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Further Compliance Issues with Successfully Funding Aboriginal Groups

**The Circle of Philanthropy and
Aboriginal Peoples in Canada's
All My Relations Gathering: Reviving Reciprocity
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Questions About Foundations

- Objects – scope and content
- Assets and Restrictions
- Interests – board, funders and other stakeholders
- Capacity

Direction and Control

- Create a written agreement with the intermediary, and implement its terms.
- Have a clear, complete, and detailed description of the activity to the intermediary.
- Monitor and supervise the activity.
- Provide clear, complete, and detailed instructions to the intermediary on an ongoing basis.
- For agency relationships, segregate funds, as well as maintain separate books and records.
- Make periodic transfers of resources, based on demonstrated performance.
- Books and records

Transferring Property Directly to Beneficiaries

- A charity does not have to adopt measures to direct and control the use of its resources when transferring property directly to proper beneficiaries of its charitable activities. For example, a charity could give school supplies, such as books or writing instruments, to impoverished students without having to direct and control how the students use those resources.

Court decisions and Intermediaries

- Three Federal Court of Appeal decisions each confirmed that a charity working with an intermediary must exercise “direction and control”
 - ***The Canadian Committee for the Tel Aviv Foundation v. Canada*** (2002 FCA 72), 2002-03-01
 - ***Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue)*** (2002 FCA 323), 2002-09-13
 - ***Bayit Lepletot v. Canada (Minister of National Revenue)*** (2006 FCA 128), 2006-03-28

What is a Gift to a Qualified Donee?

- A gift to a qualified donee is a transfer of money or any other property to a qualified donee, without consideration.
- Under the Income Tax Act, qualified donees are organizations that can issue official donation receipts for gifts that individuals and corporations make to them.

What is a Conduit

- “a conduit is 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.”
- Violates *Income Tax Act*
- Can be penalties or revocation

Requirements for Intermediaries

- Intermediary usually has resources that a charity needs, such as a particular **skill, knowledge of a region, staff in the area, or specialized equipment**.
- Charity must **investigate** status and activities of intermediary
- Charity must ensure that:
 - Intermediary has the **capacity** (for example—personnel, experience, equipment)
 - **Strong expectation** the intermediary will use the charity's resources as directed by the charity.

Types of Intermediaries

- Agent
- Joint Venture Participant
- Co-operative Participant
- Contractors

How Much Direction and Control?

- Generally speaking, the nature and the number of measures a charity adopts to direct and control the use of its resources should correspond to 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
 - the capacity and experience of the intermediary

Books and Records

- “A charity must record all steps taken to exercise direction and control as part of its books and records, to allow the CRA to verify that the charity’s funds have been spent on its activities.”

Written Agreement Not Enough

- “However, signing an agreement is not enough to prove that a charity meets the own activities test. The charity must also be able to show the CRA that the charity has a **real, ongoing, active relationship with its intermediary.**”

One Time Activities Under \$1000

- “Entering into a written agreement and implementing the terms of that agreement is usually an effective way to meet the own activities test. However, the CRA acknowledges that in situations where the amount of resources involved is minor, and is a one-time activity, the complications of developing a full, formal, written agreement may outweigh the benefits. **In situations where the money spent on a one-time activity is \$1,000 or less, other forms of communication might be used to show direction and control over the use of resources by intermediaries.**”

Template Written Agreement

- No established template for written agreements, acceptable agreements would normally contain the elements listed in Appendix C.
- See sample contractor agreement at:
 - www.globalphilanthropy.ca

Description of Activities

- Before starting an activity agree on a clear, complete, and detailed description of the activity.
- Depending on the type, complexity, duration, and expense of an activity, the charity should be able to provide documentary evidence that shows:

What's In a Description of Activities I

- Exactly what the activity involves, its purpose, and the charitable benefit it provides;
- Who benefits from the activity;
- Precise location(s) where the activity is carried on;
- Comprehensive budget for the activity, including payment schedules;
- Expected start-up and completion dates for the activity, as well as other pertinent timelines;
- Description of the deliverables, milestones, and performance benchmarks that are measured and reported;

What's In a Description of Activities II

- Specific details on how the charity monitors the activity, the use of its resources, and the intermediary carrying on the activity;
- Mechanisms that enable the charity to modify the nature or scope of the activity, including discontinuance of the activity if the situation requires (for example - the intermediary begins misusing funds);
- Nature, amount, sources, and destination of income that the activity generates, if any (for example - tuition fees from operating a school, or sales from goods produced by poor artisans in economically challenged areas); and
- Any contributions that other organizations or bodies are expected to make to the activity.

Monitoring and Supervision

- “Monitoring and supervision is the process of receiving **timely and accurate reports**, which allows a charity to make sure that its resources are being used for its own activities.”

Monitoring and Supervision

- Depending on factors such as the size, nature, and complexity of an activity, the reporting methods (as stated in any written agreement) can take many forms, including the following:
 - progress reports
 - receipts for expenses and financial statements
 - informal communication via telephone or email
 - photographs
 - audit reports
 - on-site inspections by the charity's staff members

What is Ongoing Instruction

- “Ongoing instruction is the process of providing **any necessary additional instructions or directions to an intermediary.**”
- Records of any ongoing instructions help to show that the charity is carrying out its own charitable activities in accordance with the provisions of the *Income Tax Act*. **Minutes of meetings** or other written records of decisions are one way to show that a charity has given instructions. The CRA recommends **using written instructions** (for example—letters, emails, or faxes) to communicate with an intermediary whenever possible.

What are Periodic Transfers

- “Making periodic transfers is the process of sending a charity’s resources to an intermediary **in instalments, based on demonstrated performance**, rather than in one transfer.”
- “When appropriate, a charity should keep the right to **discontinue the transfer of money and have unused funds returned if it is not satisfied with the reporting, progress, or outcome of an activity**. This will allow the charity to stop funding an activity if the charity’s resources are being misused or for any other valid reason.”

What are Separate Activities

- When carrying on an activity through an intermediary, a charity has to make sure that it can distinguish its activities from those of the 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.

What are Separate Funds

- “For certain types of arrangements (**for example—an agency agreement**) the charity’s money for the activity should be kept in a **separate bank account**, and taken out only after appropriate authorizations are made by the charity or performance benchmarks are met by the intermediary. Segregated funds should also be reported **in books and records separately from those of the intermediary.**”

Keeping Books and Records

- Under the *Income Tax Act*, a charity must keep adequate books and records in Canada. The CRA recommends that books and records be kept in either French or English.
- Books and records must enable the CRA to check the following:
 - whether a charity's funds are being spent on its own activities or on gifts to qualified donees
 - whether the charity is directing and controlling the use of its resources
 - whether there are grounds to revoke the charity's status

Municipal or Public Bodies Performing a Function of Government

- “Municipal or public bodies performing a function of government in Canada are treated as "qualified donees" in a manner similar to registered charities, meaning they can issue official donation receipts for gifts that then allow donors to claim tax relief, and as qualified donees they can receive funds from registered charities.”
 - http://www.cra-arc.gc.ca/gncy/bdgt/2011/qa20-eng.html#_Toc288650953a

Application Process

- Assemble an application package for the Charities Directorate of CRA consisting of a letter and supporting documentation.
- The letter should state that the applicant is applying for registration as a “municipal or public body performing a function of government in Canada” and should also explain how the applicant meets the requirements of a municipal or public body performing a function of government in Canada.

Application Process

- Supporting documentation may include the following:
 - a) a copy of an earlier CRA determination and other relevant correspondence
 - b) a complete description of the applicant
 - c) a description of other activities carried on by the applicant, such as business activities
 - d) a description of the activities carried out by any subsidiaries of the applicant

Is a Band a 'Public Body Performing the Function of Government'

- The CRA considers it a question of fact whether a band qualifies for this characterization.
- If significant bylaws have been passed under subsections 81 and 83 of the Indian Act, or, a band can qualify if it has bylaw under s. 81 of Indian Act together with a bylaw under subsection 5(1) of the *First Nations Fiscal and Statistical Management Act* then the CRA will accept the characterization.

Is a Band a 'Public Body Performing the Function of Government'

- It has also accepted the characterization where a band demonstrates that it performs functions and provides services in a manner generally exhibited by a government.
- Examples of such activities would be if the band has been involved in negotiating land treaties (or has negotiated a settlement agreement with Canada) or if the band provides community, health, safety, and education services to its members

CRA “List of municipal or public bodies performing a function of government in Canada”

- **Listed** organizations are qualified donees; therefore, they can issue official donation receipts, and they can receive gifts from registered charities.
- **Suspended** organizations cannot issue official donation receipts and cannot receive gifts from registered charities during the one-year suspension period.
- **Delisted** organizations are no longer qualified donees; therefore, they cannot issue official donation receipts, and cannot receive gifts from registered charities.

Further information

- www.globalphilanthropy.ca
- <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>
- <http://philanthropyandaboriginalpeoples.ca/>

Thank you!

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