Charities Now Welcome in The Political Arena: What This Means for the Charitable Sector of Today and Tomorrow

During the 2015 federal election campaign, the Liberals made a sweeping pledge to "allow charities to do their work on behalf of Canadians free from political harassment."[1] Later, in a 2018 statement, two senior government ministers said that charities play a vital role in Canadian society by providing valuable services. "We recognize the experience and value they bring to public debate, and to the formulation of public policy. As it was clearly stated in our mandate letters, our Government is committed to clarifying the rules that govern the participation of charities in political activities and we are taking the necessary steps to move forward on that commitment."[2] We argue that the Liberal government's recent changes to these rules in the *Income Tax Act* (ITA) impede the foundation underpinning the legislative framework for political activities undertaken by registered charities (RCs). In fact, the recognition of the right of charities to engage in political advocacy requires a redefinition of charitable work itself. It forces us to re-evaluate the role the sector should play in our country's democratic process.

This article is divided into three parts to shed light on ITA reform and better understand its implications for the charitable sector. First, we will provide context with a brief review of the sequence of events leading up to the Trudeau government's decision to reform the ITA, and then we will examine how this legislative change is contributing to a transformation of the Canadian regulatory system for charities. Finally, we will conclude with some reflections on the possible consequences of acknowledging the place of RCs in politics.

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The origins of the proposed legislation

Since 1985, Section 149.1 of the ITA has required that charities registered with the Canada Revenue Agency (CRA) allocate no more than 10% of their financial resources to activities deemed political.[3] This 10% rule was unpopular and raised the ire of both the charitable sector and the communities it supports. Many organizations – especially those fighting poverty, defending the rights of marginalized groups, or protecting the environment – find it necessary to get involved in politics and be vocal in public policy discussions to make headway on issues directly tied to their raison d'être. From their perspective, the 10% rule was ill-adapted to the reality of many RCs.

It was only under the Harper government that the limit become truly problematic, when the administration chose a stricter interpretation of the law to muzzle RCs critical of aspects of its political agenda. The government ordered the CRA to undertake audits aimed at identifying RCs that were too "political," using the 10% rule as justification. As a result of these investigations, at least five organizations saw their charitable status rescinded, resulting in financial instability due to the loss of income from status-related tax advantages.[4]

Canada Without Poverty was the first organization to challenge the constitutionality of this legislative provision after the CRA threatened its charitable status. The organization argued in the Ontario Superior Court that the limit constituted an arbitrary and unjustified infringement on

freedom of expression under Section 2 of the *Canadian Charter of Rights and Freedoms*.[5] Without going into too much detail about the ensuing legal proceedings, let us simply say that the case put pressure on the Liberal government to end the audit process that the Conservatives started in 2012.[6] Thus began the ITA revision process. The government established the Consultation Panel on the Political Activities of Charities around this same time.[7] The Panel's report was received favourably by the government, which stated its intent to implement the corresponding recommendations. These included "deleting any reference to non-partisan 'political activities,'" which would obviously result in an end to all limitations on such activities for RCs.

The Liberal government eventually passed a new act on December 13, 2018. The December 2018 version of Section 149.1 shows the following key modifications to the regulations governing RCs' political activity:

- The concept of "political activity" has been replaced with "public policy dialogue and development activities."
- The 10% limit is no longer in effect, but partisan political activities remain prohibited.
- The public policy development activities of an RC are not themselves considered charitable activities but must support or promote one or more of the charitable purposes expressed by the RC.

A historic shift

The stated purpose of the 10% limit was to ensure that political activities made up only a minor part of an RC's activities. Its elimination must then be interpreted as recognition of the positive contribution charities make, enlivening democratic life and enriching collective debate around public issues. However – and this is the point we would like to make – the revisions to the Act will have much broader repercussions. They not only offer RCs another avenue for action, but they also pave the way for activities that may systemically transform the regulatory regime.

To grasp these potential impacts, it is first necessary to understand the logic upon which legislators founded Canada's regulatory framework for charities. From the very beginning, the system was built to use taxation as a disciplinary mechanism. In other words, the tax benefits that came with a charitable registration number were also accompanied by legal restrictions on the type of activities that RCs could engage in, and on how they could go about these activities. This entailed an "integrated system" in which the agency in charge of overseeing the charitable sector (the CRA) was subordinate to the government and subject to its tax policies and, especially, its political positions.

Until now, Canada's integrated system has evolved without significantly altering this operational principle. In fact, subsequent legislation has reinforced it.[8] A quick overview of the origins of charity regulation shows that, even as the fiscal context of foundations and other charitable organizations has become increasingly privileged,[9] the regulatory apparatus that governs them has become more restrictive. In short, taxation is the tool that has permitted governments to control RCs: as charitable status benefits grew, the loss of such status has become more effective as a threat. As a result, the government found itself well-positioned to limit the political scope of charitable activities. Yet, an analysis of the recent changes to the regulatory system legislation shows they represent a significant break from past reasoning, which emphasized restrictions and disciplinary action.

Under the previous regulatory framework, the CRA had discretionary power from the moment an organization applied for its charitable registration number. The process of awarding charitable status was designed such that the assessment was partly based on an organization's ability to prove that its mission fell within one of the government's four broad charitable purposes.[10] Thus, an official assigned to the application was called on to interpret and pass judgment as to whether the description of an organization fit into one of the predefined categories. [11] With no clear definition of "charity" in the Act and no criteria for identifying initiatives considered charitable, the fact that an organization was explicitly politicized or "politicizable" could be interpreted as grounds for refusing its application. In this context, organizations with a mission deemed "too political," such as human rights groups, would inevitably receive a negative evaluation from CRA officials. This barrier to entry was felt less by organizations directly serving the public, for which it is much simpler to demonstrate a community benefit. It is worth noting that if CRA refused an organization's application for charitable status, it could appeal this decision before the Tax Court.[12]

The recent experience of the status application of the Research Institute on Self-Determination of Peoples and National Independence (IRAI) provides an excellent illustration. Even though the IRAI stated that its mission was strictly the scientific production of knowledge – which would normally fall under "advancement of education" – the intrinsically political nature of its field of study aroused the suspicions of the CRA official assigned its file, and its application was ultimately rejected.[13] However, the IRAI appealed the decision, claiming it was discriminatory, and it was overturned.[14] This type of situation is now improbable given RCs have legal authorization to engage in political activity.

But the matter was far from settled. After a registration process was complete, the 10% limit left the door open for government interference. This could arise in cases where an RC's public activism placed it in conflict with the sitting government's political agenda, as happened under the Harper administration. As that situation clearly showed, the regulation had left a legal loophole allowing the government to restrict the political engagement of organizations opposing its goals. It was able to surreptitiously safeguard its interests by silencing emerging criticism from the charitable sector. Any RC whose mission required it to routinely engage in politics or exert political influence lived with the sword of Damocles hanging over its head. Audit proceedings related to the 10% limit could easily lead to revocation of charitable status.

Therefore, the modifications to the ITA represent a substantial change from Canada's past institutional framework. The recognition of RCs' right to engage in non-partisan political activity protects their freedom of conscience and expression, thereby reducing the control that the CRA (or even the government through the CRA) can exert. Do these changes point to a new way of understanding charitable regulation? Is this the beginning of a new era for the charitable sector?

Projected impacts: a few hypotheses

We will now outline some hypotheses on the possible short- and medium-term impacts of these changes to charitable sector legislation. These reflections have been informed in part by a survey conducted by the Canadian network of partnership-oriented research on philanthropy ("PhiLab") researchers of a small sample of organizations that reported being very concerned by the recent legislative changes.[15] Taking inspiration from the reactions expressed by survey participants, we have formed three working hypotheses.

Hypothesis #1: This change will lead to an increase in charitable status applications.

Now that RCs have the right to engage in political activities, more organizations will see themselves as eligible for charitable status. The steps to register will hold more appeal since the political dimension sometimes inherent in a social service mission is no longer an automatic disqualifier. Should we expect a slight bump, or even an explosion, in the number of applications? Only time will tell.

If this turns out to be the case, it will be interesting to study the impact it has on the public purse. The lowering of barriers to charitable status must necessarily come at a cost to the federal coffers.

Hypothesis #2: This change will enable the politicization of the charitable sector.

In the same vein, we can expect many charities to become more political. Some will take a more activist approach and become more involved in public life. With the threat from the government reduced, these organizations risk less by venturing into political terrain. Relatedly, spending on political activities will increase from its current tiny slice of the budget. However, there will be a steep learning curve to get to that point. This is especially true when it comes to understanding what current regulation means by “political activity” versus “partisan political activity.” The latter is, of course, still prohibited. As the charitable sector learns to distinguish between authorized and unauthorized political activities, it will contribute to the credibility of non-partisan political engagement.

If we take that thinking one step further, we could easily imagine the changes having a positive effect on the relationship between grant foundations and the organizations they fund. In fact, the foundations will be in a better position to show solidarity: in addition to the funding and guidance they already provide, they will be able to represent the interests of recipient organizations more effectively in the political and media spheres. Without jeopardizing their charitable registration, these grant foundations will now be able to, for example, take up lobbying or make public appearances to sway popular opinion on certain issues.[16]

Hypothesis #3: This change will allow for a substantial reconfiguration of the legal framework governing the charitable sector.

It is thoroughly possible that the recognition of RCs’ democratic participation will pave the way for the modernization of charity law. The current legal framework has been passed down from a previous era. Many see it as anachronistic and out of step with today’s reality. Nothing corroborates this more than the fact that “advancement of religion” is still on the approved list of charitable purposes. This situation has grown increasingly unacceptable, particularly in Quebec as the province experiences a powerful upsurge in political and public support for consolidating past advances in public secularization. For many, it seems incongruous that government subsidies benefit religious organizations that are not providing public social services. This is demonstrated by the media attention given to the tax regulations for religious organizations, when the topic held little interest only a short while ago. [17]

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In conclusion, it is highly likely that these changes are the first manifestations of a new paradigm

in understanding and defining charity in Canadian society. In this sense, it is only the beginning of a thorough overhaul of the regulatory system governing charities. For some, that might mean a new commitment to political engagement. For others, a clearer definition of political activity is a critical financial concern. Consequently, education is very important, as is stepping into the political space that has opened for charities. In other words, this reform, rather than ending the debate, has merely turned the page on a new chapter. In it, we are collectively called upon to rethink and redefine the role of “political charities” in our society. Further legislation on the subject is likely to come. The new minority Liberal government will be key in determining what future changes to the legislative framework will look like.

This article was written with the collaboration of Katherine MacDonald.

[1] https://www.liberal.ca/realchange/canada-revenue-agency/

[2] https://www.newswire.ca/news-releases/statement-by-the-minister-of-national-revenue-and-minister-of-finance-on-the-governments-commitment-to-clarifying-the-rules-governing-the-political-activies-of-charities-690968451.html

[3] The regulations are slightly different for small organizations (those with annual income between $50,000 and $200,000). These can allocate between 12% and 20% of their income to political activity (CRA, 2003). Note that, in Canada, corporations are not subject to any limitations on lobbying. In fact, they are even encouraged to lobby, since any costs incurred in the process are tax deductible (Fontan et al., 2017).

[4] None of the de-registrations were because of the charity’s political activities, according to CRA, but due to other factors that were uncovered during the audits.

[5] https://ici.radio-canada.ca/nouvelle/1113280/juge-ontarien-decision-agence-revenu-statut-organismes-charite-liberte-expression (in French)

[6] https://www.canada.ca/en/revenue-agency/news/2017/05/minister_lebouthillierwelcomesthepanelreportonthepublicconsultat.html

[7] The Panel summarizes the nature of its recommendations as follows: “Our recommendations are intended to break the cycle of ambiguity, confusion and uncertainty, and to support the ability of charities to more fully participate in public policy dialogue and development. We believe that implementing these recommendations will improve the quality of public policy dialogue and development in Canada, while reducing administrative complexity and cost for both the sector and its regulator” (2017, p. 5). The complete report can be found here: https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.pdf

[8] http://www.icnl.org/research/journal/vol12iss3/art_3.htm

[9] The work of Brigitte Alepin (2004; 2011) is an invaluable source of information in this regard.

[10] RCs are required to allocate their resources exclusively to charitable purposes as defined by the *Income Tax Act*, which is enforced by the CRA. These charitable purposes have not changed since the very first federal legislation was passed to govern the donations and activities of the first charitable entities. They fall into four broad categories: (1) relief of poverty; (2) advancement of education; (3) advancement of religion; (4) certain other purposes that benefit the community in a way that the courts have said is charitable (https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/applying-registration/charitable-purposes-activities/what-charitable.html). This last category is particularly problematic, effectively serving as a catch-all: a wide range of organizations can qualify as long as they can demonstrate proof that they benefit the community. However, this is not always easy to substantiate. Moreover, the CRA's process for awarding charitable status can be highly subjective, given the lack of clear criteria for defining public benefit.

[11] These individuals benefit from all the organizations that have appealed past decisions, allowing precedents to be set over time and enlarging and enriching the understanding of a charitable cause.

[12] "The Income Tax Act provides for a formal objection process when a charity feels the Canada Revenue Agency (CRA) did not interpret the facts or apply the law correctly. If a charity disagrees with the CRA's decision concerning its objection, it has the right to appeal to a court" (https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/compliance-audits/court-decisions.html).

[13] See: https://ici.radio-canada.ca/nouvelle/1100367/refus-statut-organisme-bienfaisance-institut-recherche-autodetermination-peuples (text in French)

[14] https://www.ledevoir.com/societe/531279/statut-d-organisme-de-bienfaisance-l-irai-fait-appel-du-refus-du-fisc-federal (text in French)

[15] https://philab.uqam.ca/philab-home-blog/quebec-hub/en-route-vers-une-reforme-du-cadre-juridique-regulant-les-activites-politiques-des-obe-quatre-reactions-du-secteur-philanthropique-sur-labolition-de-la-limite-des-10/?lang=en

[16] One notable example of this approach was the Collectif des fondations québécoises contre les inégalités. As soon as it was established, the collective published a letter to the Liberal government warning it that its austerity measures were contributing to growing social inequality. This media exposure – a first in Quebec philanthropic circles – was motivated in part by concern for the impacts this government retrenchment was having on the collective's partners.
See:
https://philab.uqam.ca/wp-content/uploads/2018/01/2016-09-1520Berthiaume20-20Coalition20sur20les20inecc81galitecc81s20sociales-Rapport.pdf

[17] https://www.ledevoir.com/societe/556296/faut-il-payer-pour-la-foi (text in French)