Consulting Canadians on the Draft Legislative Proposals Regarding Political Activities of Charities

Submission to Department of Finance Canada

October 13, 2018

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Dear Department of Finance,

Blumberg Segal LLP is a law firm based in Toronto that provides legal services to Canadian non-profits, registered charities and donors. Blumberg Segal LLP maintains the websites http://www.canadiancharitylaw.ca and http://www.globalphilanthropy.ca. These sites provide extensive information and resources to Canadian charities and non-profits to encourage them to understand their legal obligations and strive for higher ethical standards. Blumbergs has also launched a transparency tool at the website www.charitydata.ca with up to fifteen years of information on every Canadian registered charity, a directors search tool and the ability to search data relating to charities. We encourage donors to be generous but careful in the way they practice charity and philanthropy. Our firm is concerned about the well-being of the non-profit and charitable sector and that there is appropriate regulation for this very important sector.

Executive Summary

We believe that the current rules allowing charities to use up to 10% of their resources for non-partisan political activities work for over 99.9% of registered charities. It is unfortunate that a recent Ontario lower court decision cast doubt on the current rules although it is being appealed and hopefully will be overturned. In response to *Canada Without Poverty v. A.G. Canada* ("*CWP*")[1], the Department of Finance Canada recently proposed amendments to the *Income Tax Act* ("Proposed Amendments") that in its view would "allow charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy"[2]. We were worried, but not after reading the Proposed Amendments, that Finance was going to open the floodgates to allow unlimited non-partisan activities by registered charities which would allow a large amount of dark money to invade the charity sector. You can see our previous article Canada Without Poverty vs. Attorney General of Canada – a pyrrhic victory for CWP and a disaster for the charity sector.

We were quite surprised with the Proposed Amendments as they may in fact reduce, rather than increase, the ability of registered charities to conduct political activities. By reverting to the common law of "ancillary and incidental" political activities the regulation of charities in Canada has gone back thirty years and this will certainly create tremendous

[1] 2018 ONSC 4147 (currently under appeal at the Ontario Court of Appeal)
[2] https://www.fin.gc.ca/n18/18-083-eng.asp

uncertainty as to how much political activities a Canadian registered charity can conduct which may take many years of conflicting court cases to clarify. We understand that the Proposed Amendments at least forestall unlimited partisan political activities by removing the impugned provisions of the Income Tax Act. We would argue that if CRA is successful in its appeal on CWP and the ITA political activity provisions are constitutional then it would be preferable that the 10% rules are reinstated in the ITA to at a minimum retain the legislative "safe harbour" for charities to spend 10% on political activities.

History and Purpose of the Legislated "Safe Harbour"

The most significant change in the Proposed Amendments is to remove the *Income Tax Act* provisions that effectively allow charities to devote approximately 10% of their resources to non-partisan political activities. In fact these provisions and the way they are interpreted by CRA actually allow smaller charities even more ability to spend resources on political activities. These provisions were enacted back in 1985 following the Federal Court of Appeal's decision in *Scarborough Community Legal Services v. The Queen* ("*Scarborough*") [3]. In *Scarborough*, Justice Marceau questioned the distinction between partisan and non-partisan political activity, and reasoned that any undertaking specifically and directly aimed at influencing the policy-making process "may always be said to be political".[4] Justice Marceau further held at para. 35 that "…I do not think that the meaning of the word charitable can ever be so extended as to cover a particular activity aimed, as I said, specifically and directly at influencing the policy-making process, whatever be the conditions or the context in which it is carried out." In Scarborough a large legal aid clinic was denied charitable status because of involvement with two minor political activities. In the wake of *Scarborough*, charities' abilities to conduct non-partisan political activities were severely curtailed. Justice Marceau effectively held that no political activity of any kind could ever be classified as charitable.

In response, the Department of Finance Canada enacted provisions which effectively created a legislative "safe harbour" which allowed charities to devote up to 10% of their resources to these activities. These provisions brought a measure of certainty and flexibility to charities that wished to devote a portion of their charitable resources to non-partisan political activities without running afoul of the common law. These provisions also provided the certainty of a spending threshold below which charities could safely conduct non-partisan political activities.

In the recent CWP decision, Justice Morgan of the Ontario Superior Court of Justice drew no distinction between charitable and non-partisan political activities, and held that any limit on a charity's ability to conduct non-partisan political activities unjustifiably infringes

[3] 1985 CanLII 3055 (FCA).
[4] *Ibid.* at para. 35.

the charity's right to freedom of expression as enshrined in s. 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[5] The decision is being appealed and will hopefully be overturned as it is quite extreme and problematic for the charitable sector.

Adverse Effects of Returning to the Common Law

The common law is far from settled on the extent to which a charity may engage in non-partisan political activities. On the one hand, *Scarborough* stands for the proposition that charities may conduct no activities whose purpose is "specifically and directly aimed at influencing the policy-making process." There are other cases in Canada and elsewhere that are more generous, however, whether Canadian courts will adopt them is unclear.

Without the statutory "safe harbour", and without settled common law, charities would be left without any clear direction as to how much, if any, of their resources may lawfully be devoted to non-partisan political activities. As the common law currently stands, charities may be offside if they spend anything on political activities or are involved in isolated political activities (per *Scarborough*).

While we understand the rationale for the Proposed Amendments being brought in we strongly urge the Department of Finance to reintroduce the legislative "safe harbour" if the CRA's CWP appeal is successful. The current ITA provisions are not perfect, they are better than the currently contemplated Proposed Amendments or just letting CWP stand.

Recent CRA Guidance confirms our concern

The Charities Directorate of the Canada Revenue Agency on October 2, 2018 released guidance "Charities and public policy advocacy" ("CRA Guidance") on the CRA's interpretation of the Proposed Amendments. The guidance fairly reflects uncertainty and also narrowness of scope for political activities under the Proposed Amendments without a legislative safe harbor such as the 10%. Normally we would not be writing to the Department of Finance on CRA Guidance, however, it was recently published in response to your Proposed Amendments and it is likely that if your Proposed Amendments are passed this will be CRA's view of the law relating to charities and political activities. We will share these comments with the Charities Directorate of CRA.

The CRA Guidance provides:
"As long as a charity operates only for charitable purposes, it can carry out activities, including public policy advocacy activities, that are incidental to those charitable purposes.

The new term "public policy advocacy activities" is defined as "Activities considered to be public policy advocacy seek to influence the laws, policies, or decisions of a

[5] *Ibid.* at paras. 68-70.

government, in Canada or any foreign country." Essentially this is similar to non-partisan political activities as previously defined.

The CRA Guidance provides that "Public policy advocacy activities must always be incidental, non-partisan, and support a charity in carrying out its charitable purposes."

It is not clear what is "incidental" and why the CRA is not using the common law standard of "incidental and ancillary" although to be fair there was lots of confusion over what each term meant and whether there is a difference between incidental and ancillary and what that difference is.

The CRA Guidance provides that "A charity can communicate directly with elected representatives or public officials to give them information that will help them make decisions, such as, for example, the expected consequences of a policy, or problems resulting from the absence or existence of regulation in a certain area. As long as these activities remain incidental, a charity can call on representatives and officials to change laws or policies as part of these communications."

Charities under the current rules are able to communicate directly with elected representatives and this was not considered political but instead charitable. The CRA Guidance provides that such communication with elected officials is public policy advocacy and must be incidental. Therefore, the most common type of activity that an average charity might undertake is currently excluded from CRA's 10% but now must be included in calculating whether the public policy advocacy activities are incidental.

Simply informing the public about what the laws are is now considered to be public policy advocacy activities. CRA notes:

> Informing the public
> There are many ways a charity can inform the public about laws or policies, including their effects and consequences, as an incidental activity.

In the past, informing the public of the law was not considered political as long as it was educational and you were not calling for a change, repeal or retention of the law. Now simply for telling a refugee woman that in Canada if her husband rapes her it is against the criminal law will be considered a public policy advocacy activity according to the CRA Guidance and needs to be incidental.

CRA also gives the example of:

> … give people information to help them make informed decisions on issues related to laws or government policies.
>
> 1. A charity publishes statistics on accidents caused by distracted driving, along with the legal penalties for distracted driving in all provinces.

Under the current political activity rules this never would have been considered political but now under the Proposed Amendments CRA takes the view that this will be public policy advocacy activities and must, along with all other public policy advocacy activities, be incidental.

The CRA Guidance provides:

> A charity can never use any of its resources to directly <u>or indirectly</u> support or oppose any political party or candidate for public office, which the CRA refers to as a partisan activity. This rule is particularly important to remember during an election period, when charities may want to express their views on the policy issues that matter to their supporters. [my emphasis]

This is similar to the current law and there is no further clarification on what exactly "indirectly" supporting or opposing a candidate or political party means.

> Example: acceptable incidental public policy advocacy activity
> A charity publishes its experiences working with newly arrived refugees to Canada, a topic on which a provincial political party has expressed its own views.

Under the current rules talking about the experiences of newly arrived refugees would probably not be considered political. Under the proposed rules this would be a public policy advocacy activity and needs to be incidental.

> If a charity's public policy advocacy activities are more than incidental, the charity likely has a political purpose. A charity is prohibited from having a political purpose by both the Income Tax Act and the common law.

The new rules may be like a Hollywood action movie in which someone is trying to break into a secure vault by avoiding a laser net with a large number of red laser beams to avoid tripping an alarm. Now a charity is going to have to be very careful to ensure that in all of its work and activities do not conflict with the following rules or concepts or the consequences will be potentially revocation for the charity:

- If the charity has a "political purpose" it can be revoked;

- If the charity's public policy advocacy activities are not "incidental" it can be revoked;

- If the charity's public policy advocacy activities are not "proportionate" it can be revoked;

- If the charity's public policy advocacy activities are "unrelated to a charitable purpose" it can be revoked;

- If the charity's public policy advocacy activities are "disproportionate" it can be revoked.

- If the charity's public policy advocacy activities are "appear to be its primary focus" it can be revoked;

- If the charity's "primary focus appear to be to sway public opinion, promote an attitude of mind, create a climate of opinion, or exercise moral pressure to keep, change, or remove a law, policy, or decision of government" it can be revoked;

- If the "charity's public policy advocacy activities carried out frequently, and over a long period of time" it can be revoked;

- If the charity is "mostly funded or operated by individuals known to be closely associated with a political party or candidate's election campaign" it can be revoked;

- If the charity carries out and disseminates "research into public policy on only a narrow range of topics, and that aligns with a prominent issue of a political party's platform" it can be revoked.

We are worried about expanding dramatically the scope of political activities and we have written extensively on the topic. We do however believe that charities should be allowed to engage in non-partisan political activities related to their purposes and these Proposed Amendments and the CRA Guidance when looked at together create tremendous uncertainty and may significantly curtail that possibility.

We also believe that in a free and democratic society it is important that there is freedom of speech and association. There is an important role for political advocacy groups who spend most or all of their time on political activities or even partisan activities. But these are not charities and should be part of the 80-100,000 non-profits that are not charities and not part of the registered charity sector. The reputational damage that some of these groups masquerading as registered charities have done to the charity sector is significant.

If you require further information or wish to discuss this submission, please do not hesitate to contact us.

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