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February 6, 2023

Via email: guidancefeedback-retroactionsurleslignesdirectrices@cra-arc.gc.ca

Charities Directorate
Attn: Policy, Planning, and Legislation Division
Canada Revenue Agency
Ottawa ON K1A 0L5

Dear Director:

Re: Draft Guidance on Registered charities making grants to non-qualified donees

The Canadian Bar Association's Charities and Not-for-Profit Law Section (CBA Section) is pleased to comment on the Canada Revenue Agency's new draft guidance: Grants to non-qualified donees (Draft guidance).

The CBA is a national association of 37,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section includes lawyers who advise or serve on the boards of charitable and other not-for-profit organizations – or are otherwise involved with the law and practice related to the charitable and not-for-profit sector.

The CBA Section commends the Charities Directorate for offering guidance to the charitable sector on the June 2022 amendments to the *Income Tax Act*¹ (ITA). The use of narrative examples and checklists is generally very helpful. We respond to the CRA's request for comments to improve the Draft guidance's accessibility and application to the charitable sector.

1. Risk Assessment – No basis in law

The CBA Section is concerned that parts of the Draft guidance go beyond the legislation's objectives. We understand that CRA views the risk assessment matrix and specific accountability measures in the Draft guidance as helpful to charities working with the new rules. We disagree, and believe that the Draft guidance attempts to make new law. We suggest that there should be greater emphasis on the fact that it is not law, but rather information to help a charity determine best practices to comply with the legislation.

The *Budget Implementation Act, 2022, No. 1*² (Draft BIA), introduced in April 2022, included draft implementation of the qualifying disbursement rules. The first version of the Draft BIA proposed to

¹ R.S.C. 1985, c. 1 (5th Supp.)

² Bill C-19, now S.C. 2022, c. 10



amend the *Income Tax Regulations*³ to include a lengthy list of mandatory accountability requirements necessary for charities to make gifts to non-qualified donees. The charitable sector resisted because the Draft BIA did not do what Budget 2022 contemplated – it did not introduce changes in the spirit of Bill S- 216, the *Effective and Accountable Charities Act*.⁴ The proposed mandatory accountability requirements would arguably increase, not reduce, administrative burden for most Canadian charities that work with non-qualified donees. Parliament accepted relevant submissions and amended the Bill to remove the proposed amendments to the *Income Tax Regulation* which would have imposed the mandatory accountability requirements.

Many of the recommended accountability measures in the Draft guidance are the same as those proposed in the Draft BIA, even though Parliament's clear intent was to remove them. We anticipate that the risk assessment approach proposed by the Draft guidance will be confusing and administratively onerous for charities to implement. Including the risk assessment matrix in the Draft guidance undermines the intention of Parliament.

a) If retained, significant changes are necessary

If the Draft guidance includes the risk assessment framework, the tremendous variety and sophistication of the charities sector should be considered. It would help to offer specific information about what precisely is expected, including a “calibration” of the circumstances of individual charities and their relationships with their grant recipients, particularly with respect to vouchers and reporting.

b) Risk threshold – dollar amount

The dollar amounts included in the Draft guidance associated with low, moderate, and high-risk grants do not reflect the sector's reality. For example, a \$50,000 grant by a foundation that regularly grants \$30 million annually would be considered a small grant by that foundation, but not by a foundation that grants \$100,000 a year. Assessing the risk level of all grants based on a \$5,000 threshold is not practical. The Draft guidance should acknowledge that determining risk is based on many factors, including the charity's granting experience and that any threshold should be proportional to the size of the charity and the financial level of its granting.

2. General wording does not accord with the legislation

While the CBA Section understands that recent ITA amendments contain several interpretive challenges, some of the terms or words used in the Draft guidance are not included in the legislation's relevant provisions or are used differently. For example, the Draft guidance uses “grant” terminology, while the definition of “qualifying disbursement” in the ITA uses the term “gift.” The Draft guidance could also be generally improved by including more concrete examples of the accountability measures that are recommended in different circumstances.

³ CRC, c.945

⁴ See *Effective and Accountable Charities Act*: [online](#)



3. Continued Direction and Control?

Budget 2022 indicated that the ITA amendments would implement Bill S-216's spirit. The intent is to minimize the administrative burden of charities seeking to offer resources to organizations that are not qualified donees, while still ensuring accountability for the use of charitable resources. The CBA Section recognizes that this is a difficult balance to achieve. However, as framed, we do not feel that the Draft guidance aligns with the spirit and intent of Bill S-216.

As above, the risk assessment framework outlined in the Draft guidance is complicated, and arguably more administratively onerous than the current "direction and control" regime. In many instances, the recommended measures mirror the requirements of the current regime. The spirit of Bill S-216 requires upfront due diligence and reporting rather than an attempt to indirectly include the long and onerous list of requirements from the Draft BIA that were rejected by Parliament before the ITA amendments came into force in June 2022.

4. Directed Giving

The Draft guidance section on directed donations causes confusion when read alongside section 168(1)(f) of the ITA. That section gives CRA authority to revoke a charity's registration if it accepts a gift "the granting of which was expressly or implicitly conditional on the charity [...] making a gift to another person, club, society, association or organization other than a qualified donee." Instead of defining or explaining of what constitutes an "implicit" condition, the Draft guidance indicates that if charities retain authority over how they use their resources, they will not be outside the ambit of this new provision. While it is helpful to clarify that charities will not be prohibited from fundraising for programs that involve non-qualified donees, the CBA Section is concerned that the Draft guidance does not align with the wording of the ITA.

The CBA Section recognizes that there are challenges with section 168(1)(f) and appreciates that CRA intends to use a "light touch" when enforcing this provision. However, administrative guidance cannot change the plain language interpretation of the legislation. In the past, auditors did not follow administrative guidance and the Courts held the taxpayers responsible notwithstanding CRA's agreed approach. Recognizing that CRA is not responsible for the legislation but understands the problem, we suggest that it should formally raise this issue with the Department of Finance. A reasonable solution is to amend this ITA provision to clarify that it does not apply where the gift to the non-qualified donee is a qualifying disbursement.

At the very least, the Draft guidance should be modified to explain what constitutes an "implicit" condition, and to clarify whether including a *pro forma* statement on a charity's website about the charity's ongoing decision-making power towards allocating grants to another entity will be sufficient to insulate it from any allegation of facilitating directed giving. It would help if CRA provided further guidance on whether such a statement is sufficient, or whether the charity's internal communication and processes available to an auditor would be considered as well.

5. Charitable Purposes

While perhaps outside the confines of the Draft guidance, the CBA Section suggests it would be helpful to have CRA's guidance about foundations that currently have as their purpose "granting to qualified donees". The Draft guidance is silent on whether these charities are required to amend



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their purposes to offer grants to non-qualified donees. While we expect this will be the case, it is unknown if CRA will accept this sort of omnibus purpose, or if it is necessary to include a lengthy list of purposes in the charity's proposed granting areas. If the CRA adopts the latter approach, it would be inconsistent with Parliament's intent of making these changes in the spirit of Bill S-216.

It would also help if the Draft guidance had sample wording of an acceptable purpose for charitable foundations (with no activities other than grant-making), to enable them to make qualifying disbursements to non-qualified donees.

Conclusion

Thank you for the ongoing opportunity to discuss these matters with the Charities Directorate. We would be delighted to participate in a call or meeting to discuss our comments in greater detail.

Yours truly,

(original letter signed by Julie Terrien for Kate Bake-Paterson)

Kate Bake-Paterson, Chair,
CBA Charities and Not-for-Profit Law Section