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A Chilly Time for Charities: Audits, Politics and Preventing Poverty

By Gordon Floyd

This article is the eighth in a series on Canadian Charities Working Internationally.

SUMMARY: In this opinion piece, *Philanthropist* editor Gordon Floyd takes a look at the recent flurry of charity audits by CRA's Charities Directorate and notes that many have been of charities, such as environmental groups, whose views are at odds with those of the current government. With regard to international development charities like Oxfam that are running afoul of CRA by aiming to prevent rather than relieve poverty (the former is not considered a charitable objective), he suggests that they look to current CRA regulations that apply to community economic development charities, which aim to help the poor as well as those at risk.

RÉSUMÉ: Dans cet article d'opinion, Gordon Floyd, rédacteur au *Philanthropist*, jette un regard sur la vague récente de vérifications d'organismes de bienfaisance menées par la Direction des organismes de bienfaisance, à l'ARC; il observe que parmi les organismes visés, bon nombre (par exemple, des groupes environnementaux) ont des points de vue qui s'opposent à ceux du gouvernement actuel. En ce qui a trait aux organismes de bienfaisance qui, comme Oxfam, œuvrent pour le développement international et ne respectent pas les règles de l'ARC en tentant de prévenir la pauvreté au lieu de la soulager (la prévention n'étant pas considérée comme un objectif de bienfaisance), il suggère qu'on s'inspire de la réglementation actuelle de l'ARC s'appliquant aux organismes de bienfaisance qui œuvrent pour le développement économique communautaire et qui visent à aider les pauvres ainsi que les personnes à risque.

It's pretty clear that certain politicians in Canada today regard some charities to be part of their political opposition, especially (but by no means only) many of those engaged in work related to the environment or international development. For instance, the 2012 federal budget provided the Charities Directorate of the Canada Revenue Agency (CRA) with a whack of new money (some \$8 million, later increased to \$13.4 million) specifically to audit the "political activities" of charities.

Despite many assurances that the process for selecting audit targets is non-political, the auditors appear

to be visiting a large number of organizations whose ideologies are at-odds with the current government. I actually have quite a bit of confidence in the integrity of the folks running the Charities Directorate at CRA, and I believe them when they say they are not receiving any explicit political direction about who should be audited, but they are working in a system that's been distorted for political ends. Best example: the charities targeted for audit are selected based on several factors, a significant one of which is the existence of complaints about their activities. Well, no surprise that some players in the oil and gas industry have been busily filing complaints about every progressive environmental charity, thereby tilting the selection process.

The good news (so far) is that no one seems to be losing their charitable registration; rather, they get warnings or sign "compliance agreements" to respect the rules (with the threat of a follow-up audit), all of which causes a "chill" on their activities and diverts them from their core work, but doesn't completely cripple them.

It's less clear what's driving the selection process for audits of international NGOs, but there seems to be a clear pattern there too of targeting groups whose views and approaches are most at odds with those of the current government (e.g., Kairos).

Another troubling report concerns Oxfam, which has been advised by CRA that its efforts should be restricted to "relieving" poverty, rather than "preventing" it. If preventing poverty is no longer to be recognized as charitable, then charities that are involved in that type of development work are jeopardizing their ability to provide donors with tax receipts or to receive grants from foundations.

While it's tempting to view this challenge to such a well-respected progressive charity as yet another example of an ideologically inspired witch hunt, the "prevention vs relief of poverty" issue that's affecting Oxfam is not so clearly motivated by partisan considerations.

"Relief of poverty" is one of the four core purposes for which a charity can legally exist in Canada (and other common law countries). One of the more troublesome aspects of charity law is that it requires charities to exist for "exclusively" charitable purposes (and Canada also requires that they carry out exclusively charitable activities, which is even more troublesome if not impossible, but that's another rant). If the beneficiaries of a charity that's registered to prevent poverty are exclusively from a class of persons who need that kind of charity (e.g., "the poor"), then the result of the work to relieve poverty is regarded as a "public benefit" and therefore charitable; but if some of a poverty-relief charity's beneficiaries are not impoverished, then they could be deemed to have received a "private benefit" from the charity's resources, which means the charity has engaged in non-charitable work and is offside.

In Oxfam's case, the difficulty is in establishing that its efforts to prevent poverty are being restricted to a class of beneficiaries who 'deserve' tax-assisted support. Presumably they are not among "the poor" (yet), but are they sufficiently 'at risk' to be considered "charity cases"? Policy-makers and regulators (and charities) have enough trouble defining who is "poor," but they have even more difficulty defining who is 'at risk'. And that's why "preventing poverty" is a problem, from a legal point of view.

One place to look for a way out of this legal box is in the CRA's published guidance for charities that engage in "community economic development" because in most cases their work helps some people who aren't "poor" in addition to many who are. This CRA guidance on Community Economic Development and Activities and Charitable Registration says: "To be charitable, CED activities must be undertaken in a way that ensures that any resulting private benefit is **incidental**, meaning that it is

necessary, reasonable, and not disproportionate to the public benefit that is delivered.” The guidance goes on to say:

“11. The following are examples of charitable purposes that can be furthered by CED activities:

- relieving poverty by relieving unemployment of the poor;
- advancing education by providing employment-related training; and
- benefiting the community in a way the law regards as charitable by:
 - relieving unemployment of individuals who are unemployed or facing a real prospect of imminent unemployment and are shown to need assistance;
 - relieving conditions associated with disability;
 - improving socio-economic conditions in areas of social and economic deprivation; and
 - promoting commerce or industry.

“12. Each charitable purpose has specific requirements relating to eligible beneficiaries. For example:

- for a purpose that relieves poverty, eligible beneficiaries must be poor;
- for a purpose that relieves conditions associated with disability, eligible beneficiaries are individuals with conditions associated with the disability;
- when unemployment is relieved to further a purpose beneficial to the community in a way the law regards as charitable, the beneficiaries must be unemployed or facing a real prospect of imminent unemployment and be shown to need assistance.”

This rather convoluted guidance for CED charities gives a good idea of the sort of approach that’s required to fit Oxfam’s activities into the legal confines of ‘charity’ – it’s a pain, but it should be doable with a bit of creativity and careful legal drafting.

Of course, this predicament affects many more charities than Oxfam. Most Canadian charities that work internationally today operate according to modern development theories that are about building the capacity of people and communities, based on their existing strengths; not many charities working overseas are focussed anymore solely on “relieving” disasters or poverty. Yet CRA’s interpretation of the rules affecting those charities still reflects an outdated, dependency-based and paternalistic approach to global development.

One of the leading lights in among Canada’s charity lawyers is fond of saying “Why must it be so hard to do good?” Our charity law is derived from 200+ years of court decisions that are not codified in an accessible way anywhere. Unlike England and Australia, among other common law countries, Canada has not enacted a “*Charities Act*” to consolidate, update and make sense of the arcane rules that, literally, date back to the time of Elizabeth I. It’s way past the time to do so. Meanwhile we all have to find workarounds like those in the CED guidance.