CHARITIES AND POLITICS

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CHARITIES ARE SUBJECT TO REAL LIMITS ON POLITICAL ACTIVITY. HOWEVER, these limits do not prevent thoughtful and careful policy advocacy related to charitable purposes. Notwithstanding current political pressure on environmental charities, the CRA policy on advocacy by charities is actually quite broad.[1]

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The *Income Tax Act* distinguishes between charitable *purposes* and charitable *activities*. What qualifies as a charitable purpose is a matter of the common law. According to the common law, a political purpose does not qualify as a charitable purpose – so a charity may not have a political purpose. The case law defines a political purpose as one designed to further the interest of a political party or politician or candidate, or to change the law or public policy, or to reverse a decision of a foreign or domestic government.

Although the case law on whether a *purpose* is political is interesting, most recent consideration of charities and politics has been focused on *activities*. This is because the *Income Tax Act* permits a limited amount of political activity so long as the underlying purpose is charitable rather than political.

INCOME TAX ACT LIMITS ON POLITICAL ACTIVITY

By definition, a public or private foundation is required by the *Income Tax Act* to have purposes that are exclusively charitable. Similarly, a charitable organization is required to devote all of its resources to charitable activities. However, a foundation and an organization are each permitted (by subsections 149.1(6.2) and (6.3) respectively) to be engaged in political activities if "substantially all" of the charity's resources are devoted to charitable purposes or activities and those political activities:

(i) are ancillary and incidental to its purpose and function, and
(ii) do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.

The Courts have suggested that "substantially all" is 90%. Other than the 90%, this *Income Tax Act* system is essentially a codification of the common law on political activities by charities.

The *Income Tax Act* also provides that expenditures on political activity do not count toward the disbursement quota (although with the removal of the 80% quota, this

The Philanthropist
2014 / volume 25 • 4

limitation is no longer of much practical impact). The 2012 Federal Budget introduced a new limitation on grants. The *Income Tax Act* now confirms that a gift to a qualified donee with a purpose of supporting the political activities of the recipient is defined to be a political activity of the grantor charity, and therefore not charitable and not eligible to count as part of the grantor's disbursement quota. The 2012 Budget also suggested that there was a problem with foreign funding of political activity by Canadian charities that needed to be addressed through a disclosure obligation. However, in practice, this has turned into an obligation to identify foreign donors generally and to disclose without donor identification if foreign funds have been spent on political activities.

CRA Policy Statement CPS-022 Political Activities

In 2003, the CRA released a very helpful update of its policy guidance on political activities and advocacy. This guidance is designed to be both clear and relatively permissive. It is explicit in narrowing what the CRA views as being political, and recognizes considerable scope for non-political advocacy by registered charities.

The Policy confirms that the CRA will view an activity as political if the charity:

1. explicitly communicates a call to political action (that is, encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
2. explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or
3. explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

The Policy discusses prohibited political activities (i.e., partisan ones), permitted political activities (i.e., ones that meet the *Income Tax Act* tests set out above) and charitable advocacy.

Prohibited Political Activities are relatively easy to identify, although charities seem to go offside this limit on a regular basis by buying tickets to partisan fundraising events. The difference between permitted political activity (with limited permission) and advocacy (permitted without limits) is sometimes a fine one. The Policy makes clear that public awareness campaigns are permitted:

> When a registered charity seeks to foster public awareness about its work or an issue related to that work, it is presumed to be taking part in a charitable activity as long as the activity is connected and subordinate to the charity's purpose. In addition, the activity should be based on a position that is well reasoned, rather than information the charity knows or ought to know is false, inaccurate, or misleading. Finally, although the Canada Revenue Agency

The Philanthropist
2014 / VOLUME 25 • 4

> acknowledges that material produced in support of a public awareness campaign may have some emotional content, it would be unacceptable for a charity to undertake an activity using primarily emotive material.

Charities may also make representations to public officials, subject to limits:

> When a registered charity makes a representation, whether by invitation or not, to an elected representative or public official, the activity is considered to be charitable. Even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed, the activity is considered to fall within the general scope of charitable activities.

A charity may even release the text of such a representation to the public.

The Policy relaxes the substantially all test by providing that a charity may average its political expenditures over multiple years. The Policy also provides that a charity with under $50,000 per year of income may spend up to 20% of its income on political activity.

Current CRA approach

Notwithstanding the relatively helpful CPS-022 CRA Policy on political activities, the CRA seems to be taking a much more aggressive approach with charities in audits. As a result of the 2012 Federal Budget devoting a significant sum of money to auditing charities carrying out advocacy, the CRA is working through a large number of such audits. The press has reported that environmental charities seem to have been targeted in particular, and that a new and narrower definition of permitted advocacy seems to be applied (unlike under some previous governments where religious charities felt threatened by CRA for taking position on social issues).

The continued apparent politicization of the CRA audit process is troubling. Canadians of all political affiliations should be concerned by allegations that charities performing what was previously widely accepted as charitable advocacy are now being accused of carrying on excess political activity.

Note

1. For a more detailed discussion of charities and politics, see Chapter 13 of Drache, Hayhoe and Stevens, *Charities Taxation: Policy and Practice*. Toronto, ON: Thomson Carswell, 2013. (Originally published in 2007)