

Working Overseas A Review of Canadian Regulations and Rules Relating to Foreign Activities

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AGENDA FOR THE DAY

- P 10:00am - Introductions
- P 10:10am - Overview of Charities and Non-Profits
- P 11:00am - The Matter of Direction and Control of Resources
- P 12:00pm - Working Lunch – Handout Questions and Conversation
- P 1:00pm – Responses to Handout – How to achieve Direction and Control
- P 1:45pm - Questions and Discussion – Issues and Concerns
- P 2:15pm - Wrap Up and Evaluation
- P 2:30pm - Adjourn

Issues and questions:

- how can a Canadian charity work with its' global partners?
- how can a Canadian charity work with Canadian entities (i.e.. Aboriginal groups etc.) that are not charities?
- how can a charity establish it has direction and control?
- how can a charity establish that it carries on its own activities?

Issues and questions:

- how can structured agreements be used to extend the field of activities where there are no qualified donees?
- what restrictions does the Charities Directorate of Canada Revenue Agency have about arrangements used with intermediaries to carry on charitable activities
- How do you manage receipts and record keeping requirements in countries where they are difficult to obtain?
- When is activity educational and when is it too political?

BACKGROUND – THE LAW OF CHARITY

There are two broad types of non-profit organizations:

- charities; and
- non-profits that are not charities

Common law – the “**what**” of charity

- doing good is charitable
- arguing about what is good is not charitable

The Income Tax Act – the “**how**” of Charity

KEY CONCEPTS

The key concepts registered charities must know to understand both the what and the why of working overseas are:

- charitable purposes
- activities
- expenditures and gifts (grants)
- qualified donees

Statute of Elizabeth 1601 and Pemsel, 1893:

Relief of poverty

Advancement of education

Advancement of religion

Public benefit determined by the courts

PURPOSES OR OBJECTS AND ACTIVITIES

Charity law sees an organization's objects as those ends towards which action is directed.

Objects are best thought of as collections of possible activities and that are both contemplated by the objects and that aim to advance them.

But activities cannot stray outside the boundaries of the objects.

GIFTS (GRANTS) AND EXPENDITURES

Gift/Grant: The transference of property in a thing by one person to another, voluntarily and without any valuable consideration

Expenditure: spending money, the giving of money in return for something

GRANTS BY REGISTERED CHARITIES

Canadian registered charities

- must devote their resources to their own charitable activities, or
- make grants to qualified donees

Canadian registered charities may not make grants (gifts) to foreign charities

- explicit grounds for intermediate sanctions or revocation of registration

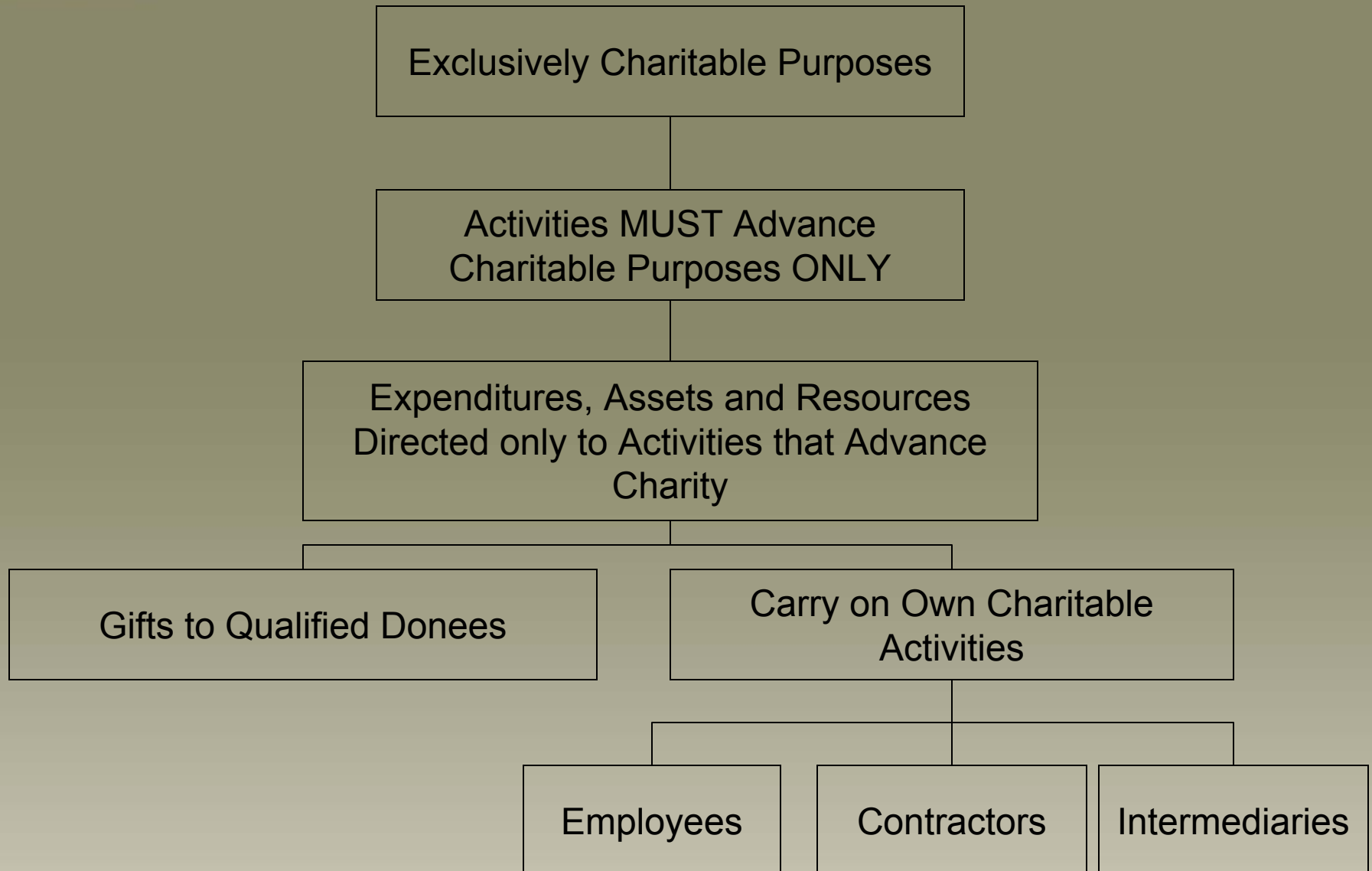
QUALIFIED DONEES

"**qualified donee**" means a donee described in any of paragraphs 110.1(1)(a) and 110.1(1)(b) and the definitions "total charitable gifts" and "total Crown gifts" in subsection 118.1(1)

Includes 82,000 registered charities

+ 7 categories of other beneficiaries [see Guidebook]

SUMMARY



WORKING OVERSEAS

CRA regularly audits charities working overseas

CRA has new RC4106 in the works – Is it more restrictive?

How will the new policies impact existing relationships?

How do organizations transition from old to new environment?

A charity must carry on its ***own charitable activities***, or fund certain organizations identified in the *Income Tax Act* (“qualified donees”), or do both;

To establish “own activities” a charity must maintain sufficient books and records in Canada to enable CRA to verify that the charity’s funds have been properly spent and ***that the charity is retaining control and direction over the use of its resources***;

WORKING OVERSEAS (CONT'D)

Canadian registered charities can operate anywhere in the world in two ways – directly or indirectly

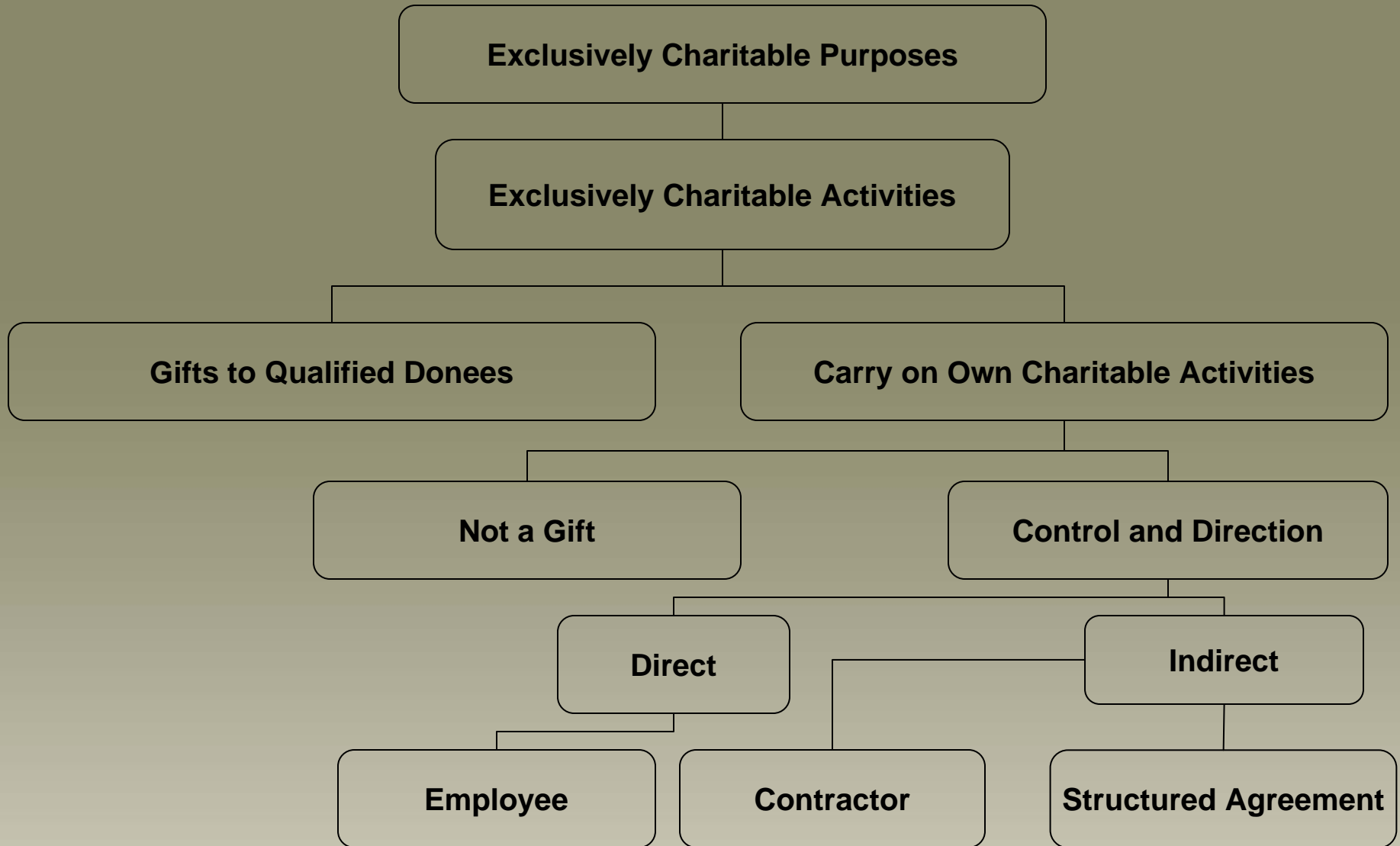
A. Direct foreign activities

- local or Canadian employees or volunteers

B. Indirect Activities by Registered Charities

- Always subject to “own activities” test
- RC 4106 “Registered Charities Operating Outside Canada”
 - need binding written agreements
 - agency/joint venture/cooperative partnership arrangements

WORKING OVERSEAS (CONT'D)



How can a charity demonstrate there is no gift and that there is effective control and direction of charitable activity?

- a written structured agreement
- see page 6 & 7 of CRA -RC4106 –Registered Charities: Operating Outside Canada

ALL WRITTEN AGREEMENTS

Names and addresses of all parties;

The duration of the agreement or the deadline by which the project must be completed;

A description of the specific activities for which funds or other resources have been transferred;

Outline clearly the limits of the authority given to the recipient to act for Canadian charity or on its behalf;

WRITTEN AGREEMENTS (CONT'D)

Provision for withdrawing or withholding funds or other resources at the charity's discretion;

Provision for maintaining adequate records;

Provision for the charity's funds and property to be segregated from those of the other party or parties and for the maintenance of separate books and records; and

The signature of all parties, along with the date.

Arrangements with intermediary can be structured in many ways including:

Agency

Joint Venture/Joint Project

Cooperative Partnership

Fee for Service/Contractor

AGENCY AGREEMENT

Principal (Canadian charity) hires agent to complete some task

Project choice is made by principal

Operational decisions can be made by agent

Liability flows from agent to principal
– Liability allocation

Stringent recordkeeping requirements

JOINT VENTURE AGREEMENT

Core elements:

- pooling of resources for common project
- requires substantive Canadian participation in decision-making related to long term planning and day to day decisions
 - Canadian votes proportional to monetary contribution; or
 - Canadian veto power
- liability allocation
- Canadian charity should regularly obtain financial information and reports relating to entire venture
- term and termination

Working side by side with other organizations and people towards a common project or objective

Each Participant takes responsibility for a particular aspect of the project

Funds are not transferred to other "partners"

Canadian charity may hire intermediary for specific transfers or services

- intellectual property licensing
- worker training
- evacuation facilities
- field supervision
- broadcast airtime purchase

Need invoices, may require regular financial and progress reports, final reports and supporting documentation

Need written contract unless nominal amount (under 5% or \$5,000 per year)

Canadian charity may give goods to foreign charity if:

- goods are intrinsically charitable (Bibles, medicines...)
- recipient organization must provide assurances it will only use goods for charitable purposes
- records are received
- Important to retain sufficient direction and control to satisfy own activity requirement

Providing Basic Facilities (i.e.. Hospitals, bridges, schools...)

May be permitted if to a government agency, municipality or non-profit community entity provided charity can obtain reasonable assurances that the property will be used for its expected life for the community as a whole

TERRORISM

Refuse or revoke charitable registration for making any resources available to a terrorist organization (directly or indirectly)

Appeal process – Respondent doesn't receive the secret intelligence but does receive a summary and has an opportunity to be heard.

To date CRA has not had to use this process.

RECORDKEEPING

Registered charities must keep supporting documents in Canada to show charitable nature of all activities

Supporting documents include

- operational reports, correspondence, minutes of meetings
- written agreements
- evidence of provisions of instructions and supervision
- financial reports (with backup), invoices
- segregated bank accounts for agency agreements
- records of funds transferred and disbursed
- photographs or other media

Where should the records be kept?

In Canada - unless by virtue of local law documentation cannot be forwarded to Canada

Must be available for inspection in any event

Intermediate sanctions

- penalty of 105% of gifts made to non qualified donee (i.e.. a foreign charity)
 - director liability?
- penalty payable to Canada Revenue Agency or to arm's length Canadian charity

CONSEQUENCES OF IMPROPERLY WORKING OVERSEAS

Loss of charitable registration

Loss of tax exempt status

Loss of tax recognition for donors

Imposition of penalty tax equal to 100% of charity's
assets

- “capital punishment”

Two recent high profile revocations for foreign activity
mis-documentation

- *Canadian Magen David Adom for Israel*
- *Tel Aviv Foundation*

ADDITIONAL *INCOME TAX ACT* LIMITATIONS

Related Business - okay for charitable organization and public foundation

Administrative/Fundraising expenses – not expenditures on charitable activity

Political Activities - ancillary and incidental to charitable purposes – the 10% rule

CPS 022 – CRA policy

- a registered charity can be involved in non-partisan political activity

CRA Policy outlines

- Prohibited Political Activity
- Permitted Political Activity
- Charitable Activity

Illegal Activity

Partisan activity – Involves direct or indirect support of, or opposition to, any political party or candidate for public office

PERMITTED POLITICAL ACTIVITY

An explicit call to political action

Explicit communication to retain, oppose or change the law, policy or decision

Explicit calls for pressure to be put on public or elected officials

CRA presumes an activity to be political if a charity:

- explicitly communicates ***a call to political action*** (i.e., encourages the public to contact a public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country)

POLITICAL ACTIVITY (CONT'D)

CRA presumes an activity to be political if a charity:

- explicitly communicates to the public that the ***law, policy, or decision of any level of government in Canada*** or a foreign country should be ***retained*** (if the retention of the law, policy or decision is being reconsidered by a government), ***opposed, or changed***; or

CRA presumes an activity to be political if a charity:

- explicitly indicates in its materials (whether internal or external) that the ***intention of the activity*** is to incite, or organize to put pressure on, ***a public official to retain, oppose, or change the law, policy, or decision of any level of government*** in Canada or a foreign country.

POLITICAL ACTIVITY (CONT'D)

As a general rule any activity that suggests convincing people or requiring them to act in a certain way and which is contingent on a change to law or government policy (e.g., "the abolition of" or "the total suppression of animal experimentation") is a political activity.

When is an activity charitable?

- If a charity seeks to foster public awareness about its work or an issue related to that work.
- If the activity should be based on a position that is well reasoned, rather than information the charity knows or ought to know is false, inaccurate, or misleading.
- Provided the material does not use primarily emotive material.

BEST PRACTICES

Plan funding of overseas projects carefully.

Don't worry about what you call it – focus on what you need the relationship to be

Consider various projects – Some may be easier than others for Canadian charities to fund

International partners do not in many instances have the same constraints.

Ensure realistic written agreements are put in place and followed.

- CRA has found on audit that many are not doing what the agreement contemplates.

Work with contracting Party on form of reports to be provided – work with them to make it feasible to get reports.

Shorter reports provided more frequently may be easier – consider the best approach for all.

Be consistent in how you manage each relationship.

Consider whether you can transfer property developed or use the Charitable Goods policy if appropriate.

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