Political activities by registered charities
Submission to the Canada Revenue Agency
November 2016

As per commitments made by the federal government during the 2015 federal election campaign, in the mandate letters provided to a number of Ministers, and in the 2016 federal budget, the Canada Revenue Agency has launched consultations on the regulation of political activity carried out by registered charities. The consultation document poses a number of questions, to which we will reply directly below.

While there is value in examining existing guidance and administrative practice, with an eye to clarifying and revisiting aspects thereof, we firmly believe that potential reforms should not be limited to such clarification. Discrepancies have arisen between the common law governing charities, and the manner in which charities' activities are regulated. **We believe that any administrative changes or clarification should be seen as a short-term measure, building towards comprehensive reform of the *Income Tax Act.***

The mandate letters to the Ministers of Finance and National Revenue, which led to this consultation process, are worth quoting at length.

To the Minister of Finance:

Work with the Minister of National Revenue to allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and non-for-profit sectors. This will include clarifying the rules governing "political activity," with an understanding that charities make an important contribution to public debate and public policy. ***A new legislative framework to strengthen the sector will emerge from this process.***

To the Minister of National Revenue:

Allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors, working with the Minister of Finance. This will include clarifying the rules governing "political activity," with an understanding that charities make an important contribution to public debate and public policy. ***A new legislative framework to strengthen the sector will emerge from this process.*** *This should also include work with the Minister of Families, Children and Social Development to develop a Social Finance and Social Enterprise strategy.*

This current consultation document does not appear designed, at first glance, to meet the commitment to "a new legislative framework" that "will emerge from this process." While the Minister of Justice has been mandated to examine the broader legal and regulatory framework under which charities and nonprofits operate, that is likely to be a much lengthier and complicated process.

We recommend that in order to meet the commitment made by the Prime Minister in the mandate letters to the Ministers of National Revenue and Finance, and as a prelude to discussions of broader legal and regulatory reform, consideration should be given to amending the *Income Tax Act* to remove the distinction between "political activity" and other public policy work undertaken by charities.

Under the existing broad legal framework charities are defined by their *purposes*. But increasingly, the CRA has focussed on regulating individual activities. We believe that this creates an artificial distinction, and one that is not grounded in common law. Common law looks at the purpose of an organization, not how it fulfills that purpose, as determining whether the organization is charitable.

Administrative practice has added layer upon layer of activity regulation that is not adequately grounded in common law. This forces charities to allocate their resources and efforts in ways that may be less effective at achieving their purpose, but that satisfy the CRA's requirements. Over the years, a number of these limitations have been written into the *Income Tax Act* – effectively constricting the definition of charity for the purposes of that legislation, and opening a gulf between how charity law is administered in Canada, and the common law basis for the notion of charity. In other cases, administrative practices have evolved that see CRA examiners increasingly focussing on activities. As some observers have pointed out, an "activity" can never be inherently charitable or non-charitable; it is the context in which an activity is carried out that should be the guiding principle.

In recent public discourse, some of these restrictions – particularly those related to political activity – have been justified based on the unique tax treatment that charities enjoy. We do not believe that this is an adequate rationale for restricting charities in comparison to other types of organization. There is a troubling discrepancy between charities' ability to engage the public on policy matters and the ability of other organizations to do so. Other organizations face no limits on the resources they can devote to "political activity." This is despite the fact that:

- Other sectors also benefit from substantial tax expenditures and direct public funding;
- Charities are the only sector required, by law, to act in the public interest;
- Charities are the only sector required, by law, to use well-reasoned and truthful arguments when discussing public policy.

Limiting charities' ability to engage the public, while placing no restrictions on the activities of other organizations, is not only poor application of common law, it is bad for democratic dialogue. For sector leaders, the regulation and restriction of organizational 'voice' has become a matter of principle. Many of today's social norms - no smoking in the workplace, tougher drinking and driving laws, and many others - were spearheaded by charitable organizations. It is difficult to comprehend how restricting the ability to speak out on important issues is in the best interests of society, particularly when our organizations are constituted for and required to act in the public benefit. In our opinion, it is time for this inequity to be removed and balance restored.

We recommend that the *Income Tax Act* be amended to restore an emphasis on charitable purposes, rather than regulating how charities achieve those purposes.

We do not, here, outline the series of amendments that would need to be made, but we can provide that information. The recommendation we make here is about principle.

Amending the *Income Tax Act* in this manner would not grant charities the right to engage in partisan activity. Indeed, we strongly support the prohibition on partisan activity by charities (although, as per below, the guidance on what constitutes partisan activity requires substantial improvement).

Amending the *Income Tax Act* would also not facilitate the rise of "single issue" organizations, set up for the sole purpose of proposing or opposing a law or policy. The common law already prohibits those organizations from becoming charities; changing the *Income Tax Act* would have no effect on that common law provision.

In jurisdictions that have implemented modernized definitions of charity, charities enjoy greater flexibility to engage in what we call political activity. There are also common law precedents (in New Zealand particularly) that break down the distinction between political activity and other public policy work by charities. There is a recognition that the most effective way of fulfilling a charity's purpose may be – for a time, at least – to devote a significant proportion of effort and resources to the public policy sphere.

Changing the *Income Tax Act* to focus on purposes, rather than activities, could have spillover effects beyond charities' public policy work. For example, it would likely mean a rethinking of the regulations that have arisen to govern charities' business activities. While we want to work with the CRA to identify these effects, we believe they are to be embraced.

Amending the *Income Tax Act* would not preclude fulfilling the broader commitment the government has made, as outlined in the mandate letter to the Minister of Justice, for a new legal and regulatory framework for the charitable and nonprofit sector. Discussion of that broader legal and regulatory framework will require a significant investment in time and resources for the federal government and for the sector to truly understand where we want to go. In fact, sector leaders are clear that adopting the recommendation made here should not 'count' as fulfilling the commitment to a modernized legislative framework. It will be important that such reform include, but not be limited to, the lens of political activity. But amending the *Income Tax Act* could represent a first step towards that broader commitment – one that allows the charitable sector and the government to lay the foundation for a renewed relationship.

In the event that the federal government is not prepared to amend the *Income Tax Act* at this point, we now turn to the questions posed by the Canada Revenue Agency, and offer specific recommendations regarding the Charities Directorate's existing policies and guidance.

Section 1 – Carrying out political activities

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

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

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

Imagine Canada has just published a *Sector Monitor* focussing on public policy engagement – including political activity – by registered charities. Results of a similar survey were published in 2010, providing us with the ability to compare trends over time.

The *Sector Monitor* did not ask charities if they engage in "political activity." Due to the low understanding of the term, it was felt that another questionnaire design technique would be needed to unearth if those types of actions were taking place, even if organizations didn't identify them as such. So, the survey listed a broad range of activities that organizations might engage in while carrying out public policy work, some of which are charitable, some of which meet the definition of "political activity" put forward in CPS-022 (the Charities Directorate's published guidance on political activity). Imagine Canada found that:

- 31% of charities report carrying out activities that fall under the definition of "political activity"
- Only 3% report political activity on their T3010. This means that 90% of organizations engaging in political activity are not reporting it.
- **Political activities appear to be under-reported largely because charities do not fully understand what they are or how they are defined.**
- Charities that are most heavily engaged in public policy work are more likely to report correctly. Charities focussing their efforts on the federal government are also more likely to report correctly.
- The two most frequently-reported forms of political activity were (i) urging members of the public to contact elected officials about an issue and (ii) making a public statement in the media that a law or policy should be adopted, changed, or maintained. These are also the activities most likely to be under-reported by charities.

Given the publicity and scrutiny around "political activity" in recent years, most in the charitable sector are aware of the phrase. As is evident from the *Sector Monitor*, though, awareness of the phrase does not translate into awareness of what it means.

While the *Sector Monitor* does not delve into this issue, **there is increasing anecdotal evidence that the term "political activity" is in and of itself counterintuitive**, and that there is a great deal of confusion between CRA requirements regarding charitable vs. political activity, and the legal definition and regulation of "lobbying." Examples of this anecdotal evidence include:

- A roomful of charity professionals and board members being provided a checklist of activities, and asked if they were charitable or political. Most of them categorized direct interaction with politicians as "political activity" and interaction with the public as "charitable" – in essence, the exact opposite of the definitions provided by the Charities Directorate.
- Charity professional believing that they are legally prohibited from engaging in activity that meets the definition of "lobbying."
- Volunteer board members discouraging organizations' participation in processes such as the Commons Finance Committee's prebudget consultations, lest such "political" activity put the organization under undue scrutiny.

We recommend that the existing terms be replaced with terms that are more intuitive and better reflect people's understanding of language. Potential new nomenclature should be tested with charity professionals, volunteer board members, and the public for its resonance.

The guidance specifies that charities engage in political activity when they indicate to the public that a law or policy should be changed, introduced, or maintained (to paraphrase), or when they directly involve the public in seeking changes, etc. to laws or policies. It is not clear, though, what is meant by the "public." For example, does the CRA see a difference between a charity taking out a newspaper ad indicating to the general public that it would like to see a change in the law, and a charity sending out a newsletter update to subscribers? If a member of the public asks somebody at a charity what they think of a proposed law, does replying constitute political activity?

We recommend that the CRA provide a clearer definition of what constitutes the "public" for the purposes of defining political activity.

Below, we make further recommendations regarding the political activity guidance itself, and the need for ongoing education and communications. Implementing these recommendations would significantly improve charities' understanding of, and adherence to, existing rules.

Section 2 – The CRA's policy guidance

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.

With regard to **the definition of "political activity,"** elements of CPS-022 are relatively clear. But **there are areas where clarification is required**.

Registered charities are, by law, required to have reasonable, research-based positions on issues. (A restriction, we note, that is not faced by any other sector or form of organization, regardless of the amount of public funding that may be involved.) Charities carry out research to inform their own programs and activities, to measure the impact of their efforts, and to inform their positions on public policy.

CPS-022 provides a number of examples outlining how the use of research in the public policy sphere may be considered charitable. It cautions that, in some cases, a portion of research investment may need to be counted as political activity, but it does not provide specific information to help charities determine these circumstances. It does not seem reasonable to hold charities accountable for following a rule that the regulator is not able to adequately express or define.

We recommend that ideally, references to research should be removed from the political activity guidance. In the absence of this, clear guidance must be developed, in partnership with the charitable sector, outlining the circumstances under which research may need to be reported as political activity. We also recommend that examples be provided in the guidance.

The Charities Directorate's definitions of "partisan" activity are more problematic. CPS-022 defines a partisan activity as "one that involves direct or indirect support of, or opposition to, any political party or candidate for public office." Such activities are prohibited. The Charities Directorate has also produced a document entitled "Partisan political activities," which is found on the website alongside other political activity resources for charities. The legal status of this document is not clear.

For clarity's sake: **we are not in any way suggesting that the prohibition on partisan activity by registered charities be reconsidered**. Public opinion surveys demonstrate an extremely high level of trust on the part of Canadians in charities and charity leaders. We believe that this level of trust is at least in part attributable to the nonpartisan way in which charities behave. We do, however, have concerns with grey areas in the existing guidance.

First of all, **the phrase "candidate for public office" is not adequately defined**. The *Elections Act* specifies that one is a "candidate" upon filing nomination papers after the writ has been dropped. However, political parties often nominate candidates well before – sometimes, years before – the writ has been dropped. If the Charities Directorate uses the *Elections Act* definition of candidate, this is not problematic to charities. However, if the Charities Directorate considers someone to be a "candidate" as soon as their party nomination meeting has been held, this would conceivably prevent charities from

supporting or criticizing policy or legislative proposals made by that person. We do not believe this is the Directorate's intent.

We recommend that the Charities Directorate specify that its definition of "candidate" matches that of the *Elections Act* (or, the relevant legislation governing provincial, territorial, and municipal elections).

The phrase "indirectly" when defining partisan activity is also problematic. In a strict legal sense, Parliamentarians, Ministers, and Departments are not partisan entities, so supporting or criticizing legislative or policy proposals they make should not be problematic. In an era of hyperpartisanship though, where legislators have themselves sought to blur the lines between the permanent institutions to which they have been elected or appointed, and the parties which they represent, almost any statement that a charity makes on a public policy issue could generate a complaint of "indirect" partisanship.

We recommend that references to "indirect" partisanship make it explicit that charities are not being partisan when they support or oppose legislative or policy proposals on their merits (regardless of whether the positions they take happen to be associated with particular political parties), as long as in doing so the charity does not make positive or negative statements about a political party.

The "Partisan political activities" document states that by **"allowing a candidate or political party to use a charity's equipment, facilities, volunteer time, or other resources,"** a charity has engaged in partisan activity. Does this mean that, if a political party or a candidate asks a charity for information, the charity is not allowed to respond? Does this mean that a political party or candidate wanting to make a major policy announcement about, for example, postsecondary education, is not allowed to use a university as a backdrop? Does this mean that charities are not allowed to provide policy advice to inform political party platforms (as long as the same advice is provided to each party that requests it)? All of these examples involve the use of a charity's resources, and a strict reading would see them all prohibited.

We recommend that the Charities Directorate work with the charitable sector to more clearly define the prohibition on the use of charities' resources by candidates and political parties.

In discussing policies, particularly during an election campaign, the Charities Directorate states that **charities must not explicitly connect their views to any candidate or political party**. In general, this prohibition is not problematic. However, we have seen examples of political parties adopting policies that have long been recommended by particular charities, and providing credit to those charities for those ideas. In such circumstances, questions arise about whether, if asked, the charity is allowed to be pleased about or take credit for such a development. There is a qualitative difference between "We think you should vote for Party X because they've adopted this policy" and "Yes, we are pleased that Party X has adopted this policy." Existing advice and guidance from the Charities Directorate does not recognize this qualitative difference.

Because of the public trust they enjoy, charities may also be called upon to provide comment or analysis about policy proposals made by political parties. If the policy in question is within the charity's remit, and there is no explicit support for or criticism of a party or party platform more generally, charities should be free to respond to queries from, for example, the media or the general public.

We recommend that the Charities Directorate clarify its language so that (i) charities can indeed comment on their own policies at all times, and (ii) charities can, when asked, provide dispassionate and factual reactions to specific policy proposals made by political parties or candidates.

In a general Q&A document, the Charities Directorate states that "**linking to the website of a particular political party or candidate is typically considered a partisan political activity**." It is not clear whether the Charities Directorate means linking to one party or candidate to the exclusion of others, or whether it means linking to parties and candidates in general. It is also not clear whether the Charities Directorate is referring to party's home pages, or to pages focussing on issues within a charity's sphere of operation. If a charity is trying to provide unfiltered information about where various political parties or candidates stand on issues of relevance to its purposes, it would seem that the most effective way to do so is to link directly to candidate or party platforms, without editorializing in any way. Under existing guidance, it is seemingly permissible to copy and paste relevant sections of a platform into a new document, but not to link to the platform directly. This does not seem to be a logical approach.

We recommend that the prohibition on linking to candidate or political party websites be clarified, allowing charities to link to information, relevant to their charitable purpose, published by parties or candidates.

"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."

While the issue of regulatory reform is on the table, we need to also consider **education, outreach and communications by the Charities Directorate**. There is a great deal of content already available on the Charities Directorate website. To the average person seeking information – indeed, to professional practitioners within charities – the presentation of this content is problematic.

- The landing page listing resources for charities about political activities includes a number of links, but does not provide context as to what status each document has. For example, does the document entitled "Partisan activities" have legal standing? How do the various documents relate to CPS-022? In the case of discrepancies or inconsistencies between documents, which takes precedence?
- A great number of the resources available are very text-heavy. This may give the impression that the issue is more complicated than it actually is, and could create a barrier to people actually processing the information available.
- Information is not always presented in an enabling manner (that charities' involvement in public policy activities is not only permitted, but encouraged and valued).
- Different audiences will have different needs. A member of the general public interested in the issue is not likely to be well served by the existing resources. Similarly, within charities themselves, audiences are not homogenous; the information required by a CEO or a public policy practitioner is not the same as that required by a volunteer board member.

We recommend that:

- **The Charities Directorate's overarching message and tone should emphasize what charities are allowed to do, as opposed to maintaining a focus on what they are not allowed to do. Relying on an emphasis on restrictions can have the effect of discouraging charities from engaging in public policy.**
- **The communications effort should impress upon both our sector and the public that charities have and do play an integral role in the development and evolution of public policy. Targeted messaging towards the public would stress that there is value and legitimacy to charities' involvement in this process.**
- **Any communications and education effort must ensure clarity of the boundaries between the activities and roles that are allowed and not allowed. This effort must also ensure clarity regarding the interpretation of the administrative responsibilities of charities, as well as the regulatory compliance process.**
- **Part of the role of the Charities Directorate is to educate, though we acknowledge that it will speak with a regulator's voice. Sector organizations have an important role to play in both clarifying and amplifying the communication and education of the new framework. Sector umbrella organizations at the national and provincial levels can advise on how audiences might be segmented for effective message delivery.**
- **Beyond messaging, the Charities Directorate should work with charities and foundations to audit existing educational materials and develop new ones where necessary. All of the vehicles outlined in the consultation question (reproduced above) would likely form part of an effective suite of educational materials; none of them would be, in isolation from others, sufficiently effective.**
- **While on-line resources are valuable, the Charities Directorate should seek to engage with charities on the ground. For example, the Directorate should work with regional and subsector umbrella organizations to deliver workshops on charities' engagement in public policy activities. All education materials must take into account the varying capacities of charities – particularly the more than half of organizations that do not have paid staff. Materials must be clear and accessible and as jargon-free as possible. Outside partners also have a role to play in delivering educational materials. For example, financial professionals and accountants may be responsible for completing T3010 returns; in the absence of specific education about political activity reporting, they may fail to report activities that did not involve specific costs.**
- **In order to measure the success of its education efforts, the Charities Directorate should conduct periodic surveys of its target audience, along the lines of the Sector Monitor reports on charities' public policy activity produced by Imagine Canada in 2010 and 2016.**

Section 3 – Future policy development

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

The **ongoing political activity audit process** may itself identify areas for reform. Most organizations participating in this consultation process are not privy to any of those audits. While many of us have access to some anecdotal evidence, we are not able to confidently identify and share learnings arising from the audit process.

We recommend that the Charities Directorate, without violating *Income Tax Act* confidentiality requirements, work with audited organizations to prepare and share a summary of major findings and lessons learned from the political activity audit process.

The current political activity **audit process** has led us to a number of observations. We stress that these observations are based on anecdotal evidence, but nonetheless the frequency with which we hear them, and the credibility of the sources, lead us to believe that these are **real problems**:

- Auditors have not always been forthcoming about the purpose of the audit (i.e., whether or not it was a political activities audit).
- The audit process takes a long time. Some of the political activity audits, and the appeals that have arisen therefrom, date back to 2012. The CRA should not have artificial deadlines imposed on it, but at some point organizations require certainty.
- While the CRA emphasizes an education and compliance first approach, it needs the flexibility to move immediately to "harsher" measures (such as revocation) in serious cases. It is not clear, though, what kind of standards are in place to determine the CRA's first course of action. There is a great deal of information on the CRA's website about the meaning of an education letter, a compliance agreement, etc., but little to indicate the kind of circumstance that merits one over the other.

We recommend that:

- **The reason for an audit be immediately conveyed to the organization being audited.**
- **That CRA work to develop and make public examples of the kind of finding that merits education letters, compliance agreements, sanctions, or notices of revocation.**
- **That the CRA review the audits and appeals that have taken place to identify ways in which the process could be streamlined without compromising its integrity. This may involve increased investment in the CRA's auditing and appeal functions.**