Court Declares 10 Per Cent Limit On Political Activities By Charities Unconstitutional

23 août 2018

In a recent decision, the Ontario Superior Court ruled that the current rules on political activities infringe on the constitutional right to free expression.

The lack of clarity with the rules surrounding political activities of registered charities, and their application, has been an ongoing concern in the charitable sector. In this bulletin, we review the current rules on political activities of charities under the Income Tax Act (Canada) (the Tax Act) and the administrative position of the Canada Revenue Agency (the CRA), the controversial political activities audits of the CRA, and the most recent decision of the Ontario Superior Court in Canada Without Poverty v. Attorney General of Canada released on July 16, 2018 which found that the current rules on political activities infringe on the constitutional right to free expression. As such, the Court declared that the CRA's interpretation that mandated that only 10 per cent of a charity's resources be for political activities is unconstitutional and ordered the CRA to cease applying this interpretation.

Current Legislative and Administrative Framework

The current legislative framework under the Tax Act relating to political activities of registered charities provides that charitable foundations and charitable organizations must devote "substantially all" of their resources to their charitable purposes or activities respectively and may devote part of their resources to "political activities" if these are "ancillary and incidental" to their charitable purposes or activities and if they do not include partisan activities (i.e., "direct or indirect support of, or opposition to, any political party or candidate for public office").

The CRA current administrative policy on political activities of registered charities is set out in the CRA's guidance CPS-022 Political Activities, published in 2003. It is the CRA's position that references to "substantially all" in the Tax Act equate to 90 per cent, allowing a maximum of 10 per cent of resources to be spent on political activities. Charities are required to monitor and provide a quantitative reporting of their political activities to demonstrate compliance with the CRA policy, which has proven to be very difficult and costly for charities.

Furthermore, there is no clear definition of "political activities" in the Tax Act. The Tax Act only provides that a "political activity" includes the making of a gift to a qualified donee (which includes other registered charities) if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee. The CRA presumes an activity to be political if a charity:

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);
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; and
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.

In essence, the CRA divides "political activities" into two general types: (1) submissions directly to government; and (2) public advocacy. However, the use of the term "political activities" has been problematic as it is often interpreted by the sector to mean partisan activities, which are clearly prohibited. This problem of terminology lies at the root of much of the confusion and uncertainty that exists through the charitable sector.

CRA Political Activities Audits

In the 2012 Federal Budget, the Conservative Federal Government acknowledged the valuable contribution of charities to public policy development in Canada, but went on to state that concern had been raised about whether charities were following the rules regarding political activities. The CRA was given additional resources to audit charities engaging in political activities, to increase reporting requirements on the annual T3010 information return and to provide additional educational tools. As a result, the CRA embarked on a series of 60 audits as part of a Political Activities Audit Program. These audits received a great deal of public attention, with concerns raised of bias and political interference.

But the dynamic changed in 2015 when the Conservative Federal Government was replaced by a majority Liberal Government. In November 2015, the Prime Minister issued a Mandate Letter to the Minister of National Revenue, asking her to work with the Minister of Finance to modernize the legislation governing the charitable sector, including a clarification of the rules governing political activities to allow charities to work "free from political harassment".

In January 2016, the Minister of National Revenue announced that the Political Activities Audit Program would be wound down (i.e., no further audits would be undertaken although the remaining audits would be completed) and the CRA would engage with stakeholders on the topic of charities' political activities. The announcement also recognized the critical role charities play in our society and their valuable contribution to public policy debate on behalf of all Canadians. The 2016 Federal Budget, tabled on March 22, 2016, included an announcement that, in the short term, the CRA would collaborate with the Department of Finance to engage with charities to clarify the rules governing political activities.

In September 2016, the Minister of National Revenue announced online and in-person consultations with charities to clarify the rules of their participation in political activities, which took place between September and December 2016. The Minister also appointed a Consultation Panel on the Political Activities of Charities, comprised of five individuals with broad experience in the charitable sector and expertise on the regulatory issues facing charities, to consider feedback from the consultations and make recommendations to the Minister of National Revenue on how the CRA can clarify the guidance, information and resources it provides to charities on the rules governing political activities.

The Consultation Panel released its report on March 31, 2017, which offered four significant recommendations, with the first two relating to interim administrative changes and the second two focused on the longer-term legislative changes required:

Revise the CRA's administrative position and policy (including its policy guidance, CPS-022 Political Activities) to enable charities to fully engage in public policy dialogue and development.
Implement changes to the CRA's administration of the Tax Act in the following areas: compliance and appeals, audits, and communication and collaboration to enhance clarity and consistency.
Amend the Tax Act by deleting any reference to non-partisan "political activities" to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.
Modernize the legislative framework governing the charitable sector under the Tax Act to ensure a focus on charitable purposes rather than activities, and adopt an inclusive list of acceptable charitable purposes to reflect current social and environmental issues and approaches.
As an immediate first step to responding to the Panel's recommendations, on May 4, 2017, the Minister of National Revenue asked the CRA to suspend all action in relation to the remaining audits and objections that were part of the Political Activities Audit Program until the government officially responds to the Consultation Panel's report. The Minister of National Revenue also shared the report with the Minister of Finance as the report contains suggestions for changes to the Tax Act. The government indicated that it is carefully reviewing the Consultation Panel's report to help inform its regulation of charities going forward.

Recent Court Challenge

The applicant in Canada Without Poverty v. Attorney General of Canada is a registered charity under the Tax Act with the stated charitable purpose of relieving poverty in Canada. In relying on the global framework for relief of poverty pronounced in Copenhagen in 1995 and other studies, the applicant placed its resources and efforts behind civic engagement and public dialogue with the ambition of bringing about legislative and policy change for the effective relief of poverty. That is, the applicant engaged in public advocacy for policy and attitudinal change as its primary means of achieving an end to poverty.

Following a Political Activities Audit of the applicant, the CRA concluded that virtually all of the applicant's activities involved political activities (i.e., political engagement in the

nature of communications to the public advocating policy changes) and the applicant was offside the 10 per cent threshold. The Political Activities Audit findings indicated that the CRA's interpretation and enforcement of the Tax Act restricts virtually all aspects of the applicant's communications to the public regarding law reform or policy change. It also greatly limits the extent to which the applicant can encourage the public to participate in various governmental forums and democratic processes to promote awareness of the challenges of living with poverty and to support measures for the relief of poverty.

The applicant challenged the CRA's 10 per cent rule of interpretation and enforcement for the "substantially all" requirement in the Tax Act, as applied to public policy advocacy by registered charities and argued that it infringes freedom of expression under Section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter). It likewise argued that there is no valid distinction between political expression (with the exception of partisan political involvement) and charitable activities, and so the current rules in the Tax Act violate the Charter's guarantee of freedom of expression as well. In a nutshell, the applicant argued that public advocacy for policy change is fundamental to its charitable purpose of poverty relief and without this component its charitable activities cannot accomplish their purpose.

Justice Morgan for the Ontario Superior Court agreed that the CRA's interpretation of "substantially all" in the Tax Act infringed on freedom of expression. In particular, the Court agreed with the applicant's argument that the interpretation constituted censorship. The Attorney General attempted to argue that the applicant was seeking a "positive right" to speech. The Court rejected this argument and held that there is no way to pursue the applicant's charitable purpose while restricting its politically expressive activity to 10 per cent of its resources.

The Court then went on to find that the restriction on freedom of expression could not be justified in a free and democratic society. In order to justify a restriction, the Attorney General has the burden to demonstrate that the government has a pressing and substantial objective and that the means chosen to achieve that objective infringe the right no more than is necessary. The Court found that the government could not pass the first part of the justification stage – that is, the government has a pressing and substantial objective.

The Court concluded that there is no contradiction and no justification for an interpretation of the Tax Act that draws a distinction between charitable activities and non-partisan "political activities" in the nature of public policy advocacy. This applies whether the charity's communications are made directly to government, to the public at large, or internally within its own organization. As long as the advocacy is done in pursuit of the overall charitable purpose – for the applicant, the relief of poverty – such "political activities" are charitable activities. Accordingly, an organization such as the applicant can spend "substantially all" of its resources on non-partisan public policy advocacy or communications aimed at changing hearts and minds with respect to poverty and its causes and remedies and still be spending "substantially all" of its time on charitable activities as required by the Tax Act.

The Court ordered that its declarations that the interpretation is unconstitutional be of immediate force and effect. This is an unusual step for a court to take as often the Court will suspend any declaration of unconstitutionality for a period of time in order for the government to amend the legislation.

Government Statement in Response to the Decision

On August 15, 2018, the Minister of National Revenue and the Minister of Finance issued a statement that the Government of Canada recognizes the important role that charities play in Canadian society and the value they bring to public debate and the formulation of public policy.

The government indicated that it would appeal the decision of Justice Morgan having "identified significant errors of law." Despite the pending appeal, the statement provides that the government will remove the quantitative limits on political activities in the legislation. The government intends to introduce new legislation this fall. The intended amendments will allow charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policies. However, charities will still be required to have an exclusively charitable purpose and the restrictions against partisan political activities will remain. The legislation will be drafted with retroactive effect, including audits and objections that are currently suspended.

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