



## Sample Contractor Agreement for a Canadian Registered Charity Carrying Out Foreign Activities

By Mark Blumberg, Blumberg Segal LLP (June 25, 2010)

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Canadian charities often work with foreign intermediaries to conduct charitable activities in other countries. It is important that those Canadian charities when transferring resources to a foreign intermediary have a written agreement with their foreign intermediary to show that the Canadian charity maintains direction and control over its foreign activities and meet the “own activities” test under the *Income Tax Act* (Canada). See the CRA “*Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities*”<sup>1</sup> which sets out CRA’s views of the relationship between Canadian charities and non-qualified donees (including foreign charities).

There are many different types of relationships that a Canadian charity can utilize with a foreign intermediary including contractor, partnership, agency, joint venture or employee/volunteer. CRA describes the “measures of control” including written agreements, clear and complete description of activities, monitoring and supervision, ongoing instruction, periodic transfers, and separate activities and funds. A proper written agreement sets out exactly how funds will be used, what monitoring and reporting will take place, the schedule of progress payments, and any termination provisions.

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<sup>1</sup> <http://www.cra-arc.gc.ca/tx/chrts/plcy/cnsltns/ccrc-eng.html>

Having an appropriate level of detail will increase the likelihood that the charity's resources will be properly utilized.

We reprint a caution from CRA about written agreements:

“However, simply entering into an agreement is not enough to prove that a charity meets the own activities test. The charity must also be able to show to the CRA that the charity has a real, ongoing, active relationship with its intermediary, whereby it directs and controls the use of its resources by that intermediary. ”

The sample contractor agreement below is included to provide some assistance to charities in understanding some of the elements that may in certain circumstances be included in an intermediary contract. It was an agreement approved by CRA in a particular situation. It covers a relatively straightforward contractor arrangement between a Canadian charity and its foreign contractor. It may not necessarily be appropriate for a larger, more complicated situation or one involving a government or foundation funder with greater reporting requirements. It also may not be appropriate in places with difficult security situations or endemic violence. When charities enter into large or complicated contractual relationships with foreign charities or organizations, it is advisable to obtain legal advice from a lawyer who is knowledgeable about direction and control and “measures of control” in the context of Canadian charities conducting foreign activities. For further information on Canadian charities and foreign activities see [www.globalphilanthropy.ca](http://www.globalphilanthropy.ca)

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**Memorandum of Understanding**

**THIS AGREEMENT** made the \_\_\_\_\_ day of \_\_\_\_\_, 2010.

**B E T W E E N:**

**<INSERT FULL LEGAL NAME OF THE CANADIAN CHARITY>**,

a corporation incorporated under the laws of Canada,

(hereinafter referred to as "CANADIANCHARITY")

OF THE FIRST PART;

- and

**<INSERT FULL LEGAL NAME OF FOREIGN CONTRACTOR>**,

a corporation incorporated under the laws of \_\_\_\_\_,

(hereinafter referred to as the "INTERMEDIARY")

OF THE SECOND PART.

**WHEREAS** CANADIANCHARITY is a Canadian charity registered under the *Income Tax Act* (Canada) (the "Act") as a *charitable organization/public foundation/private foundation* and wishes to retain INTERMEDIARY to assist in the administration and implementation of the charitable activities of CANADIANCHARITY;

**AND WHEREAS** INTERMEDIARY is a \_\_\_\_\_ ;

**AND WHEREAS** INTERMEDIARY has experience and expertise in \_\_\_\_\_ ;

**AND WHEREAS** CANADIANCHARITY wishes to obtain advice and assistance with respect to \_\_\_\_\_ in the area of \_\_\_\_\_ and wishes to retain the service of INTERMEDIARY for those purposes;

**AND WHEREAS** INTERMEDIARY is desirous of providing the projects outlined in Schedule "A" on the terms and conditions hereinafter set out;

**AND WHEREAS** the parties wish to clarify the roles, responsibilities, liabilities, accountability, communications and other related issues between CANADIANCHARITY and INTERMEDIARY;

**NOW THEREFORE THIS AGREEMENT WITNESSESTH** that in consideration of the mutual covenants and agreements hereinafter contained and of other good and valuable consideration (the receipt and sufficiency of which is acknowledged), the parties agree as follows:

### **1. Project**

The parties shall co-operate with each other in carrying out the charitable activities as set out in Schedule "A" attached hereto, such activities herein called the "Project". INTERMEDIARY agrees to undertake the Project and provide CANADIANCHARITY with the deliverables as listed in Schedule "A" and in accordance with the budget as proposed in Schedule "A". Any additional projects approved by the parties in writing may be appended to this Agreement as part of Schedule "A", and such additional projects shall be subject to all the terms and conditions of this Agreement and form part of the Project. In the event of a conflict between the terms of this Agreement and a Schedule, the terms of this Agreement shall supersede the terms and conditions of the Schedule. Any funds provided by one party to the other shall only be used for the Project described in Schedule "A".

### **2. Amendments to Project**

In the event the parties hereto mutually agree in writing to amend the Project, such amended Project shall be required to be charitable in accordance with the laws of both Canada and \_\_\_\_\_, and the resources or equipment of the parties used in such amended Project shall be used exclusively for charitable purposes within the prescribed charitable objects of each institution.

### **3. Term**

This Agreement shall come into force for a five-year period on the day of signature by the parties unless and until this Agreement is terminated in accordance with the provisions of this Article 11. The Agreement may be renewed by mutual agreement in writing at the expiration of the term.

#### **4. Advance**

With respect to any Project, CANADIANCHARITY may advance to INTERMEDIARY funds prior to the commencement of the Project. This amount will be considered an advance against fees and expenses incurred by INTERMEDIARY and will be accounted for in the final invoice for the Project.

#### **5. Equipment**

In the event that one party provides capital equipment to the other then such equipment is owned by the party that provided it and such party retains all rights with respect to the equipment and the recipient party shall be a trustee of such equipment only and shall have no right of ownership with respect to same, unless agreed in writing to the contrary by the parties. Each party shall have and will maintain full and complete direction, control and supervision over the use and application of its own equipment. On the completion or termination of this Agreement for any reason, unless agreed in writing otherwise, such equipment or the then fair market value of same shall be returned.

#### **6. Immovable Capital Assets**

Where any party pays for the acquisition, construction, or improvement of any immovable capital property, legal title shall be held in the name of the party that paid for the immovable capital property except as provided hereafter. If agreed in writing between the parties the immovable capital property may be held by a government agency, municipality or non-profit organization that is established to provide benefits to the community at large, subject to there being reasonable written assurances that the property will continue to be used for exclusively charitable purposes upon and after completion of the capital project.

#### **7. Progress Reports & Payments**

Any payments contemplated under this Agreement will be made by installments listed in a disbursement schedule based on confirmation of reasonable progress in the charitable activities and programs as set out in Schedule "A" and that any resources or funds provided earlier have been applied to such activities. When funds are transferred pursuant to this Agreement they will be clearly identified as being part of a particular project and will be used only for such project and pursuant to this Agreement and the budget contained in Schedule "A". The INTERMEDIARY agrees that if the INTERMEDIARY is not abiding by this Agreement, then the CANADIANCHARITY, at its own discretion, may withdraw or withhold funds or other resources. Financial and narrative reports should be sent by INTERMEDIARY by email to \_\_\_\_\_ at CANADIANCHARITY whose e-mail is \_\_\_\_@\_\_\_\_\_.

## **8. Relationship**

Nothing in this Agreement shall constitute or be construed to create a partnership, agency, joint venture or an employment relationship as between the parties and neither party shall hold itself out as partner, agent, joint venturer or employee of the other or any other type of relationship that render one party liable for the debts or obligations of any other party except as specifically provided for in this Agreement. The parties shall secure all personnel required in performing their services under this Agreement and shall be responsible for all taxes and other payments, and all reporting requirements for their personnel that each uses in the performance of its services.

## **9. Insurance**

Without in any way limiting the liability of INTERMEDIARY under this Agreement it shall be the sole responsibility of INTERMEDIARY to maintain and keep in force and effect during the term of this Agreement sufficient insurance as is customarily kept by an organization conducting similar activities.

## **10. Confidentiality**

Each party acknowledges that, during the term of this Agreement, it may be required from time to time to disclose to the other party certain confidential and proprietary materials, information and data relating to that party's activities (all of which is referred to as "Confidential Information"). Each party acknowledges that the other's Confidential Information, other than that which is publicly known, is confidential and proprietary information. Each party agrees to exercise the same degree of care of the other party's Confidential Information that it does with its own Confidential Information and to confine knowledge of Confidential Information only to its employees who require that knowledge for use in the ordinary course and scope of their employment. The parties shall not, during the term of this Agreement or thereafter, use, disclose, divulge or make available each other's Confidential Information to any third party either directly or indirectly in any manner whatsoever without the prior written consent of the other party.

## **11. Termination**

Notwithstanding Article 3 of this Agreement, either party shall have the right at any time to terminate this Agreement for any reason on sixty (60) days' written notice to the other party. In the event of improper use of the funds by the INTERMEDIARY under, or a material breach by the INTERMEDIARY of, any term of this Agreement, as determined by the CANADIANCHARITY, the CANADIANCHARITY may terminate this Agreement effective immediately upon delivery of written notice of termination to the INTERMEDIARY. In the event of termination, INTERMEDIARY will refund

forthwith to CANADIANCHARITY any monies advanced by CANADIANCHARITY and not expended in accordance with the terms of this Agreement. Subject to the terms of this Agreement, CANADIANCHARITY will make the payments outlined in this Agreement until the date of termination, but will have no further obligation with respect to a termination of this Agreement.

## **12. Books and Records**

CANADIANCHARITY shall maintain adequate books and records, in accordance with the requirements under the Act, at its office address set out in Article 16 below.

Each party shall maintain full and complete books and records of, and shall provide to the other at least every six (6) months, or at any time upon request, full and complete reports on the Project, setting forth and confirming the amount of funds received from the other and expended and a detailed breakdown of expenditures made in respect of the charitable activities performed, so as to enable the other party to make informed decisions as to the application of its funds and to maintain full and complete records of same. These reports will be in a form acceptable to the other party. All reimbursable expenses shall be in accordance with the budget in Schedule "A" and will be supported by true copies of invoices, receipts, vouchers and/or other relevant documentation.

## **13. Monitoring and Evaluation**

The parties believe that honest and timely communication is vital to effective project monitoring and evaluation, and thus will comprise a key component of the Project. This will allow for any potential challenges and constraints to be discussed and efficiently addressed, as well as the Project's outcomes and impacts to be accurately documented. INTERMEDIARY will be responsible for the routine management and monitoring of the Project. Each party shall permit the other party to enter at reasonable times any premises used by the party in connection with the activities and Project as set out in Schedule "A" in order to observe and evaluate the activities and programs and inspect all records relating to the same. Donors to CANADIANCHARITY will be accommodated if they wish to travel on any of these field visits or at another time during Project implementation. INTERMEDIARY will report on the fulfillment of the financial commitments in this Agreement in both annual and final reports. These reports should contain information about the progress of the Project as well as beneficiary stories and photos that display the project in action.

## **14. Prevention of Certain Activities**

Throughout the term of this Agreement, the parties hereto shall exercise due diligence to ensure that the resources of the parties shall not be used to facilitate any

illegal or terrorist activity, human rights abuses, forced or compulsory labour, or use of child labour. The parties also commit to promote the protection of the environment and work against all forms of corruption, including extortion and bribery. The parties declare that neither their organization nor any member of their staff or Board of Directors have, in the business of a third, any pecuniary interest that could produce or seem to produce a conflict of interest related to the execution of this Agreement. If during the term of this Agreement such an interest appears, such party must immediately declare the conflict of interest to the other(s).

## **15. Assignment or Subcontracting**

Neither party may assign, pledge, mortgage or otherwise encumber any of its rights under this Agreement without the prior written consent of the other party. INTERMEDIARY may not subcontract any part of this Agreement unless provided in Schedule "A" or without the prior consent in writing of CANADIANCHARITY; provided that INTERMEDIARY shall be entitled to use its own employees and consultants for the purposes of carrying out its obligations under this Agreement.

## **16. Notice**

Except as otherwise provided in this Agreement, any notice contemplated or required to be given hereunder shall be in writing and may be made or given either by personal delivery, by courier, by fax or by electronic mail addressed to the respective parties as follows:

To CANADIANCHARITY:

Address:

Fax. #:

E-mail:

To INTERMEDIARY:

Address:

Fax. #:

E-mail:

or to such other address, fax number or e-mail address as either party may from time to time notify the other in accordance with this section. Any notice or communication made by personal delivery or by courier shall be conclusively deemed to have been given on the day of actual delivery thereof, or, if made or given by fax or e-mail on the first business day following the transmittal thereof.

**17. Compliance with Laws and Governing Laws**

In the performance of the Project, all parties agree to comply with all laws, ordinances, rules, and regulations of any government or administrative agency, federal, provincial, state or local that affect the Project. This Agreement and the rights and obligations and relations of the parties shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The parties agree to cooperate in good faith with respect to the Project, to communicate openly and honestly, and generally to attempt to avoid disputes in connection with this Agreement. If, nevertheless, a dispute should arise, the parties agree to attempt first to resolve such dispute by discussion.

**18. Time**

Time shall be of the essence in this Agreement and of every part of it and no extension or variation of this Agreement shall operate as a waiver of this provision.

**19. Entire Agreement**

This Agreement constitutes the entire agreement between the parties with respect to all of the matters herein and shall not be amended, altered or qualified except by a memorandum in writing, signed by both of the parties hereto.

**20. Counterparts**

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and such counterparts together shall constitute one original agreement.

**IN WITNESS WHEREOF** the parties hereto have executed this Agreement.

**SIGNED, SEALED AND DELIVERED)**

in the presence of:

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**CANADIANCHARITY**

Per: \_\_\_\_\_

I have the authority to bind  
the Corporation

**INTERMEDIARY**

) Per: \_\_\_\_\_  
) I have the authority to bind  
) the Corporation  
)  
)

Schedule "A"

**Description of Project(s)**

***[INSERT CLEAR, COMPLETE AND DETAILED DESCRIPTION OF ACTIVITY OR PROJECT***

*Before starting an activity, the charity and its intermediary should agree on a clear, complete, and detailed description of the activity. The charity should be able to document its exact nature, scope, and complexity.*

*Depending on the type, complexity, duration, and expense of an activity, the description of project or activity should show:*

- *exactly what the activity involves, its purpose, and the charitable benefit it provides;*
- *who benefits from the activity;*
- *the precise location(s) where the activity is carried on;*
- *a comprehensive budget for the activity, including payment schedules;*
- *the expected start-up and completion dates for the activity, as well as other pertinent timelines;*
- *a description of the deliverables, milestones, and performance benchmarks that are measured and reported;*
- *the specific details concerning how the charity monitors the activity, the use of its resources, and those that carry on the activity;*
- *the 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);*
- *the nature, amount, sources, and destination of income that the activity generates, if any (for example, tuition fees from operating a school); and,*
- *the contributions that other organizations or bodies are expected to make to the activity, if any.]*

## Budget

INTERMEDIARY shall have the following Project budget:

*[insert budget]*

## Reporting & Disbursement schedule

Reporting Date	Payment Amount	Contingent Upon
_____, 2010	\$	Receipt of signed agreement
_____, 2010	\$	Upon receipt of a satisfactory Financial & Narrative Report for the period _____ from _____ to _____ showing completion of A, B, and C.
_____, 2010	\$	Upon receipt of a satisfactory Financial & Narrative Report for the period _____ from _____ to _____ showing completion of D, E, and F.
_____, 2010	\$	Upon receipt of a satisfactory Financial & Narrative Report for the period _____ from _____ to _____ showing completion of G, H, and I and showing that the project has been completed including final evaluation.

*This sample agreement is prepared by Mark Blumberg, who is a lawyer at Blumberg Segal LLP in Toronto, Ontario and lead trainer for Capacity Builders' Charity Law Information Program (CLIP). He can be contacted at [mark@blumbergs.ca](mailto:mark@blumbergs.ca) or at 416-361-1982. To find out more about legal services that Blumbergs provides to Canadian charities and non-profits please visit [www.canadiancharitylaw.ca](http://www.canadiancharitylaw.ca) or [www.globalphilanthropy.ca](http://www.globalphilanthropy.ca) which has a large amount of information on Canadian charities and foreign activities.*

**To communicate with CLIP please contact** the CLIP office at 1-877-484-3030 or 416-256-3010 x 232 or by email at [clipreception@capacitybuilders.ca](mailto:clipreception@capacitybuilders.ca). For further information, please see <http://www.capacitybuilders.ca/clip>.

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