulatory regime governing registered charities here, the concepts of 'qualified donee' and 'own activities' do not figure prominently in other jurisdictions, which tend to use other means to ensure their charities use their resources appropriately.

Although making gifts to qualified donees is straightforward, the vast majority of them are Canadian, so this option is usually not available to groups wanting to do work abroad. What constitutes carrying on your own activities, especially in the context of initiatives where there are likely to be other partners or intermediaries, is more complex.

The cases in this area are largely concerned with instances when a registered charity is exercising sufficient direction and control with respect to a particular undertaking such that it can be said to be carrying on its own activities. Often a supposed agency arrangement is at issue. Generally, the courts have concurred with the CRA's positions on the high degree of direction and control a Canadian charity operating through a foreign agent, or other mechanism, must exert in order to be said to be carrying on its own activities. Unfortunately, the courts have not provided a lot of detail of the specifics of direction and control.

Buttressing the requirement that charities pursue exclusively charitable ends, several years ago provisions were added to the ITA designed to stop charities from issuing grants to foreign groups or for projects outside of Canada unless they ensure that they are exercising strict control over how their resources are used. The measures explicitly prohibit gifts to entities that are not qualified donees. (Any transfer of resources by a

registered charity, whether called a gift, a grant, or something else, that is made without the charity receiving fair market value consideration in return can be characterized as a gift for purposes of the ITA.)

Prior to these provisions being introduced, there was some ambiguity about whether charities that had met their spending requirements and other regulatory obligations could give relatively limited amounts of money to non-charities either abroad or in Canada.

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Taken together, these measures have resulted in often onerous costs and paperwork for organizations undertaking work abroad. Moreover, they have been difficult to reconcile with 21st century values in the international development community which increasingly emphasize the empowerment and autonomy of local partners.

So the release of updated and more flexible guidance on charities' foreign activities in July was heartily welcomed. It is available at: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html.

The new guidance features a wealth of concrete examples, a helpful listing of "measures of control,"and identifies a threshold under which a charity will not be expected to incur the expense and administrative burden of a written agreement before it contributes resources to an initiative. It also tackles topics like conduit organizations, abiding by local laws, undertaking work that puts people at risk, and organizational obligations arising from anti-terrorism legislation.

As well, it clarifies and provides more detail on the types of arrangements that a charity can enter into if it wishes to undertake activities abroad. Especially helpful are the appendices discussing disaster relief, capacity-building, joint ventures, and what ought to be included in a written agreement with an intermediary.

The new guidance goes a long way toward redressing the excessive emphasis on agency agreements of the previous guidance that marked the CRA's approach to oversight of charitable work abroad in the past.

Some problems remain – the guidance doesn't come up with any way for a charity to avoid the inconvenience of having to ship documentation back here so it can meet the requirement in the ITA to keep books and records in Canada, doesn't grapple with the issue of microfinance and program-related investment, and could more effectively use CIDA's oversight of many charities' work abroad as a proxy for satisfying ITA regulatory requirements — but by and large it marks a huge step forward.

Even so, Canada still lags behind other jurisdictions. For example, our law still doesn't facilitate transfers to well-regulated charities in other developed countries.

In this regard, the European Court of Justice case ruling in *Hein Persche v. Finanzamt Ludenscheid* requires European Union (EU) member states to allow their citizens to claim tax deductions for gifts to a charity in another EU country if that charity meets the criteria for being a charity in the first country's jurisdiction. This obviates the need for the "friends of" parallel charity structure that was historically used in the United Kingdom in the work of charities in other European countries.

In the U.S., a charity can generally support programs or projects abroad that would qualify as charitable under U.S. law but remains accountable for use of its resources. There is a range of ways in which it may do so, but showing knowledge of how the funds will be used, requiring accounting of expenditures, and monitoring compliance with Internal Revenue Service rules are key considerations. Another factor taken into account is the ability to terminate funding if improper spending is discovered.

In Canada, legislative change is likely needed if we are ever to move toward a model more in keeping with the approach taken by other jurisdictions in the developed world. Aside from better aligning our regulatory regime in this area to that of other countries, such a change would also allow Canadian charities to partner with their overseas counterparts in a way more in keeping with contemporary development practice and honour Canada's storied tradition of international engagement.

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