

Philanthropy abroad

Daniel Frajman and Alana Petraske discuss the promotion of cross-border philanthropy



Charitable organisations and foundations often fund causes outside their home jurisdiction. This is the bedrock of international philanthropy and examples of it are numerous: the public charity raising funds in a wealthier nation to promote healthcare or alleviate poverty in a developing country, or the private foundation using its endowment to rebuild a school in another nation that has come to the attention of the foundation's founder. It is therefore important that the best possible rules govern such

cross-border flows of philanthropic funds.

Canada may be an example of a nation with rules that, although well intentioned, unduly hinder such international giving. As highlighted in a June 2019 Senate of Canada report (the Report),¹ the current Canada Revenue Agency (CRA) policy requires a Canadian charity's overseas activities to be carried out by the organisation itself, and if this is done through an intermediary organisation conducting local activities on the charity's behalf, the charity must maintain 'direction and control' over the local activities.²

With this policy, the CRA is attempting to hold charities accountable, but the Report found the existing rules to be too difficult to implement and at odds with contemporary values such as inclusion in local decision-making. The Report therefore advocated that the direction and

control test be dropped for Canadian charities in favour of an expenditure responsibility test.

Expenditure responsibility plays an important role in other parts of the Anglo-American charity world. Both the US and the UK tax authorities recognise as compliant grant-making procedures that effectively 'follow the money' to proper application.

As is typical, the UK takes a principles-based approach, although one with a worrying level of subjectivity in this case: UK charity trustees must take

such steps as Her Majesty's Revenue and Customs (HMRC) considers reasonable to ensure proper application of funds granted abroad. Failure to comply can lead to a limitation of the charity's tax exemption in respect of its income and gains.

In the US, federal law imposes an excise tax on US private foundations that fail to comply with one of two prescribed options. Expenditure responsibility requires the US foundation to establish adequate procedures to:

- ensure that the grant is properly expended;
- obtain grantee reports; and
- report back to the tax authority.

Suitable due diligence and a written grant agreement, including monitoring and reporting, form the bedrock for compliance. A UK charity that took this approach to its own foreign grants would likely go beyond the minimum requirements of the UK overseas payments rules in some cases, but the similarity of approach is striking.

The US 'equivalency determination' is an alternative option under which a 'good faith' determination is made that a grantee is equivalent to a US public charity. The UK lacks a reliable equivalency option, with HMRC's published guidance³ merely hinting that, in some circumstances, 'reasonable steps' may involve effectively establishing equivalency of regulation. Canada's developing landscape would benefit from permitting local charities to 'follow the money', but also provide a reliable equivalency alternative.

#CHARITIES #PHILANTHROPY
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¹ Senate of Canada, *Report of the Special Senate Committee on the Charitable Sector* (June 2019) at [sencanada.ca](https://www.sencanada.ca), pp.92–97 ² Canada Revenue Agency, Guidance CG-002, 'Canadian registered charities carrying out activities outside of Canada' (8 July 2010) at [canada.ca](https://www.canada.ca) ³ See Example 3b in Annex ii, bit.ly/3gFXcny