Charities now have a roadmap for working with domestic non-charities

Peter Broder

Regular readers of this column know that there is a scarcity of Canadian case law on the definition of charity and many other aspects of what it is legally permissible for registered charities to do. One area where charities have long faced uncertainty in their operation is in working with domestic intermediaries.

The courts have, over the years, considered a number of cases dealing with charities furthering their purposes through relationships with overseas organizations. Domestically, however, there was a dearth of jurisprudence on what a charity ought to do if it wanted to advance its objects through, or in conjunction with, a non-charitable party within Canada. Given our relatively static definition of charity this was particularly unfortunate. In the past, charities asking the Canada Revenue Agency (CRA) Charities Directorate about this issue were routinely referred to the guidance dealing with foreign intermediaries and told that they should apply the same principles when working within Canada.

Added to this context, the importance of conducting domestic work appropriately became even more heightened when provisions were added to the *Income Tax Act* (*ITA*) recently, explicitly

prohibiting the making of gifts to "non-qualified donees" (groups that were not registered charities or entities afforded status akin to registered charities under the *ITA*) and providing for possible revocation of the registration of charities that made such gifts.

In June, CRA stepped into the vacuum and provided comprehensive guidance on charities working with domestic intermediaries. That guidance, *Using an Intermediary to Carry out a Charity's Activities within Canada*, is available at: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html . While this guidance is still derived from case law related to foreign activities, it is written for charities dealing with domestic intermediaries and addresses some questions likely to arise specifically in the Canadian context.

The guidance discusses several avenues for working with non-charities to advance an organization's purposes. It also highlights the impropriety of "lending" one's charitable number to a non-charity – a practice that, although often well-intentioned, remains a frequent and serious violation of the *Income Tax Act* and puts numerous charities at risk of revocation every year. As well, it explains that a registered charity cannot be a "conduit" that accepts donations that are subsequently funnelled to an organization without charitable status.

That said, a charity need not be hamstrung by how it carries out its charitable work. It is acceptable, and sometimes more efficient than acting independently, for a charity to work with others to advance its objects. Groups may lack the internal capacity or expertise to accomplish work in a certain area, and it is legitimate for them to seek out other organizations to assist with such work.

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The guidance even gives an example of when it might be appropriate for a charity to engage with a for-profit entity to fulfil its mandate. Whether working with a non-profit organization, co-operative, for-profit or other non-charitable body (in *ITA* parlance a "non-qualified donee"), however, the law requires that the charity demonstrably show that it has sufficient direction and control to ensure any resources it provides are used exclusively for furthering the charitable purposes it is constituted to advance.

In some circumstances, in light of the nature of the resources provided and the circumstances under which they are provided, CRA will generally accept that they are dedicated to charitable ends: for example, supplies of a medical, scholastic or religious character are apt to be used to further a recognized charitable purpose even if they are transferred to a non-charitable organization.

CRA's expectation in such circumstances is that the receiving organization understands and agrees to use the property for charitable purposes and that it is reasonable that the supplying charity have a "strong expectation" that the goods will be used for charitable ends.

Where the character of the goods does not necessarily suggest use for charitable ends, the guidance lays out various methods whereby the charity can ensure direction and control. These

include: use of agents; entering into joint ventures; working with cooperatives; and contracting. In assessing the acceptability of a charity engaging with a non-charity, CRA looks for documentation of the ways the charity is managing and/or overseeing use of the resources and whether the charity has the ability to cancel or withdraw its support if the project or activity ceases to advance the purpose(s) for which it was provided.

Helpfully, the guidance recognizes the need for the mechanism for exercising direction and control to be proportionate to the resources that are being made available.

Another positive feature of the guidance is an acknowledgement that often, work with intermediaries is both a means to deliver charitable services and a means to develop capacity within the organization with which the charity is working. This is an issue that has not been fully canvassed in the case law, and CRA is to be commended for providing a framework within the guidance for dealing with a practical difficulty often faced by groups undertaking this type of activity.

An appendix to the guidance indicates that, in any capacity-building activity, the charity must still further its purposes, maintain adequate direction and control over use of its resources and continue to satisfy the public benefit test that is an essential element of any charitable purpose. It cautions that capacity-building may result in impermissible private benefit. But, if any private benefit can be kept incidental, it also notes that capacity-building can be acceptable where it is furthering a recognized charitable purpose, such as relief of poverty or advancement of education.

Other appendices outline what CRA generally expects where the relationship between the charity and non-charity is a joint venture or written agreement.

All in all, in the absence of further case law, this guidance provides a reasonable and useful roadmap for charities wanting to work with other groups who may not be qualified donees to accomplish their mandates within Canada. If charities heed the advice it offers, a good deal of the inadvertent non-compliance currently occurring in this area should be avoided.

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