



THE CANADIAN
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Political Activities for Charities

**CANADIAN BAR ASSOCIATION
CHARITIES AND NOT-FOR-PROFIT LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Charities and Not-for-Profit Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Charities and Not-for-Profit Law Section.

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Political Activities for Charities

I. INTRODUCTION

The Canadian Bar Association Charities and Not-for-Profit Section (CBA Section) appreciates the initiative of the Canada Revenue Agency (CRA) in consulting on political activities for charities, and we welcome the opportunity to provide our comments on this important issue.

Much has been written by legal academics, lawyers and others working for and in the voluntary sector on the subject of political activities. We have limited our response to the interpretation of section 149.1 of the *Income Tax Act (Canada)* and specifically to the questions posed in the CRA's online consultation. We do not comment on the overall scheme established in the legislation, other than to say that the CBA Section supports a comprehensive review and reform of charities law in Canada.

II. CARRYING OUT POLITICAL ACTIVITIES

A. Are charities generally aware of what the rules are on political activities?

Charities are generally aware of the rules on political activities in that they realize there are restrictions in how they engage in political activities. However, there is significant confusion on the application of the rules to the operations of individual charities, and we believe this could be improved by the CRA.

Charities are also generally aware of the 10% rule, although their accounting for compliance with the rule poses logistical confusion and challenges. As well, it is not generally well understood that it is 10% of resources that is addressed by the rule or how the calculation is to be done.

The recent 'political purpose' audits by the CRA have increased confusion in the voluntary sector and with the public, particularly about what political means in the charitable context. Some media coverage of the audits was problematic in our view, in that it suggested that charities should have no role in the public debate.

B. What issues or challenges do charities encounter with the existing policies on charities' political activities?

Charities face onerous legislative and policy obligations on what they can and cannot do while engaging in political activities. These obligations, as well as the CRA's interpretation of them, are often confusing. As a result, charities encounter numerous challenges, such as:

- Undue restrictions on their activities as a result of the outdated 'political purpose doctrine' and the CRA's over-reliance on it;
- Difficulty understanding the distinction between political purposes and political activities, particularly since the term in the *Act* is 'activities.' The CRA interpretation, including as set out in the political activities policy guidance, reveals no bright line dividing 'activities' from 'purposes' and this often results in considerable confusion for charities;
- Difficulty understanding the notion of 'non-stated collateral political purposes' and when that becomes an issue concerning political activities and political purposes. Further, the CRA's use of these 'non-stated purposes' requires charities to discharge a reverse onus when these purposes are alleged;
- Lack of confidence and reluctance in carrying out permitted political activities even to the allowable limit. Fear of reprisal (penalties, audits) and uncertainty about the rules has led to a chilling effect on charities;
- Lack of understanding around the accounting for resources allocated to political activities;
- Expensive use of time, funds and other resources to understand and properly work within the legislative and policy scheme; and
- Uncertainty around charities' online activities - for example, their use of photos and hashtags, as well as comments on the charity's social media posts may become politicized by followers, without the charity itself participating in or encouraging those discussions. The expectation that charities must 'remove, edit or moderate' political statements in the comments section on their websites, blogs and social media can be problematic. Charities need more guidance about the impact of political activities regulation on their online presence that is sensitive to practical and legal difficulties. For example, the requirement that volunteers and employees use caveats when they make political comments in public or on social media, even outside the context of their work with the charity, creates onerous obligations requiring a charity to control out-of-work conduct and can raise employment law considerations.

C. Do these policies help or hinder charities in advocating for their causes or for the people they serve?

Charities are hindered by the current political activities policies given the challenges noted above.

A healthy voluntary sector is essential to the health of the Canadian community. Since the 2001 *Accord between the Government of Canada and the Voluntary Sector* (the *Accord*), the federal government has acknowledged the important and unique role charities should play in public policy debates. Since 2003, the policy guidance on political activities¹ has explicitly acknowledged:

- The Government of Canada recognizes the need to engage the voluntary sector in open, informed and sustained dialogue in order that the sector may contribute its experience, **expertise, knowledge and ideas in developing better public policies and in the design and delivery of programs;**
- Canadian society has been enriched by the **invaluable contribution charities have made in developing social capital and social cohesion.** By working with communities at the grassroots level, charities are trusted by and understand the needs of the people they serve. This is important work that engages individuals and communities in shaping and creating a more inclusive society; and
- Through their dedicated delivery of essential programs, many charities have acquired **a wealth of knowledge about how government policies affect people's lives.** Charities are well placed to study, assess, and comment on those government policies. **Canadians benefit from the efforts of charities and the practical, innovative ways they use to resolve complex issues related to delivering social services.** Beyond service delivery, their expertise is also a vital source of information for governments to help guide policy decisions. It is therefore essential that charities continue to offer their direct knowledge of social issues to public policy debates. [all emphasis is ours]

In our view, the current interpretation of limits on political activities is not in the spirit of these acknowledged principles. A burdensome, complicated and confusing legislative and policy scheme discourages charities from meaningfully participating in public policy debate. The negative impact on the quality and robustness of that debate is detrimental to Canadian society generally.

The perception in the voluntary sector is that engaging in political activities even to the extent of allowable limits is discouraged by the federal government, or simply not worth the risk. Our experience is that most charities opt not to engage in political activities even to the extent currently permitted for this reason.

¹ <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>

III. THE CRA'S POLICY GUIDANCE

A. Is the CRA's policy guidance on political activities clear, useful, and complete? For example, how could the CRA improve its policy guidance on these topics:

- the description of a political activity
- the description of a partisan political activity
- charities' accountability for their use of resources

We are not advocating for a complete overhaul of the policy guidance itself. There are certainly helpful aspects of the existing guidance, particularly in its flexibility – charities can consider the examples in the guidance and apply them to their own circumstances. The current examples on direct representation to the government (in section 7 of the guidance), and indeed the explanations of prohibited partisan activities and permissible political activities generally are helpful to the sector.

The guidance could be improved by:

- placing emphasis first and foremost on framing permissible charitable activities as those that further a charity's charitable purposes, and within the parameters of constating documents and other applicable laws. The next question should be whether other activities (including political activities) exceed 10%. This would clarify the manner in which the analysis takes place or ought to take place;
- moving away from the notion of 'unstated collateral political purposes' – either a charity is operating in a manner that furthers its charitable purposes, or it is not;
- acknowledging that charities can always engage in activities that further their charitable purposes, regardless of the political environment at the time in question. Charities do not control the political environment. For example, teaching the tenets of a religion is not a 'political activity,' but an activity in furtherance of the recognized charitable purpose of advancing religion. Theological and religious teachings by a religious organization or leader on doctrines may touch on a social issue that has become 'politicized', but they remain charitable activities (though if they involve a call to political action, they may be considered 'political activities'). This has long been the CRA's position but it should be made explicit and clear;
- stating the CRA's commitment to supporting charities in their involvement in and contribution to high quality public policy debates;
- providing concrete examples of accountability for use of resources, while maintaining flexibility for each charity to manage its own operations; and

- using examples to provide clarity about online activities by charities, and to balance practical and legal considerations.

Beyond suggestions to improve the guidance itself, the CRA might consider publishing the charitable purposes of a charity as part of its online profile. While this information can be requested now, making the information available online without the need for a request would underscore the importance of charitable purposes to the sector and the public, and increase accountability and transparency. This would accord with our other comments and suggestions in this consultation. Charitable purposes are published online by the charities regulator in the United Kingdom.

B. Which formats are the most useful and effective for offering policy guidance on the rules for political activities? For example:

- **two to three minute videos**
- **videoconferences**
- **comprehensive guidance documents like those on the CRA website**
- **webinars or other types of presentations delivered by organizations other than the CRA**
- **other formats**

Whether the CRA decides to employ comprehensive documents, videos or other means, real life examples are key in offering helpful guidance to charities.

IV. FUTURE POLICY DEVELOPMENT

A. Should changes be made to the rules governing political activities and, if so, what should those changes be?

We suggest four changes:

1. Stop reliance on the political purposes doctrine
2. Move away from the '10% rule
3. The only impermissible political activities should be partisan activities
4. Repeal the 2012 *Income Tax Act* amendments on gifts to qualified donees intended for political activities

Stop reliance on the political purposes doctrine

Courts in several Commonwealth jurisdictions have dismissed a blanket rejection of political purposes. In Canada, the issue of political purposes has been considered by several courts. The rule is confusing and convoluted given the decision in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*² where the Supreme Court of Canada stressed that the analysis ought to be about whether all or substantially all of a charity's activities furthers its charitable purposes. Further, the *Act* refers to 'activities', and consistent terminology and scope for the applicable terms would be helpful.

Move away from the 10% rule

Apart from the usual rules for all charities to devote their resources to achieving their charitable purposes, to act within the confines of their constating documents and to comply with other laws (such as the lobbying regime), there should be no limits on charities engaging in permitted political activities.

Our rationale is supported by:

- The *Accord* recognizes the important and unique expertise of charities. The voluntary sector has consistently maintained that while the 2003 guidance was an improvement over previous policies, more needs to be done to free charities to speak on issues that they are knowledgeable about.
- The changing roles of - and increasing demands on - charities include funding shortages, growing needs of beneficiaries and increasing regulatory oversight. Charities must be able to employ efficiencies now more than ever to meet these demands. Eliminating the limit on permitted political activities would remove complication and uncertainty, and save time and money accounting for use of resources for political activities.
- Because of uncertain rules and fear of reprisal, charities may be doing less political activity than they are legally entitled to do. Removing this rule and the accounting difficulties that come with it would improve the quality of public policy debate through full participation by charities. More informed discussion is better for Canadian society as a whole.
- Charities are unduly affected by political activities rules. Although they are not the only ones receiving tax benefits (tax benefits are available to those donating to political parties, write-offs and other benefits are available to the for-profit sector in terms of lobbying, advocacy, and advertising expenses to reduce income tax payable), charities are the only

² [1999] 1 SCR 10 at paras. 152-154.

entities subject to limits of this nature. The freedom of the for-profit sector to release information in whatever manner they choose (subject to usual advertising rules) creates an imbalance in the public policy discussion. This imbalance is heightened by different priorities, expertise and stakeholder interests.

The only impermissible political activities should be those directly promoting or opposing political parties, and candidates for office in the election period (referred to as ‘partisan activities’)

Our rationale for this suggestion is similar to that for eliminating the 10% rule. Few charities operate in areas that are not regulated by government policy and legislation aside from the *Income Tax Act* and CRA policy. They should have a voice in the rules that directly affect their operations and the people they serve.

Repeal the 2012 *Income Tax Act* amendments on gifts to qualified donees intended for political activities

There is currently a double counting within the allowable limit on resources for political activities; once by the donor charity if the amendment applies, and once by the recipient qualified donee when the funds received are eventually expended on permitted political activities. Further, the phrase ‘can reasonably be considered’ in the proposed definition of political activity is ambiguous. Since its introduction, this provision has added to the confusion surrounding political activities, and added to the chill on the sector in engaging in public policy debates.

V. CONCLUSION

We appreciate the opportunity to contribute to this consultation and would be happy to continue that participation to explain or elaborate on our recommendations. The CBA Section suggests that consideration of any specific amendments to the guidance or related documents occur only in consultation with representatives from the sector, and we are happy to contribute our views and expertise.