



UNESCO Biosphere Reserves of Canada Applying For Charitable Registration

A. OVERVIEW

There are eighteen UNESCO biosphere reserves in Canada yet only a few of them have obtained registered charity status. Generally speaking, the activities conducted by biosphere reserves should allow them to qualify however the disconnect between how the Canada Revenue Agency's Charities Directorate (the "CRA") may view the activities of an applicant *as described by the applicant*, and the activity in question as described in its most literal sense, is likely the stumbling block to a successful application. The most significant issue facing organizations that attempt charitable registration is that sector "jargon" and aspirational language is used to explain *why* the organization feels it should qualify. Unfortunately the analysis that the CRA must make is much more prosaic and technical and focuses entirely on the actual activities being performed by the applicant *at the point in time the application is made*. The CRA does not care *why* the organization thinks it should be registered, or what it might aspire to – that is not the focus of its analysis.

The other issue which frequently arises is the drafting of the organization's charitable purposes. The CRA has a very rigid approach to the drafting of purposes. The reality is that in order to successfully obtain registration it is necessary to draft within the CRA's drafting expectations. These expectations are again, quite literal and prosaic. Many organizations spend an inordinate amount of time crafting their purposes to incorporate aspects of their mission, values and aspirations. This approach is generally unsuccessful with the CRA and should be avoided.

This guide is intended to give Biosphere Reserves in Canada considering an application for charitable registration a sense of the framework within which such an application is made and an idea of where to focus their attention.

B. FRAMEWORK OF THE *INCOME TAX ACT*

It is section 149.1 of the *Income Tax Act* (the "Act") which sets out the basis upon which an organization can become a registered charity. There are three types of registered charities in Canada: charitable organizations, public foundations and private foundations. Generally charitable organizations are expected to be the deliverer of charitable programs and the two types of foundations are grant making organizations. That said, it is possible for charitable organizations to make grants, although there is a cap on the amount, and it is also possible for both types of foundations to conduct programs. Depending on the nature of the Biosphere Reserve and the activities it intends to conduct, it would generally apply to be



either a charitable organization or a public foundation. In many cases registration as a public foundation represents the most operationally flexible option. It is very unlikely that a Biosphere Reserve would apply to become a private foundation as private foundations are those which are controlled by a family or group of related individuals. Private foundations are also subject to greater operational restrictions than charitable organizations and public foundations.

Becoming a registered charity means that an organization is a “qualified donee” as defined in the Act. A qualified donee is an organization which is tax exempt but which is also entitled to provide donation tax receipts to donors. This is significant if the Biosphere Reserve intends to attempt to fundraise from individuals and it is extremely important if the Biosphere Reserve wishes to seek grants from other Canadian registered charities.

If the primary sources of funding for the Biosphere Reserve are business corporations or governments, charitable registration may not be of particular importance. This is so because charitable registration is generally not relevant to a government’s decision to provide funding, and a business corporation can, in most circumstances, claim a 100% tax deduction as a business promotion expense when making a contribution to a non-profit organization.

It is only in circumstances where the Biosphere Reserve wishes to seek funding from individuals and from foundations which are themselves qualified donees that charitable registration really matters. Individuals will not generally consider contributing significantly to an organization without the ability to receive a donation tax receipt for their contribution. Foundations which are registered charities are prevented by the Act from granting to an organization which is not a qualified donee.

Therefore, a consideration of the funding sources past, present and future of the Biosphere Reserve should be undertaken prior to making the decision to apply for charitable registration. It is only in the event that potential sources of funding include individuals and foundations that charitable registration should be sought.

It is important to note that registered charities are subject to a more complex and strict regulatory environment and it is virtually impossible for an organization once it becomes a registered charity to change its mind and go back to claiming the tax exemption for non-profit organizations. Further, once a Biosphere Reserve becomes a registered charity it would then itself be subject to the restriction on granting only to qualified donees. Registration eliminates the ability of a Biosphere Reserve to grant to non-profit organizations and businesses in its reserve area, although it does not preclude working collaboratively with such organizations (albeit with more administrative complexity).



There are also restrictions in the Act regarding registered charities' conduct of advocacy and lobbying activities (termed "political activities" in the Act), the carrying on of business and social enterprise activities and the manner in which collaborations with other organizations which are not qualified donees may be undertaken. When considering an application for charitable registration the current activities of the Biosphere Reserve, as well as those activities planned for the near future, must be considered with respect whether there may be a need to adjust or abandon some of these proposed activities in order to ensure compliance with the regulatory regime for registered charities.

C. DISTINCTION BETWEEN CHARITABLE PURPOSES AND CHARITABLE ACTIVITIES

Under the common law a charity is required to have exclusively charitable purposes and any activity conducted by that charity in furtherance of its charitable purposes is acceptable. The Act however alters the common law and overlays certain additional requirements through unfortunate and contradictory language in the Act. So, not only must an organization applying for charitable registration have exclusively charitable *purposes* it must also ensure that its *activities* in furtherance of those purposes are also charitable. If you think this is circular you are likely correct. If you think this is confusing, you are certainly correct. An activity is an activity, it cannot be "charitable" in and of itself – it must be considered in the context of the purpose for which the activity is being conducted.

With respect to applications for registration, what this problematic distinction means in practical terms is that it is very important not only to have purposes that are drafted in the way the CRA expects them to be drafted but that every single activity that the Biosphere Reserve intends to conduct must be (a) linked to one of the organization's charitable purposes, and (b) described in a way such that the CRA will perceive the activity to be "charitable". It is critically important to describe the organization's current activities in sufficient detail to allow the CRA examiner to understand precisely what it is that the Biosphere Reserve is doing. As noted above, the CRA does not care *why* the organization proposes to conduct a certain activity, it cares only that it is in furtherance of a charitable purpose and that there is sufficient detail with which to discern that the activity is, in their view, charitable.

For example, the following represents two different drafting approaches to describing an activity:

1. the applicant intends to work with local First Nations to deliver educational workshops; or
2. the applicant intends to work with three First Nations in its Biosphere Reserve, each of which is a qualified donee pursuant to the requirements of the *Income Tax Act*. It is planned that at least annually two workshops will be delivered in the territories of each of the First Nations. Each workshop will be for one day and will be open to the public generally and will be advertised on social media and the websites of the applicant and the respective First Nation. The proposed curriculum for the workshop is enclosed herewith [attach detailed summary of the workshop including timelines, topics, format



(lecture or break-out), anticipated learning outcomes]. The leaders of the workshop are elders from each of the various First Nations and X who has the following qualifications: ▼. This is a pilot program and after the completion of all workshops the applicant will review and decide whether or not to carry on similar workshops in future.

The first approach will not be successful with the CRA; the second approach should be.

D. drafting charitable purposes

As noted above, the CRA has strong views on the manner in which charitable purposes must be drafted. Each purpose must be clear and cannot be broad or vague. A purpose should be functional and not “aspirational” and should avoid sector jargon. Each purpose is expected to contain three elements: the charitable purpose “category” (for example, relief of poverty, advancement of education), the means of providing the charitable benefit and the eligible beneficiary group.

To give you a sense of the issue, the following are examples of purposes not acceptable to the CRA:

- (a) establishing and operating inclusive spaces;
- (b) to explore the nature of family to best serve the needs of parents and children;
- (c) studying the interconnections and interactions within ecological and human communities and developing a body of research data;
- (d) formulating the steps needed to make the transition necessary to achieve an equilibrium state with the planet’s ecosystems;
- (e) to inspire Canadian youth to use their unique perspective to create change;
- (f) to creatively educate the public of their ecological impact within Canada’s river sheds predicated on sound ecological principals;
- (g) to educate the public of the necessary steps to make the transition to work with sustainable living;
- (h) to advocate for sustainable development.

Applicants for charitable registration are often confused by the CRA’s comments on the drafting of their purposes because the CRA does not clearly indicate that the issue is generally the manner in which the purpose is drafted rather than the purpose itself. The CRA publishes model objects on its website at <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/applying-registration/charitable-purposes/model-purposes.html>.



It is useful to review the model objects when drafting or considering the amendment of charitable purposes. It is an absolute necessity for any applicant for charitable registration to review its purposes and ensure that they fit within the CRA's drafting norms.

The following purposes have been accepted by the CRA for a Biosphere Reserve:

- (a) to conduct and support research, education and programs which advance conservation and the understanding of natural processes in the marine and terrestrial eco-systems in the X Biosphere Region;
- (b) to conduct and support research, education and programs in the local communities and First Nations within the X Biosphere Region that promote the health of individuals and communities.

The following purposes should also be acceptable:

- (a) to advance education by commissioning and conducting research related to ecosystems and biodiversity and publicly disseminating the results of such research;
- (b) to protect the environment for the benefit of the public by conserving or restoring ecosystems and biodiversity on a long-term basis;
- (c) to protect the environment for the benefit of the public by restoring stressed or endangered freshwater and ocean ecosystems and wildlife and their habitats.

With respect to the number of charitable purposes, the fewer the better. It is important to understand that for those Biosphere Reserves which are incorporated, in most jurisdictions the process of incorporation by law gives that organization all the powers of a natural person. It is therefore redundant to include matters like the power to invest, the ability to purchase real property and the like in an organization's purposes because the organization has that power regardless. The organization's purposes are to set out *why* the organization exists. Purposes actually create a *limitation* on the breadth of the activities the organization can pursue.

E. DRAFTING THE STATEMENT OF ACTIVITIES

When drafting the Statement of Activities it is best to create a separate Word document rather than complete the section of the T2050 Application to Register a Charity form¹. Each purpose should be used as a heading and the various activities conducted or planned for the near future by the organization should be grouped under the particular purpose within which they fall. If there are activities that are

¹ We note that commencing in November 2018 all applications will be required to be e-filed – documents will be uploaded through a CRA portal.



outside the existing purposes the organization's purposes will need to be amended prior to making the application for charitable registration.

Each activity needs to be described with the detail noted above in section C. with a focus on who, what, where and when. The detailed description of each activity is the most crucial part of the application. It is necessary to avoid jargon. For example, we commonly see the term "social enterprise" referenced in applications for charitable registration. This is a term of some elasticity – there is no fixed meaning. A social enterprise could be a charitable activity, it could be a revenue generating or fundraising activity, or it could be a business activity. The examiner must be able to understand the precise nature of the activity in basic literal terms. In the writer's experience many organizations describe their charitable activities as social enterprises. While this may be helpful for promotional purposes it is distinctly unhelpful in dealing with the CRA.

Common errors in the preparation of the Statement of Activities include:

- (a) not providing an activity for each purpose;
- (b) not listing all activities;
- (c) including aspirational activities that the organization would ultimately like to do but which are, at the time of the application, completely unrealistic given the level of funding;
- (d) including activities conducted by another organization rather than the applicant
- (e) indicating that the applicant intends to provide funding or other support to non-qualified donees;
- (f) considerable detail and statistics regarding why a particular program is necessary – some detail is appropriate to frame the problem the applicant wishes to address, but generally this type of detail is not relevant to the CRA examiner's assessment; and
- (g) indicating that the applicant is "working with" or "partnering with" other organizations without providing details regarding the fundamental nature of this collaboration . The CRA will want to know who the other organizations are, what kind of status they have (most particularly whether or not the organization is a qualified donee), what activities are being conducted by whom, who is making decisions regarding the collaboration and whether there is a written agreement in place (there needs to be).

F. PROBLEMS CREATED BY WEBSITES AND SOCIAL MEDIA



Applicants for charitable registration should be aware that the CRA does extensive internet and database research with respect to applicants for charitable registration and their directors. We have unfortunately assisted many organizations whose application has been completely undermined by information on its website or social media feeds that contradicts information in the application or which raised concerns for the CRA examiner. It is our practice to strongly recommend to clients that prior to filing the application for charitable registration that its internet presence be reviewed and amended or “scrubbed” as need be to ensure that the language used in the application for charitable registration is consistent with the organization’s external communications. We have seen many applications fail because of the language used on the applicant’s website and social media.

In cases where an organization has been operating for some time prior to applying for charitable registration, it is quite possible that its social media presence may raise concerns – this is most common in the realm of advocacy activities and those which promote legislative change. If that is the case, these issues must be directly addressed in the application to ensure that the examiner understands that the organization understands that it needs to adjust its social media practices once it becomes a registered charity to ensure that it complies with the requirements of the Act.

G. DEALING WITH THE CRA EXAMINER

The registration application process is a “first in first out” system. The CRA receives approximately one hundred applications a day. The applications are first screened for completeness and whether there are any terrorism/money laundering concerns. Barring any terrorism or money laundering concerns, a complete application then moves into the assessment process and is, in essence, placed on the bottom of the pile. Once the application reaches the top of the pile, it is assigned to an examiner.

At the present time assignment to an examiner happens generally between four to five months from the date the application is received in Ottawa. The writer starts generally starts to call the CRA to enquire whether an examiner has been assigned around the three month point. Once an examiner has been assigned the applicant has a name and contact information and is able to regularly check-in with the examiner regarding the status of the application. Depending on the seniority of the examiner he or she may be able to make the determination himself or herself. If the matter is more complex the examiner will make a preliminary finding and then have the matter reviewed by his or her supervisor. It is frequently the case that the examiner will call to request further information on certain issues in the application. This information should be promptly supplied and generally speaking if the application is well prepared, registration should follow shortly thereafter.

We find that this proactive response can speed up the processing of applications and also helps flag issues that need clarifying with the examiner at an early stage. Many applicants who simply await the



response of the CRA can find themselves confronted with a quite technical letter in response, the tone of which is generally perceived to be negative. In reality, such response masks what is best categorized as a request for further clarifying information and an indication that the purposes will be required to be amended. Unfortunately many organizations abandon their application at this stage because of a perception that it is unlikely that registration can be achieved. In the writer's experience this is infrequently the case – most applications are salvageable with some understanding of the foregoing.



H. SUMMARY

Once a Biosphere Reserve has determined that it makes sense to pursue charitable registration, and makes a critical evaluation of the drafting of its purposes and how its programs fit within those purposes, and what potential restrictions under the Act may require operational changes, crafting an application with the above-noted guidelines in place should ultimately be successful.

Useful materials from the CRA can be found here: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/applying-registration.html>