THE MUTTART FOUNDATION

Consultation on Charities working with Non-Charities

25-28 October 2022

Banff, Alberta

A Summary of the Discussion

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This report is a summary of one of a series of periodic discussions convened by the Muttart Foundation on voluntary sector regulatory issues. The session was held to promote an exchange of ideas and to develop a fuller understanding of the concerns of both sector groups and government regulators. Any remarks included in the report are intended to reflect the discussions. No undertakings or commitments from either regulators or sector participants are expected or made, notwithstanding any of the wording in the report.

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Day 1

ROUNDTABLE INTRODUCTIONS

This session began with a round of participant introductions. Each participant was asked to identify one issue or one question that they have in relation to "charities working with non-charities". The questions and issues are listed below:

- Could guidance be only about key principles?
- Why is it so hard to "do good"? Can the guidance balance enabling with minimizing risk?
- How do we "get out of the way" so good work can happen?
- How can guidance be simplified so that it is easier to apply?
- Guidance may need to provide more definitions so that we can understand the full meaning of the language used.
- Consideration needs to be given to balancing intent; balancing between control and collaboration?
- What is the mischief we are trying to remedy? How do we reduce the risks of mischief and/or scams?
- Guidance provides information on thresholds – are those the right amounts?
- How can we be clearer in the guidance on the intent of the legislation?
- Do we have confidence that the new legislation will mean new funding recipients?
- Will new legislation have unintended consequences? Do we have a sense of what those may be?
- How do we fund individuals without presumption of private benefit?
- Why are domestic non-charities not becoming charities?
- Language/terminology used in the guidance is an issue – seen almost as "direction and control"; some words are not defined, correlation of language between the statute and the guidance, etc.
- How do we ensure accountability without complicated reporting requirements?
- Why are many "non-qualified donees" difficult to find? Is there a provincial role? Can T1044 be made public? Are the data available?
- How can we apply an equity, diversity, and inclusion (EDI) lens to the guidance?

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INTERNATIONAL PERSPECTIVES

England and Wales

There is no concept of "non-qualified" donees in the UK. The guiding principle is that grants must be in furtherance of a charitable purpose. There is a claw-back provision for situations where funds aren't used for charitable purposes. Once that is established, the funder does due diligence and ensures that risks are minimized and that the grant is monitored.

There is guidance for international grants that was implemented about 20 years ago. The guidance requires due diligence and stipulates the need for awareness of the local culture. A second guidance was developed to protect charities from harm – particularly in high-risk areas. In 2013, additional guidance was developed on how to manage risk when working internationally. This included risk to local staff, risk of fraud and other financial risks, risks of money transfers etc.

https://www.gov.uk/guidance/charities-how-to-manage-risks-when-working-internationally

In 2016, guidance was developed for grant funding to non-charities. This was introduced following a high-profile case.

https://www.theguardian.com/society/2015/oct/21/charities-can-fund-controversial-pressure-group-cage-court-finds

The guidance applies to charities and non-charities and provides information related to "charitable purpose", due diligence and risk. One of the most difficult areas is whether support costs can be linked back to charitable purposes.

High-risk areas – may not meet public benefit and private benefit can only be incidental (examples are human rights organizations and community development organizations).

If there is a serious breach occurring, the charity needs to report this to the Charity Commission.

HM Revenue and Customs has also produced a guidance related to the tax rules on non-charitable expenditure which has five examples relating to the size of the grant.

USA

Definitions for charities were established in 1959 and included a section on "what records" were required to ensure that dollars were spent appropriately. A system of rules was put in place by the Treasury Department.

Dollars are controlled by ensuring that public benefit or community benefit must be the purpose. There is a distinction between charities and everyone else. Charities apply to the IRS and donors get a tax deduction.

Charities can grant to non-charities and the charity is not the "guarantor" of the funds, but charities must undertake due diligence and be prudent in their grants. There are intermediary penalties if a breach of the agreement takes place.

A grant letter includes: how dollars will be used, what reporting will occur, and what work will be done. If the dollars are not well used, the charity must make efforts to recoup the dollars and redistribute them for a charitable purpose (private benefit can only be incidental).

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Documentation must show that the charitable purpose is either that of the charity or of the recipient.

The process to become a tax-exempt charity is seen as fairly simple: a form is filled out, the charitable purpose is drafted, articles are filed with the Secretary of State, and an application is filed with the IRS (the application is simple for smaller charities).

Questions and Comments on the USA Presentation

- How are non-qualified donees treated in the U.S.? The terms fiscal sponsorship/fiscal agent do not appear in the code or IRS regulations. Relationships between for-profits and charities are not always presumed to be a problem.
- Can dollars be allocated by a charity to a grantee for any charitable purpose (that is not necessarily linked to the charity's stated purpose)?

Australia

General Requirements for a Charity

The primary law for Australian charities resides in the laws of each State and Territory, which largely follow the English jurisprudence.

To be considered a charity, an organization must:

- be not-for-profit; and
- have only charitable purposes that are for the public benefit.

The Commonwealth government established an independent charity regulator (Australian Charities and Not for Profits Commission - ACNC) together with a statutory definition of charity in 2013, acting as a gateway to federal legislation concessions such as income tax exemption and gift deductibility.

To be eligible to be registered as a charity with the ACNC, an organization must:

- be not-for-profit;
- have only charitable purposes that are for the public benefit;
- comply with the ACNC Governance Standards;
- comply with the ACNC External Conduct Standards;
- not have any disqualifying purposes (which are engaging in or promoting activities that are unlawful, or contrary to public policy, and promoting or opposing a political party or candidate for political office); and
- not be an individual, political party or government entity.

How can a charity operate?

ACNC Governance Standard 1 requires charities to demonstrate that they:

- were set up as a not-for-profit with a charitable purpose; and
- run as a not-for-profit and work towards that charitable purpose.

This is consistent with State and Territory laws.

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Provided a charity operates for its purpose and abides by the law, there are few restraints on how it achieves its purposes.

The main area of contention in Australian law is whether an activity does not flow from achieving a charitable purpose, but rather is evidence of an independent and non-ancillary purpose. The law will allow merely concomitant, incidental, and ancillary objects, or activities that naturally go with achieving the charitable purpose.

There are no provisions for regulating the activities of charities whose purposes are pursued through a contract or understanding with another organization, or a gift or grant to another organization.

Other tax concession organizations

Australia is almost unique in not granting deductible gift status to all organizations that qualify as charities.

While most ACNC charities will qualify with the Australian Taxation Office (ATO) as income tax exempt, they will not automatically receive deductible gift status.

To provide donors with a gift deduction receipt, an organization must qualify as a Deductible Gift Recipient (DGR), and some of these organizations have restrictions on distribution of their resources to other organizations.

The architecture of the DGR regime is to reserve gift deductions to a select group of organizations that, in the main, relieve the burdens of government, or have been deemed worthy of receiving political approval to receive taxation concessions. Some organizations that unsuccessfully litigate for the status of a DGR class are later deemed worthy by parliament and added to the statutory list of DGRs.

The list of DGR organizations, and their qualifications and restrictions, are contained in the main tax legislation and added to on a regular basis. There are over two hundred and thirty legislative entries, made up of:

- classes of organizations (e.g. Public Benevolent Institutions, Private Foundations);
- department approved registers of organizations (e.g. Overseas Aid, Environment, Cultural); and
- individually named organizations.

These listings may be further restricted by:

- only being distributed to specific DGR organizations;
- only being approved for a limited time; or
- a limited purpose (a school building fund only to be expended on school buildings or a scholarship fund only to be expended on individual students).

Private Ancillary Funds (Family Foundations) and Public Ancillary Funds (Community Foundations) are DGR classes that have strict grant rules that require these organizations only to disburse to DGRs which are not private or public ancillary funds at set rates per annum.

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Questions and Comments on the Australian Presentation

- Is there anything that we should consider replicating from the Australian approach? Yes, the most useful practice would be how overseas aid organizations are funded and regulated.
- This approach seems more focused on principles.
- Culture and history of the country impacts charitable legislation and regulations.
- Beware of tax shelter promoters who take advantage of a comparatively generous system of tax concessions.
- Should we be looking at the fringe benefits program? Probably not as there will be changes in the future.
- Are charities with fewer tax concessions given more latitude? Yes, they are less regulated.

CRA PRESENTATION

Canada Revenue Agency (CRA) staff summarized the background that led to the need to develop a new guidance on making qualifying disbursements to non-qualified donees; described the previous and anticipated feedback process; explained the key features of the draft version of the guidance; and listed a number of questions for consideration and discussion.

As a result of changes to the *Income Tax Act*, the draft guidance introduces an alternative to the current "direction and control" regime that applies when working through an "intermediary". This new option adopts the language of "granting" to "grantees" for when charities provide resources to non-qualified donees. Unlike the "direction and control" regime, the guidance emphasizes "accountability requirements" – that is, the new legislative requirements. The CRA's interpretation of the legislative requirements are intended to be flexible and responsive to a grantee's unique circumstances.

The presentation included guidance objectives, scope and terminology, the distinction between accountability requirements and direction and control/own activities, the recommended grant-making process, a risk matrix, and accountability tools.

Staff from the Canada Revenue Agency then provided an overview of the draft guidance document.

Questions and Comments on the CRA Presentation

- Questions provided by CRA in the 'Other Topics' section are hefty. Will all of them be responded to before releasing the guidance? Yes, as much as possible.
- What is the mischief? What is the history on losses and fraud? How many people will it take to regulate this? They have tried to be flexible with the guidance but have no exact data on the outliers.
- The guidance may be too enabling because of common law. Also, concerns about private benefit, mission drift, and constraints need to be calibrated.
- Need for amendments about how foundations can use this guidance.
- Does the guidance enable or create barriers for marginalized groups?
- We may be creating rules that get in the way, that impede charitable activities. The rules as written are mostly about not diverting funds.

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- The guidance includes things such as terminology that are not in the legislation.
- The directed gift provisions are amended but still not clear.
- Legislation rules - guidance products are an interpretation of the legislation and are evergreen - they can change.
- Some foundations only have granting to qualified donees as their purpose. Will their purposes need to be changed?

Day 2

INSIGHTS/COMMENTS/QUESTIONS RAISED

To start off the session, participants were invited to share their thoughts about what they heard and what was discussed on Day 1.

- What parts of the legislation (and the guidance) address the criticisms that this is a colonial and paternalistic system?
- What type of mischief is this guidance trying to address? Fraud, ill intent, other?
- Does this new regime provide benefits to non-charities without accountability?
- We need to keep the focus on the legislation- guidance follows. There may be discrepancies between these two documents that will need to be addressed.
- What can or can't be fixed by changes to the guidance? Could we address the need for change to legislation in the *Budget Implementation Act*?
- Need to better understand the reporting requirements – see item 50 in the guidance.
- Look at question 19 - the amending purposes
- There is a problem with the terms "grant" and "grantees". Transferring funds to qualified donees - worry that the terms "grant" and "grantees" now mean something different. Note: grant is the term that traditionally has been used to transfer funds to a qualified donee; those would now be "gifts" while payments to non-qualified donees would be "grants". The challenge is that, in law, "gifts" cannot have conditions and most foundations have conditions when making a "grant/gift"
- If we used an asset-based lens, how would this document be different?
- There are four perspectives here - lawyers, CRA, foundations and non-profits. Should we prioritize?
- Felt confident after the CRA presentation but there is still a culture of fear reflected in the guidance. Accessing funding from foundations will not necessarily be seen as a benefit by the "unregistered" non-profits (NQDs). The document is long, and overly complicated. What do CRA and the funders need to remove the fear?
- How do these guidelines simplify access?
- Why does CRA need to monitor some areas in the guidance? If the charity is ensuring that its charitable objects are being furthered by the non-profit, is that not enough?
- What are the resource requirements at CRA to monitor compliance? Will only be done through audits.
- Mischief- why might working through non-qualified donees require additional safeguards? The ideal guidance should be specific to the risk profile of non-qualified donees.
- Are there unintended consequences to this guidance?
- Need to look at the language of gifts (which are unconditional) and grants. The change may create confusion.

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- Remember that the legal liability rests with the charity. As an example, what happens when a non-qualified donee engages in political activity? See question 71.
- Changing charitable objects may be a problem (ex-foundations).
- Reference to public policy needs further discussion. See question 70.
- Handling sensitive information is an issue, especially for those funding outside Canada.
- Foreshadowing- will this become too complex over time? Will we start looking like Australia?
- While the guidance is intended to be helpful, over time it may become interpreted as a set of rules and very rigid.
- Balance between technicality and practicality.
- Need to put the mischief in context - from what perspective?

BALANCING AN ENABLING ENVIRONMENT AND RISK MITIGATION

Participants were then assigned to four breakout groups. Each group was asked to address the following questions.

1) Given the legislation, what specific changes would you propose to the guidance to create a more enabling environment?
2) Given the legislation, what specific changes would you propose to the guidance to minimize risk?

Each small group was asked to report back on their key suggestions/ideas. Below are some of the highlights of the report-back sessions.

Group 1

The group felt that to be more “enabling” the guidance needed to be written for charities and non-qualified donees. The language/terminology used needs to be simplified. Although many charities are already providing funds to non-qualified donees, those that don’t will need more information. One suggestion is to format the guidance differently: start with what the legislation states, then speak to how charities can meet the legislation requirements. Appendices can follow.

Other suggestions included:

- Create a section for “charities who have no experience in providing funding to non-qualified donees”.
- Set out principles at the beginning of the guidance.
- Create a preamble that uses enabling language (as opposed to enforcement language)
- Recognize that charities are already accountable.
- Reduce details so as not to perpetuate “direction and control”.
- Address the risks (funding for charitable purpose, misuse of funds, excessive private benefit etc.).

This group also noted that currently, the language used in the French version of the legislation is different (and appears less restrictive) than in the English version. The example provided was the word “ensure” in English and the word “veiller” in French. The word “veiller” can be translated to “monitor”.

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Group 2

The group agreed that the language at the beginning of the guidance needs to be enabling and that some of the language throughout the guidance needed to be adjusted to reflect this. The guidance also needs to reflect the fact that the intent is to ensure that the non-qualified donee is adhering to the charitable purpose (the activities are decided by the non-qualified donee).

Additional points were brought forward:

- It seems odd (and likely requires further conversation) that the legislation provides for charities to give to non-qualified donees – but are unable to fundraise for that purpose. Consider remedying this by allowing donors to name a program – as opposed to an actual agency.
- In terms of reconciliation – this may require a different tax category as common law can be seen as colonial/paternalistic.
- The term non-qualified donee is problematic to many (it can be interpreted as “not qualified” in the broader sense).
- Consider the spirit of the legislation and the principles of trust, reciprocity, strengths-based, and inclusion.
- Use a “trust and verify” approach.
- Name the risks: non-charitable purpose, for profit, personal benefit, partisan.
- Proposed potential changes to the guidance: add an FAQ section, relational matrix, simplified due diligence and accountability tools.
- Recognize that although there is a desire for guidance to be “enabling”, the CRA is the regulator and enabling guidance can be more difficult to enforce.

Group 3

This group also agreed that an introduction/preamble would help to set the tone of the guidance. The preamble could speak to the enabling intent (i.e., this is not about direction and control) and could also have an explicit statement about the common law’s enabling posture vis-à-vis activities. The caveat would be to ensure that readers understand that this does not mean unlimited freedom.

The points below were also raised by the group:

- Consider how to highlight the positive benefits of the new legislation
- Distill the intent of legislation to short guidance – supported by appendices that explain “how to”.
- Some language will need to be adjusted – there are issues related to “gifts” vs. “grants” and the French “faire un don” or “make a donation” (some language implies conditions and some does not).
- A question was raised as to whether the learnings from past audits had been integrated into the guidance.
- The risks should be specific to the legislation and should not include operational risk.
- Conduiting was identified as a potential concern.
- The section related to revocation (7.6) should be expanded to read “If the charity cannot meet the accountability requirements in the *Income Tax Act*, it may be subject to penalties up to and including revocation”.

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- The language is too broad in the sections relating to directed giving and public policy.
- Reconciliation may be best addressed through a different mechanism.

This presentation was followed by several questions/comments from the participants. The comments/questions included:

- Is there additional risk to a charity when providing funding to a for-profit organization? Funders will need to be mindful to ensure that the activities are in support of the charitable purpose. If issues arise, the charity needs to make efforts to recover the funds.
- In some cases there will be private benefit – what is important is ensuring that private benefit is incidental.
- The need for a risk matrix was questioned. Although some charities have funded non-qualified donees, this is new for many. The focus of the risk matrix in this guidance should be about the risks of this legislation, operational risk can be added as a link (rather than in the matrix or in the appendices).
- Does geography change risk? (The examples provided were in relation to anti-terrorist legislation as well as anti-corruption legislation).

Group 4

The final group also agreed that the guidance should start with an enabling opening statement and provide key principles including the necessity of allocating resources to charitable purposes, and the intent of removing barriers. There should be a positive statement about the new legislation allowing for more diversity/inclusion in funding.

The additional points below were also brought forward by the group:

- Consider making guidance brief with several appendices. Consider bolding what is most important and explaining what is provided as recommendations and/or tools.
- The financial thresholds in the guidance need to be revised – participants felt that the existing thresholds were too low.
- The directed giving section seems too restrictive.
- Grants and gifts language needs to be carefully considered – can be interpreted differently depending on the audience.
- In the risk matrix – consider changing the factor called “location” to “circumstance”.

After the debrief (above), participants were once again invited to four breakout groups. The topics listed below were chosen because they were most frequently mentioned in the morning breakouts.

Group 1 - Target audience, Preamble and Principles

The group felt that charities are the primary audience for this document, while the non-qualified donees (NQDs) are the secondary audience. The general public can also be considered a tertiary audience for reasons of ensuring transparency.

The preamble should be made up of three parts that speak to the intent of the guidance, how it aligns with the legislation, and what the guidance is meant to do. The preamble should refer to the spirit behind the legislation, which was primarily to create an enabling environment for non-

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registered organizations to access resources for work that aligns with charitable objects. It should also spell out that while charities must meet the requirements of the legislation, the guidance is not prescriptive. Somewhere in the preamble it would also be helpful to refer to the common law interpretation of doing good.

Guiding principles could include the following:

- A need for proportionality in relation to the amount of the grant and the size of the organization.
- Ensuring that this new approach increases access to resources and greater equity, making it easier for people who are doing good, especially marginalized, rural and Indigenous groups.
- The guidance is meant to not only enable the transfer of resources but also to help charities create relationships and collaborate with each other, while ensuring reciprocity between the parties.
- It would be preferable to use the word “responsibility” instead of “accountability”, which is perceived to be more top-down language. In the same vein, accountability tools could be reframed as “tools meant to demonstrate responsibility”. Where possible the language used can also draw on concepts from Indigenous communities such as providing “bundles” to characterize the notion of grants.

If it is possible to do so, a summary of the guidance could be provided at the front of the document.

Group 2 - Risk

The group agreed that the risks of funding NQDs are similar to those for funding qualified donees, and that a primary risk associated with funding NQDs is the general lack of information about who they are and what they do. The funders need information to do their due diligence, and the lack of it increases their reputational risk. A potential solution is in the mandatory filing of returns by non-profits. At this time, many don’t even know that they are supposed to file and the information they do provide is not readily available.

There is a threshold asset level of $200,000 to file a return so some small non-profits never have to file, although they are encouraged to do so. This rule hasn’t been changed in a long time and would require an amendment to the *Income Tax Act* (ITA). There is currently some discussion at the federal level about requesting non-profits to file.

There is currently activity in Ontario to capture these data in a provincial registry, but it’s not being shared with the federal government. Five provinces are in the process of setting up registries, but there is some question as to whether they will want to invest the necessary resources to appropriately collect these data.

Some participants mused that there needs to be some sort of stamp of approval for non-profits, in much the same way as Imagine Canada, through its Standards program, is seen to provide a stamp of approval for registered charities.

Concern was also expressed that making funding available to non-qualified donees will increase demand without necessarily making the pie any bigger. And will donors only want to support charities and not non-qualified donees?

Group 3 - Language

- The terms in the guidance need to be made understandable and accessible to all.
- "Gifts" vs. "grants": gifts are generally associated with receiving dollars from an individual. Can we simplify so as to use the term "grants" only by amending section 3.0 to say "grants to qualified and non-qualified donees". It was noted that the word "gift" is in the legislation but not as a defined term, only as a descriptor.
- Ensure: what is the intent of the word "ensure"? Need to look at what the word means and whether it refers to a process or a guarantee of success. It should not be a problem insofar as the charity could demonstrate it had undertaken the necessary processes but if "ensure" is meant to guarantee success, that may be more challenging for the grantor to demonstrate. The guidance should clarify this.
- Under "monitor and reporting", remove the word monitor and use only the word report.
- The word "reasonableness" is not in the guidance. Does the term "reasonable" need to be defined?
- The use of "must" and "may": there was support for using the word "must" to reflect the requirements of the legislation and "may" for approaches to demonstrate accountability. The guidance should make it clearer what is a "must" and what is a "may".
- There are currently no intermediate sanctions besides revocation if organizations do not do their due diligence. Should there be? The Department of Finance will look at penalties and change the regime at a later date but it is not an automatic revocation for charities; all steps can be taken before getting to revocation as a last resort.

Group 4 - Other topics: directed giving, conduiting, changing the purpose of the foundation

- Directed giving and conduiting- conduiting is not in the legislation. Directed giving is in the legislation. A reason was provided by a government representative for which the directed giving clause is included. It was agreed that the approach should be to go with the legislation and the narrow interpretation of dealing with a conditional gift. We can narrow the scope of that provision, talk about the fiscal implications behind it and explain what the concern is.
- Get rid of the conduit provision (section 76).
- How do the qualifying disbursements apply when the purpose of a foundation is to make grants to qualified donees? Making a grant to a non-qualified donee is not in itself a charitable purpose. Do foundations need to change their objects? Some believe that is not necessary, but CRA's interpretation of the legislation is different. Could there be a streamlined process to make that change with CRA, as many foundations may need to do so? Could a pre-approved object be "to advance any charitable purpose at law by making necessary disbursements"?

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Day 3

As the group convened for the third day of the consultation, participants were once again invited to provide any thoughts/issues from their conversations.

The following is a sample of the thoughts/issues raised:

- Should the guidance separate non-qualified donees between "foreign" and "domestic" as the issues encountered can be quite different?
- If issues arise – could an ultimate risk be that charities lose the current tax credit?
- Should foundations support non-qualified donees in becoming registered charities?
- We need to be careful about assumptions; non-profits choose not to be registered charities for a variety of reasons.
- Confusion could arise in the sector given that we now have two regimes – thought needs to be given as to how to explain the differences.
- Clarity needs to be provided in terms of timing (the legislation, the draft guidance, then the final guidance). CRA confirms that due to time constraints, the draft guidance will be released for public feedback "as is", for a period of 60 days. Feedback provided at the Muttart Consultation will be considered and, where appropriate, incorporated into the final version of the guidance.
- Suggestion to make the filings for non-profits public – that would improve transparency and accountability. Challenge is that there are many types of non-profits and not all are doing "public good".
- There is a risk that some charities will see this new legislation as simpler than it actually is; it is important to communicate to charities that they need to understand the legislation as well as the risks and barriers.

The morning continued with participants invited to reflect/discuss a prepared case study. The case study reads as follows:

SCENARIO #1

Facts:

The Smith Foundation is a Canadian registered charity founded by two philanthropic visionaries, Bruce Smith and Allan Brown. The Smith Foundation created a progressive program called the Just Society Initiative the aim of which is to enhance and defend human rights in jurisdictions lacking constitutionally entrenched bills of rights. As part of the Justice Society Initiative, the Smith Foundation funds a non-qualified donee (the "Non-Profit") in a foreign jurisdiction.

The activities of the Non-Profit funded by the Smith Foundation include the following:

1) **Advocacy for law reforms designed to achieve equal access to education for women and girls and to combat discrimination on the basis of sexual orientation;**

2) **Funding lawyers to defend persons facing criminal prosecution for participating in same-sex relationships; and**

3) **Disbursing funds to families in financial need in circumstances where the family breadwinner has been incarcerated for publicly criticizing human rights abuses by the local government.**

All of the above activities are illegal in the foreign jurisdiction in which the Non-Profit operates but not in Canada.

The Smith Foundation has carried on a fundraising campaign asking donors to earmark donations for the Just Society Initiative.

Issues to Consider:

1) **What, if any, accountability measures are appropriate in the circumstances?**

2) **How, if at all, does illegality factor into the regulatory analysis of the Just Society Initiative?**

3) **Can the Smith Foundation accept and issue donation receipts for donations to the Just Society Initiative?**

Participant comments/questions/discussions:

- Is the guidance clear on the "illegality" factor in this scenario? The activity is legal in Canada but illegal in the recipient country – does this put the Justice Society in danger? Is this similar to peace work? There are multiple issues to consider:
    - Is illegality furthering a charitable purpose?
    - What is the Justice Society's ability to deliver?
    - The activities are about human rights – that is a charitable activity
    - What are the risks to the Justice Society (implications for staff, success, resources)?
- This type of disbursement should be allowed. Global Affairs Canada already funds these types of projects. There are greater requirements for charities than in government-funded programs in a foreign country – that doesn't seem logical.
- This is a good scenario to explore under the two regimes in terms of liability, risk, ability to get insurance.
- Does the grant further the charitable purpose? Has the risk assessment been conducted? Are accountability tools in place? How will the accountability tools be applied?
- Does the type of information/documentation pose a risk to the individuals involved?

The afternoon of the third day was spent in breakout groups discussing two more prepared scenarios.

SCENARIO #2

Facts:

A devastating flood has leveled a coastal community located within Canada. The flood destroyed housing and business properties. The devastation requires an urgent response.

The Jones Organization – a well-respected Canadian registered charity known for its ability to mobilize resources effectively and quickly – received a grant from the provincial government to respond to the urgent needs arising from the flood. In turn, the

Jones Organization granted funds to a local non-qualified donee (the "Non-Profit Organization"). The Non-Profit Organization used the funds as follows:

1) **The Non-Profit Organization paid for lodging for displaced residents at a local hotel (the "Hotel") that survived the flood. The Hotel charged the Non-Profit Organization market rates. Due to the exigent circumstances, the Jones Organization did not enter into any written agreement with the Non-Profit Organization. The Mayor of the town – Mayor Taylor – is on the board of the Non-Profit Organization and is also (it turns out) the owner of the Hotel.**

2) **The Non-Profit Organization purchased a large tract of land outside of the flood plain to enable future rebuilding efforts within the community. The land sits vacant while efforts are made at zoning and development. Mayor Taylor (it turns out) owns the adjacent land which has now gone up in value.**

<u>Issues to Consider:</u>

1) **What, if any, accountability measures should the Jones Organization have taken in these circumstances?**

2) **Do these circumstances entail unacceptable "private benefit"? If so, what should the Jones Organization have done differently?**

Participant comments/questions/discussions:

- The assumption made by the group was that disaster relief is the foundation's charitable purpose.
- Contextual factors would need to be considered. The rapid pace of response required means less time for comprehensive due diligence, but it could be done at a later date; the size of the community means greater potential for non-arms length dealings, more conflicts of interest; government funding provided may have direction and control. Would the CRA actually audit a charity working with the government?
- In terms of accountability tools, be mindful of the possibility for tiered funding, structured to meet immediate needs and then do more due diligence as the situation and information evolves.
- How soon does a funded partner need to move land into an active project? Could the charity claim that the purchase of the land counts as a disbursement quota (DQ) expense in the year of acquisition?
- When it comes to personal property, the common law does not have as much jurisprudence on conditional gifts compared to gifts of real property. One solution might be to look at the example of a defeasible and determinable interest in the land, i.e., being an interest that will terminate after a given period of time or after a particular event has occurred.
- The land might be rezoned for development at a later date. What happens if they build a mall instead? The charity would need to be sure to specify the purpose for which the land will be used.
- Giving cash for land will not protect the funder from a change in the purpose but giving land (instead of cash) would allow the funder to attach conditions.

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- Was there disclosure of the potential conflict of interest by the mayor? It might be forgivable under the circumstances if it was the only hotel available. Remember proportionality - the benefit needs to be incidental, proportional, and necessary. If the choice was between charging private market rates and having people be homeless - the private benefit is proportional in this case.
- Purchase of the land - what is the charitable purpose being advanced? How is this an urgent need? Is the vacant land purchase reasonable, necessary, proportionate?
- This is really about good governance. If there is sufficient reason to believe there is a redirection of funds, you need to disclose it.
- What is the level of discretion that charities have for qualifying disbursements? How do we not fall back into direction and control?

SCENARIO #3

Facts:

The ABC Foundation (the "Foundation") is a well-known Canadian registered charity with a significant endowment. Although the Foundation has on more than one occasion received a CRA education letter for improper receipting practices (specifically the Foundation's failure to include the middle initial of donors on official donation receipts as specifically required by the *Income Tax Act (Canada)*), it otherwise has a solid reputation within the Canadian charitable sector.

The Foundation recently decided to contribute to a pooled fund (the "Pooled Fund") intended to support the work of a foreign non-qualified donee (the "Non-Qualified Donee"). The other contributors to the Pooled Fund include other registered charities, non-qualified donees and for-profit businesses. The Pooled Fund is used to financially support an educational program supplied by the Non-Qualified Donee in a foreign jurisdiction. The educational program provides both formal classroom and informal ad-hoc education to refugee women and girls. Canada has levied sanctions against the foreign jurisdiction in which the Non-Qualified Donee works to condemn the local government's human rights abuses.

Issues to Consider:

1) **What, if any, accountability measures should the Foundation take in these circumstances?**

2) **How, if at all, is the answer to #1 impacted by the Foundation's proportionate contribution to the pooled fund? If the Foundation contributed, say, 50% of the assets in the Pooled Fund, is it obligated to implement more significant accountability measures compared to if it contributed, say, 5% of the Pooled Fund?**

3) **How, if at all, would your answer to #1 change if the Non-Qualified Donee was an English charity regulated by the UK Charity Commission or an American 501(c)(3) charity regulated by the IRS?**

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Participant comments/questions/discussions:

- There are lots of missing facts here such as the purpose of the foundation and the size of the contribution from the foundation (because the level of accountability will differ).
- With multiple funders, an overarching governance structure could be one option for ensuring accountability, but all groups would need to understand the parameters.
- Government sanctions would need to be taken into account - what are they? Grantors would not want to run afoul of Canadian law.
- There would need to be a more detailed description of activities.
- Need safeguards so that the control doesn't shift over time. How does that get dealt with?
- Would need to make sure that the use of all the funds in the pool is consistent with the purposes of the ABC foundation. If not, the funds from the Canadian funder would need to be carved out.
- Tracking is rarely possible for pooled funds and the guidance recognizes that.
- Would need to know more about the nature of the educational programs.
- Claw-back provisions would need to be in place.
- The size of the contribution is more relevant than the proportion of the fund.
- This would be a good example of separating out purpose risk from operational risk because you need to back out if the purpose gets changed.
- Would there be merit in looking at the terms of a multi-year project on an annual basis?
- There are global databases to identify companies and charities that may be offside on sanctions.
- Anti-terrorism legislation and regulations have a series of requirements and checklists. You are supposed to be doing due diligence on the board, officers, employees, and the location of the activities. The bar is high.

SCENARIO #4

Facts:

The XYZ Foundation is a Canadian registered charity with a reputation for respectful collaboration and impeccable regulatory compliance. The XYZ Foundation recently got involved in an initiative to combat food insecurity within an Indigenous community (the "Community"). The XYZ Foundation set aside a pooled fund (the "Fund") comprised of contributions from the Foundation itself, other Canadian registered charities and for-profit businesses. The XYZ Foundation convened a group (the "Advisory Group") to collaboratively discuss how the Fund should be deployed in order to achieve maximum impact within the subject Indigenous community. This advisory group includes Elders from the Indigenous community.

On the recommendation of the Advisory Group, the XYZ Foundation made the following grants out of the Fund:

1) **The Foundation made cash transfers from the Fund to an Indigenous non-qualified donee (a non-profit organization) located within the Community (the "Donee"). The Donee produces sustainable and healthy food not otherwise**

available within the Community. The Donee sells the food on a cost-recovery basis to an Indigenous-owned for-profit grocery retailer located within the Community. The grocery retailer in turn sells the food at market rates to the local community.

2) **The Foundation made a gift-in-kind of trapping equipment to an Elder residing within the Community. The Elder is on the Advisory Board. The trapping equipment was intended to enable the Elder to source food for personal consumption and also for sharing within the Community.**

Issues to Consider:

1) **What, if any, accountability measures should the Foundation implement?**

2) **Has the Foundation acted improperly in any way?**

Participant comments/questions/discussions:

- Need to ensure that one of the purposes of the foundation is food security.
- Cash transfers need to be documented. A schedule of payments would be best.
- The Advisory Group is not a decision-making body so there may not be a conflict of interest when it comes to giving an Elder trapping equipment. The conflict would have to be declared and the Advisory Group would have to be advised of the gift to the Elder.
- The Advisory Group should be largely constituted of Indigenous members from the community.
- Did the foundation retain authority over its own assets or did the Advisory Group make the decision?
- On the private benefit issue - should determine what happens to the profit and why the grocery store is charging market rates for the food produced. For example, the grocer may be at risk of going out of business and the community wants to support it. Or the grocer could be contributing to the program of food security.
- Cost recovery means lower than market rates to the retailer so it confers an improper private benefit. If there are extenuating circumstances, this needs to be documented.
- Need to understand the culture - in this instance, food may be a benefit to the family as a whole and not to the individual, so paying for trapping equipment is not a personal benefit. Would also need to know more about the proportionality of the trapping equipment.
- Did others in the community have a chance to get access to the free trapping equipment? Is this the most efficient way to get country food? The beneficiary pool is not wide enough to confer a public benefit. Looks like a program that was designed to help only one person.
- Measures should be informed by the cultural context. The food sharing concept is real in Indigenous communities.
- This project may not be addressing food insecurity if they resell the food at market rates.
- Giving the funds to Indigenous communities that are qualified donees would resolve some of the issues.

- Need to understand the context in which funds are being given before making a decision on things like private benefit. Need to understand the programmatic rationale.
- Some gifts in kind can be used with a low threshold - the trapping equipment could fit this situation.
- Consider the nature of the partnership between the foundation and the Advisory Group. If the intention was to ensure greater food security, the Advisory Group should have the requisite authority. Addressing food insecurity can best be understood by looking at the historical legacy and why there is food insecurity.
- The community knows what the community needs. Need to practice trust philanthropy by partnering and working alongside the Indigenous groups and communities.

PROPOSED CHANGES TO GUIDANCE- INPUT FROM PARTICIPANTS

The day ended with participants asked to identify what their top 2-3 changes they would like to see in the draft guidance. The facilitators gathered the information and summarized the information as follows:

Terminology/Language/Tone

- Fix the terminology that uses “grants” and “gifts” to refer to QDs and NQDs respectively. In the field, in reality, they are all referred to as grants.
- Find a way to avoid confusion that will result from using the term “grant” for this new avenue. Perhaps replace with “contribution”.
- Get rid of the term NQD.
- Fix language “ensure”.
- Remove “accountability” and replace with “responsibility” to reflect a more collaborative relationship between charity and NQD.
- “Granting” and “accountability” reflect a top-down approach - use other words like “support” or “responsibility”.
- Tone should be positive and instructive.
- Strengthen the language that states that the tools are suggestions or examples.

Look at Risk

- Separate the list of risks (and related mitigation measures) into those that are specific to making grants to NQD and those that apply to all grants – both QDs and NQDs.
- Structure the document to show that risk to purpose is related to, but more important than, operational risk.
- Need more explicit identification of, and accountability tools to deal with, the unique risks that arise when registered charities fund non-qualified donees.
- Keep the risk matrix but review it.
- Clarify “risk” and be careful not to use it in multiple ways.
- Include nature of activity and nature of grantee in risk factors (i.e., 501c).
- Acknowledge the weighting of risk factors.
- In the list of risk factors, add:
    - Charity’s own experience in working with grantees.

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    - Any local regulation (including registration as a charity/non-profit in local jurisdiction) that may be relevant in assessing risk of non-charitable use of assets.
- Work with the sector to update thresholds.

Simplify

- Simplify the regulation (guidelines) to ensure access to marginalized groups.
- Guidance needs to be of reasonable size (less than 10 pages) as to not act as a deterrent to be considered by funders.

Reflect the original intent

- Have the guidelines better reflect the spirit of C-216.
- Put more of the "why" into the guidance so people better understand.

Information on NPOs

- Department of finance needs to provide tools to allow NPO/NGO to raise the level of accountability standards satisfying CRA/funder. This includes requiring all federally and provincially/territorially incorporated non-profits file and making filing public. This would mean NPOs who refuse to disclose would be ineligible to apply for funding.

Structure and Content

- Start with enabling preamble and principles; an explicit statement in the opening paragraphs that charities enjoy under common law a broad discretion to determine the activities through which they further their charitable purposes; a statement of principle that the donor organization is not the guarantor of a charitable outcome; make it clear in the preamble that this is guidance only.
- Separate the document into two sections (1) the guidance (definitions, preamble, relationship to legislation) – essentially the "must" elements – general requirements, etc. and (2) meeting the guidance (all the rest – process, books and records, examples, the "may") .
- Organize the document: chapter to outline the change in legislation, how the new regime differs from the old regime, the application of the new rules in terms of funding NPOs, examples, suggested accountability and risk elements.
- Guidance document to be organized in a way that focuses first on domestic then on international.
- Provide more domestic examples.
- Include a FAQ that answers/describes commonly asked questions – start from basic to complex questions (e.g. How are charities similar or different from non-charities?)
- Include a glossary of terminology.
- Keep the body of the guidance short and consider moving more of the content into schedules or appendices: risk factors, accountability tools, etc..
- The legislation requires the grant further the funder's charitable purpose but the guidance jumps from section 3 – how charities operate generally to section 4 accountability and section 5 grant making process – seems backwards and does not reflect the spirit of s216.
- Include a flow chart.

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- Examples or case studies could be included in schedules.
- Minimize prescriptive steps for grant making/fund distribution/add examples rather than mandatory requirements.

Review specific areas of content

- Restrict the anti-directed provision in section 7.4 of the guidance so that it reflects the wording of Bill C-19 so that it applies to conditional gifts (e.g. when the donor is requiring a return of the gift or a gift is turned over to someone else in the event that the charity does not gift to a NQD named by the donor). Confirm ability of charities to accept gifts that are restricted to being used for a program with a known (and if appropriate, identified) third party grantee, provided that the gift is not subject to being returned to the donor if the grantee is no longer involved.
- Address the purposes issue for foundations- provide a simplified process that would allow foundations that have purposes to fund QDs to be able to apply for an additional purpose of pursuing charitable purposes through making qualified disbursements.
- Need more clarification about how to handle grants to individuals and for profits.
- Section 7.0 special topics: Add some language to state that in the case of where there is a difference in illegality, it does not automatically disqualify the activity from proceeding, include language that states the difference between illegality and sanctions.
- Directed donations- remove reference in para. 75 to charity being required to retain authority over the use of its resources.
- Clarify how qualifying disbursements can be used and documented when they support administrative capacity or other activities deemed to remotely further charitable purpose.
- Clarify how charities can engage in fundraising for specific partners.

Documentation and reporting requirements

- Specify the minimum requirements- a focus on books and records will continue the current problem where CRA auditors always cite inadequate books and records.
- Is there an opportunity to simplify the T3010 reporting requirements? There will be many grants over $5,000/year, which means extensive and time-consuming reporting.

Day 4

On the final day, the above list was circulated to participants, and they were asked to provide any further thoughts for consideration. The following thoughts were offered:

- Ongoing concern for the need to separate operational risk from risk specifically related to the new legislation.
- The conversation related to the potential need for many foundations to change their purpose needs to be thought through. Could this apply to other charities?
- Should CRA reach out to those who might need to amend/change their purpose and provide them with a streamlined process?
- Should guidance raise the potential additional risk in dealing with non-arms length (particularly if the non-arms length is a for-profit organization)?
- Unintended consequences related to partisan activity will require close monitoring; the original intent is for more dollars to go to non-qualified donees but some dollars can now

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go to other jurisdictions for non-relief work – this may not be transparent depending on what is required on the T3010.
- Will this new legislation actually make an impact? The Carleton University report "Unfunded" has highlighted important issues; Government is expecting that the change in legislation will make an impact. How will expectations be managed?
- Perfection is the enemy of progress.
- There may be unintended consequences given the current funding context (increase in disbursement quota (DQ), rise in inflation, etc.).
- The intent is to increase dollars to marginalized groups – there are significant resources in Donor Advised Funds (DAFs) which could be unlocked.
- CRA has limitations in terms of communicating the guidance to the targeted audiences – others can support the communication (Ontario Nonprofit Network (ONN), Community Foundations of Canada (CFC), Philanthropic Foundations Canada (PFC), Imagine Canada, etc.).
- When thinking of risk – we need to consider both likelihood and impact.
- Private benefit considerations are tricky in Indigenous communities given context, history, culture, etc..
- Relationships should be a risk mitigation factor but we need to be careful as to not discourage new relationships.
- We have not discussed grants for administration and/or fundraising – this needs to be balanced with conduiting.
- Let's ensure that the guidance isn't limiting access.

SUMMARY OF FINAL THOUGHTS

At the close of the session, all participants were invited to express their views on this consultation - what they liked and what might be improved in the future.

Almost all of the participants started by expressing their thanks to the Muttart Foundation, its Board of Directors and the Executive Director for convening this important discussion. Thanks also went to the facilitators and to the international presenters.

Here is a summary of other comments made:

- Good process - the small group discussions were helpful and the scenarios instructive.
- This amendment to the ITA is a huge step; getting to the details has been arduous but we are removing barriers for funders. Five years from now we will see results.
- Appreciated the opportunity to participate.
- Curation of participants was well done.
- There was good sharing of data and comments that both CRA and the sector can use.
- This is a good reminder of the importance of tax rulings.
- Results of the 50th Muttart consultation are already being implemented; with new people come new perspectives.
- As a person working at the grassroots level, was not sure what to expect or what could be contributed because of the technical nature of the guidance but is hopeful that the changes discussed will increase access to resources for black communities and Indigenous communities.
- Appreciated how first timers to a consultation were provided with mentors.

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- Bringing diversity of thought into the room created meaningful conversations. The environment was productive, collaborative and instructive.
- Kudos to the CRA and Finance representatives: it is not always easy to receive criticism about a document you worked on for months. They were professional, gracious and displayed a good measure of openness. CRA and Finance disarmed themselves and created a level playing field for all.
- This was the right group with the right mix of perspectives and expertise.
- The problem was appropriately framed yet the conversation broad enough to include other issues. We made meaningful progress.
- This was a classic example of the success of the process for resolving deficiencies and problems when dealing with rules.
- This was an extraordinary helpful exercise which will only help to make the guidance better. The summary of the issues will be helpful to CRA.
- People were charitable with their time and with sharing their wisdom to consider the document and critique it.
- Having no predetermined agenda was great. The process was organic yet the discussions were comprehensive.
- Learned a lot about this topic. Constructive solutions and recommendations were provided.
- Great process that is unique and different.
- There is a lot of passion in this room for the work being done in the sector and to improve communities.
- Thanks for being able to use French.
- Legal gibberish was hard to follow at times but the lawyers were sensitive to that.
- Thanks to the voices of the NQDs at the table.
- Language is important - when the guidance gets translated, it will need to consider the different nuances.
- There will be a group of funders working on a kit to simplify access to the guidance.
- Would be nice to have some connection to the Banff community in some way when these consultations take place.
- Got a better understanding of the Department of Finance’s views and their thought processes.
- This was an engaged group and perhaps noisier than usual, but this may be because of the greater number of participants this time. Welcomed the presence of new participants.
- It is good to have a space where we can disagree well.
- Appreciated having a good amount of time to devote to the topic and appreciated the ground rules that were laid out at the beginning.
- Appreciated the structure of the days and having longer breaks.
- Liked the side conversations, the humour and collegiality and the courage to have difficult conversations.
- This is such a unique opportunity to create better policies and to make us better advocates.
- Thanks to the foundation for investing in relationships - there is no problem where relationship is not the answer. This consultation has led to thinking about a research project on the current body of law and its adaptiveness to Indigenous culture and reconciliation.

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- Loved the process, the people, the culture of respect, learning and listening.
- Coming from the private sector, it felt at times that we were creating more expectations of the NFP sector than we do of the private sector.
- Need to also consider the role that good governance can play in ensuring intended charitable results - the need for transparency and accountability – the best way to do that is through education.
- Work will now begin to release the current version of the draft guidance for public feedback, and subsequently, to prepare and approve the final draft of the guidance.

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