

Some Legal and Ethical Issues in Canadian Charities Conducting Foreign Activities and International Development

A presentation to

Care Canada

June 11, 2008

Mark Blumberg



www.globalphilanthropy.ca

Overview

- ❑ Good works outside Charitable realm
- ❑ Framework for Charities operating Abroad – Corporate, CRA views and documents, Ways to Carry on Own Activities
- ❑ Cases
- ❑ Operational Legal issues

Disclaimer - presentation is information, not legal advice



Theme 1

- ❑ There are CRA rules for Canadian charities operating abroad – they are especially important for Canadian charities transferring funds or resources outside of Canada
- ❑ The rules are not too onerous and understanding their rationale will assist in compliance
- ❑ The rules focus on written agreements, control, monitoring and records



Theme 2

- ❑ Many Canadian charities have many partners, whether they realize it or not.
- ❑ Each partner may have different requirements or needs and it is best to ascertain what those needs are and to try to satisfy those needs and one's legal obligations and also to act at the appropriate standard.
- ❑ CRA is often forgotten, they are "silent" partner - will focus on their needs in this presentation



Who are your partners?

- ❑ intermediaries - civil society organizations
- ❑ intermediaries - large Western NGOs
- ❑ CIDA, CRA, Canadian government
- ❑ donors and corporate partners
- ❑ your staff
- ❑ international affiliations or secretariat or coalitions



Variety of Charities

- ❑ 82,000 Registered Charities in Canada
- ❑ every charity is different –
objects / areas of charitable work /
philosophy/ risk tolerance / public profile /
donors / level of government support /
independent versus international affiliations /
resources / knowledge
- ❑ legal compliance versus ethical standards



Variety of Charities (cont)

- ❑ 12,000 carried on 'programs' outside of Canada
- ❑ 70,000 did not
- ❑ of 12,000 some dedicated to humanitarian assistance, international development, international education, international religious
- ❑ many 'local' charities considering expansion of activities



Importance

Integrity and Trust

Of the ten types of charities in Canada according to a recent survey Canadians are most likely to trust hospitals a lot or some (89%), trust charities that focus on children/children's activities (85%), trust health prevention/health research (84%), trust charities that focus on education (77%), churches (67%) and least likely to trust international development charities (57%).

Talking About Charities 2006: Tracking Canadian's Opinions About Charities and The Issues Affecting Them
by Ipsos Reid for The Muttart Foundation, September 2006



www.blumbergs.ca

Importance (Cont) – Canadian charities foreign expenditures

- ❑ 2002 - \$1.4 Billion
- ❑ 2004 - \$1.8 Billion
- ❑ 2005 - \$2.1 Billion
- ❑ 2006 - \$2.3 Billion



Canadian charities by \$ spent directly outside of Canada (2006)

1. WORLD VISION CANADA-VISION MONDIALE CANADA \$ 287,877,830.00
2. CARE CANADA \$ 187,223,833.00
3. ESCARPMENT BIOSPHERE FOUNDATION, INC. \$ 125,546,505.00
4. INTERNATIONAL DEVELOPMENT RESEARCH CENTRE-CENTRE DE RECHERCHES POUR LE DEVELOPPEMENT INTERNATIONAL \$ 97,565,681.00
5. HAMILTON HEALTH SCIENCES CORPORATION \$ 92,855,349.00
6. PLAN INTERNATIONAL CANADA INC. \$ 54,146,626.00
7. THE CANADIAN RED CROSS SOCIETY \$ 48,245,075.00
8. UNITED ISRAEL APPEAL OF CANADA INC \$ 40,726,294.00
9. THE SAMARITAN'S PURSE - CANADA \$ 35,955,229.00
10. CHRISTIAN CHILDREN'S FUND OF CANADA \$ 33,644,359.00
11. MENNONITE CENTRAL COMMITTEE CANADA \$ 32,159,078.00
12. CANADIAN CATHOLIC ORGANIZATION FOR DEVELOPMENT AND PEACE \$ 27,192,639.00
13. CENTRE D'ETUDE ET DE COOPERATION INTERNATIONALE \$ 25,303,615.00
14. OXFAM-QUEBEC \$ 22,460,066.00
15. CANADIAN FOODGRAINS BANK ASSOCIATION INC/ASSOCIATION DE LA BANQUE CANADIENNE DE GRAINS INC. \$ 22,073,907.00



CRA Charities Partnership and Outreach Program Funding Priorities

- ❑ 1. Conducting foreign activities in compliance with a charity's obligations under the *Income Tax Act*.

Increasingly, registered charities are conducting some of their charitable activities internationally. As charitable activities are conducted beyond Canadian borders, a number of control or compliance issues may arise that could result in a charity being non-compliant with respect to its obligations under the *Income Tax Act*.

- ❑ 2. Fundraising, receipting, and maintaining books and records in compliance with a charity's obligations under the *Income Tax Act*.

See CRA website.



Good Works

Carrying on Good Works Abroad outside of the CRA charity regulation

- ❑ personal donations of cash or in kind items to foreign charities, no tax receipt
- ❑ business – donation, sponsorship, advertising, doing business in developing countries, CSR, etc
- ❑ For profit “non-profit” -Google.org, micro-loans
- ❑ non-profit without charitable status – if no need to issue tax receipts.



Carrying on Good Works Abroad outside of the CRA Charity regulation

- ❑ volunteering –at home and abroad
- ❑ gifts to family, friends, former employees abroad –remittances



Corporate, Trust and Donor Issues

Operating Abroad – Corporate and Trust law issues

- ❑ Letters Patent/Articles of Incorporation – objects and restrictions –avoiding ultra vires activities
- ❑ By-laws and resolutions
- ❑ Trusts agreement –scope
- ❑ Donor restricted gifts



Charitable Objects – eg. International Development

Relief of Poverty -To relieve poverty in developing nations by providing food and other basic supplies to persons in need.

Health - To develop or promote public health in developing nations by educating and instructing the public on prevention of, and curative measures for, health problems and by researching and documenting changes in the health of the community.

Drinking Water -To improve the quality of drinking water in developing nations by constructing wells and water treatment, irrigation and sewage treatment systems.

Agriculture - To improve skills in forestry, agriculture and horticulture and to assist in the preservation of the environment in developing nations.

Disaster Relief - To provide necessities of life to victims of disasters.



Source: Ontario Not-For Profit Incorporator's Handbook.

www.blumbergs.ca

Objects that may require modifications or additions

To establish and maintain a hospital.

To establish and maintain a hospital in Mississauga, Ontario.

To receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to charitable organizations that are also registered charities under the Income Tax Act (Canada).



CRA

Considerations

CRA – Considerations that apply to all charities and those operating abroad

- ❑ no partisan political activities
- ❑ limited non partisan political activities
- ❑ only undertake charitable activities
(relieve poverty, advance education, advance religion, benefit community as a whole)
- ❑ cannot violate Canadian public policy



CRA Views on Canadian Charities operating outside of Canada

- ❑ RC4106 “Registered Charities Operating Outside Canada”
- ❑ Registered Charities Newsletters
- ❑ Information Letters
- ❑ Policy Statements
- ❑ Consultation on Proposed Policy



CRA – Considerations that apply to Canadian charities operating abroad * * *

- ❑ The Canadian Income Tax Act allows charities to conduct their charitable purposes by
 - 1) giving monies to another "qualified donee" (usually a Canadian charity but also includes the United Nations and a small number of foreign entities) or
 - or
 - 2) their own activities (at home or abroad)
- ❑ No third option - A Canadian charity cannot just transfer money to a foreign charity.



Qualified Donees

Donations to Qualified Donees –Tax Credit for Charitable activities abroad

- ❑ registered charities, registered Canadian amateur athletic assoc., tax exempt housing corporations, Canadian municipalities
- ❑ United Nation and its agencies
- ❑ certain Universities outside Canada that student body of which ordinarily include students from Canada(Reg 3503) (“Schedule VIII Universities” or “prescribed universities”)



Eligibility for Tax Credit (Continued)

- a charitable organization outside of Canada to which Her Majesty in right of Canada (federal government or its agents) has made a gift in the corporation's taxation year or the preceding 12 months. (see CRA Circular 84-3R5 and Attachment to IC 84-3R5, Gifts to Certain Charitable Organizations Outside Canada)



**OWN
ACTIVITIES**

RC 4106 – “Own activities”

- assurances that other organization is able to deliver services (due diligence)
- expenses must further objects of Canadian Charity and constitute charitable activities
- adequate written agreement
- periodic, specific instructions
- regularly monitors project and evidence
- periodic payments, right to discontinue, in certain circumstances



“Own activities” – other ideas

- ❑ providing clear and complete description of activity
- ❑ being aware of issues, problems, challenges etc. relating to your activities
- ❑ having Canadian on board of intermediary or intermediary rep on Canadian board not at all adequate
- ❑ direction, control, monitoring and evidence
- ❑ structured arrangement, not “conduit”



Written Agreements –Part 1

- 1) names and addresses of all parties
- 2) duration of agreement/project
- 3) description of specific activities
- 4) written progress reports and right to inspect
- 5) payments by instalment based on reasonable progress



Written Agreements –Part 2

- 6) withdrawing or withholding funds at charities discretion
- 7) adequate records in Canada
- 8) agent – adequate records and funds segregated for Canadian Charity's funds
- 9) signature of all parties
- 10) date



Ways for Canadian Registered Charity to Carry on “Own Activities” * * *

1. employee in foreign country
2. agency agreement
3. contractor
4. joint venture agreement/joint ministry agreement
5. cooperative partnership agreement



1) Employees or Volunteers

- ❑ Can be Canadian employees or volunteers or locals.
- ❑ best model? eg. MSF, missionaries
- ❑ skills, beliefs, control, reporting, language, returning workers
- ❑ concerns – local knowledge, costs, sustainability, danger,



2) Agency Agreement

- ❑ Canadian charity appoints agent abroad to conduct Canadian charity's activities with Canadian charity providing funding and control
- ❑ most common
- ❑ need written agency agreement
- ❑ concern – charity liability for agents actions, agents ignore agreement, hierarchy



3) Contractor Agreement

- ❑ Canadian charity hires foreign contractor to conduct certain work.
- ❑ eg. drill well
- ❑ need written agreement
- ❑ not agent – business agreement, limited liability



4) Joint Venture/Joint Ministry Agreement

- ❑ Canadian charity can work with a foreign organization jointly pursuant to a joint venture/ministry agreement (JVA/JMA)
- ❑ pool resources to carry out certain works
- ❑ need written JVA or JMA
- ❑ control by CC at least in proportion to CC contribution



5) Cooperative Partnership Agreement

- ❑ CC works with foreign organization and each contributes different resources and undertakes a different part of the project.
- ❑ need Cooperative Partnership Agreement.
- ❑ disbursement quota concern if CC does all admin services for project



Exceptions?

Transfer of Property in Foreign Country

- ❑ Canadian charity should maintain ownership and control over assets
- ❑ can sell assets at FMV or transfer to qualified donee
- ❑ exception
 - 1) can transfer assets if charitable ('charitable goods policy')—eg. food to hungry, prayer books
 - 2) prohibition on foreign ownership of real estate
 - 3) development work –can turn over to local control – need assurances of continued community benefit



“Charitable Goods Policy”

Equally acceptable are transfers of goods and services that are directed to a particular use by the very nature of the goods and services so transferred.

Examples of such transfers include:

- transfers, by a research organization, of books and scientific reports to anyone interested (including foreign governments, libraries, schools, etc.),
- transfers of books - on a subject of particular interest to an educational charity - to public libraries in major cities all over the world,
- transfers of medical supplies to a refugee camp,
- transfers of food, blankets, etc. to a charity coping with a natural disaster,
- transfers of drugs, medical equipment, etc. to poorly equipped hospitals,
- transfers of personnel to schools or hospitals (on loan).

1985 CRA Staff memo cited in CMDA Case



www.blumbergs.ca

Charitable Goods Policy – Beware.

- ❑ Transfers of goods or services can more easily be viewed as charitable activities per se. The transfer of a piece of equipment that is meant to be used **only** for charitable purposes to an organization that will **clearly** use it for such purposes is **likely** to be a charitable activity. (MDA Case) [emphasis added]
- ❑ CRA will look at nature of goods, which organization receives goods and controls placed



Charitable Goods Policy – Beware.

- ❑ is it a policy?
- ❑ suspicious transfers, sham transactions.
- ❑ when to use – small amounts, emergency, very reputable, non-political, non-sectarian, organization acting as representative.



Repayment of bona fide Debt/Loan

- ❑ repay loan to creditor regardless of whether in Canada or outside
- ❑ must be a real debt
- ❑ if foreign charity advances funds to Canadian charity consider whether foreign charity should gift or loan amount
- ❑ disbursement quota issues



Tithes, Royalties, Membership or Similar Fees

- ❑ international associations/alliances
- ❑ goods and services, training courses, literature, membership, intellectual property
- ❑ amount paid must be proportional to benefit received unless small amount (ie. lesser of 5% of expenditures or \$5000)
- ❑ need to be able to document and if excessive then CRA considers it gift to non-qualified donee and can result in revocation



Books and Records

- ❑ English or French, kept in Canada
- ❑ substantiate qualification of charity to registration, permit verification of donations, be supported by source documents.
- ❑ “record” includes
an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether written or in any other form.



Books and Records (continued)

- ❑ contracting out to third party does not relieve charity of obligations
- ❑ traditional or electronic, backups
- ❑ failure to keep adequate books and records grounds for revocation



Books and Records (continued)

- ❑ RC4106 “reasonable reports on the progress of its projects and programs”
- ❑ These reports should be supported with documentary evidence such as: copies of written agreements; deeds; financial statements; invoices; photos; minutes of meetings; and any other materials that reflect the charity's ongoing participation and that show how the charity's funds are used.
- ❑ Suggestions for Agents, Contractors, Joint Ventures, Cooperative Partnerships, CIDA projects.



Canadian Cases

Canadian Cases on Registered Charities Operating Abroad

- ❑ Tel-Aviv Foundation Case
- ❑ Canadian Magen David Adom Case
- ❑ Bayit Lepletot Case
- ❑ Travel Just Case



Canadian Committee for the Tel Aviv Foundation v. Canada (2002 FCA 72)

- ❑ promotion of education and relief of poverty in Tel-Aviv by agency agreement
- ❑ 1990 audit (lack documents of overseas expenditures etc)
- ❑ 1993 audit –new Israeli management not aware of Agency Agreement



Tel Aviv Foundation v. Canada (cont)

- ❑ Foundation made undertaking in 1996 to “conform strictly to the requirements of Revenue Canada, including the specific provisions of the Agency Agreement”.
- ❑ 1997 audit – CRA says violated agency agreement in little control over funds disbursed to agent (just conduit and not controlling), cannot show reporting, funds of Foundation not kept separate from agent, receipt



Tel Aviv Foundation v. Canada (cont.)

and T3010 and T4 irregularities, Foundation did not authorize projects, grant to Air Force Museum in Beersheva (outside of objects - ultra vires), no evidence of alleged oral arrangements that superceded agency agreement.

- ❑ FCA in 2002 finds against Foundation



Tel Aviv Foundation –Lessons Learned

- ❑ stay within your objects
- ❑ have agreement but also follow it –control projects and have reporting
- ❑ undertakings must be strictly complied with
- ❑ avoid military in foreign country?
- ❑ changes to agreements should be in writing



Canadian Magen David Adom for Israel and MNR (2002 FCA 323)

- ❑ object – To donate emergency medical supplies and ambulances directly to the people of Israel
- ❑ CMDA appointed Canadian representative in Israel to implement
- ❑ 1986 audit – concerns – funds to US MDA for purchasing ambulances, not directly to General Motors, and also no agency agr. with MDA in Israel and no control over ambulances



Canadian Magen David Adom (cont)

- ❑ CMDA acknowledges need for agency agreement, but does not enter into one, MDA in Israel is not interested
- ❑ charitable goods policy but sometimes expenditures considered remote
- ❑ T3010 - magnetic punch card system – should be admin, not charity, CRA disapproves of expense



Canadian Magen David Adom (cont)

- ❑ DQ shortfall –\$169,000
- ❑ audit of 1993 and 1995, 1996 years
- ❑ concerns – no agency agreement, persistent DQ problems, non-charitable expenditures like bullet proof vests (too indirect/can be used by anyone), not “emergency medical supplies” –objects.
- ❑ CMDA says no need for agency agreement, no DQ problem, defends bullet proof vests



Canadian Magen David Adom (cont)

- ❑ public policy concern – supporting permanence of settlements in West Bank –no interpretation bulletin on this –must be “definite and somehow officially declared and implemented policy”
- ❑ transfer of capital assets (ambulance) to MDA in Israel and one to IDF after agency agreement. Ambulances and telecom equipment can be used for non-charitable purposes



Canadian Magen David Adom (cont)

- ❑ 2001 notice of revocation and FCA dismisses appeal and CMDA loses status
- ❑ finds that no public policy issue here, but concern over:
 - 1) agent “not effectively authorized, controlled and monitored by the charity”
 - 2) equipment not only used for charitable purposes and including concerns of involvement by agent with Israeli military operations



Magen David Adom –Lessons Learned

- ❑ CRA will go after powerful and good charities
- ❑ need for written agreement
- ❑ disbursement quota
- ❑ no donations of equipment to foreign military
- ❑ who wants a 16 year audit?



Canadian charities and involvement with foreign militaries

- ❑ permissible – eg in natural disaster foreign military transports your food to affected area
- ❑ not permissible – eg. transferring to foreign military capital equipment
- ❑ grey area
- ❑ recent discussions - CMDA, Heseq Foundation
- ❑ concern in conflict areas of close relationship between humanitarian groups and the military



Bayit Lepletot, 2006 FCA 128 (March 28, 2006)

- ❑ Canadian Charity deals with Rabbi in Israel who “presumably” exercises some control over Israeli charity with similar name to the Canadian Charity. But no evidence of his control over charitable works
- ❑ Agent can carry on charitable work but it must be shown that the agent is actually carrying on the work. Not sufficient for agent to be part of another organization that does work. No factual basis for arguing delegation. Status revoked.



Travel Just, 2006 FCA 343 (October 24, 2006)

- ❑ application for charitable status – ethical tourism –deemed refusal and appeal
- ❑ OBJECTS a. ...to create and develop model tourism development projects that contribute to the realization of international human rights and environmental norms and that achieve social and conservation aims that are in harmony with economic development aims for the particular region; ..
- ❑ concerns – vague/subjective objects and concern with private benefit



CRA REVIEW of FOREIGN ACTIVITIES

CRA Review

- ❑ what has changed since RC4106?
- ❑ CRA Concerns
- ❑ CRA will be doing a public consultation



CONTRACT ISSUES GENERALLY

Contract issues generally

- correct party/correct legal name
- choice of law
- indemnity
- type of relationship/liability for other's actions
- insurance
- foreign currency fluctuations



**CIDA
CONTRACT
ISSUES**

CIDA Concerns

- environment
- security
- public recognition
- monitoring and audit
- appropriation of funds



CIDA Concerns (cont)

- ❑ anti-corruption
- ❑ conflict of interest
- ❑ intellectual property
- ❑ conduct prejudicial to Canada



OPERATIONAL ISSUES

Top Compliance Concerns Presentation from Terry de March, CRA

- ❑ incorrect issuance of receipts (lack information, mistakes, FMV)
- ❑ failure to file T3010
- ❑ T3010 omissions
- ❑ non-charitable activities
- ❑ gifts to non-qualified donees



Top Compliance Concerns (cont)

- ❑ failure to maintain direction and control
- ❑ fundraising costs (reasonable and proportionate)
- ❑ political activities
- ❑ unrelated business activities
- ❑ religious school tuition receipts



Top Compliance Concerns(cont)

- ❑ tax shelters
- ❑ fraudulent tax receipts
- ❑ transactions with directors
- ❑ other CRA rules (payroll, GST etc)



Other Operational Issues

- ❑ employees vs. independent contractors
- ❑ written agreements when required
- ❑ corporate requirements
- ❑ CRA requirements - generally
- ❑ terrorism, fraud, and money laundering



Operational Issues (cont)

- ❑ bribery and corruption
- ❑ private benefits
- ❑ logistics/security of staff abroad
- ❑ ethical issues
- ❑ cultural, religious, gender issues.



Operational Issues (cont)

- ❑ IP issues (trademark, copyright, trade secrets, licences)
- ❑ Legal constraints outside of Canada (eg. Russia, foreign currency restrictions, land)
- ❑ donor and CIDA constraints



ETHICAL ISSUES

Canadian Council for International Cooperation (CCIC)

- ❑ CCIC Code of Ethics
- ❑ principles of development and partnership
- ❑ conduct – governance, integrity, finances, communication with public, human resources
- ❑ CCIC Ethics Review Committee
- ❑ www.ccic.ca



Marketing and Ethics

- ❑ see Canadian Council for International Cooperation (CCIC) material (ccic.ca)
- ❑ avoid stereotypes, people as hopeless
- ❑ avoid masking diversity and difficulty
- ❑ Northern superiority vs. partnership
- ❑ see CCIC Code of Ethics



Compliance with local laws of foreign jurisdiction

- ❑ Are Canadian charities required by the Canadian government or CRA to comply with the laws of the foreign country in which they operate?



Conflicts of Interest

- ❑ person has private or personal interest sufficient to appear to influence the objective exercise of person's duties.
- ❑ real, actual / perceived / foreseeable
- ❑ eg. Self-dealing, misuse of information
- ❑ managing – declare, discuss, deal with it (restrict, recruit help, remove, relinquish private interest, resign) and document



“CSO Effectiveness”, Accountability and Transparency

- ❑ Paris Declaration Concerns – Aid Effectiveness (ownership, alignment, harmonisation, managing for results and mutual accountability)
- ❑ Canadian donor concerns
- ❑ newspaper reports and trust



T3010A – Registered Charity Information Return

- C4 -Did the charity carry on programs, directly or indirectly, **outside** Canada? If *yes*, were any carried out: by employees or volunteers of the charity? - under agency agreement, contract, joint-venture, or similar arrangements? - through gifts to qualified donees? - by other means?

- C5 For programs the charity managed directly, outside of Canada, list the countries or regions where programs were carried on. Do **not** include countries or regions where programs were managed by a qualified donee.

- F1F1 What were the total expenditures on programs **outside** Canada during the fiscal period, excluding gifts to qualified donees?

**DUE 6 MONTHS
AFTER CHARITY'S YEAR END**



More Information

www.globalphilanthropy.ca

www.blumbergs.ca/non_profit.php

Mark Blumberg, Blumberg Segal LLP

390 Bay Street, Suite 1202, Toronto, ON M5H 2Y2

416-361-1982 x. 237

mark@blumbergs.ca



www.blumbergs.ca