Submission to the Consultation on Political Activities

Canada Revenue Agency

Submitted by

The Muttart Foundation

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INTRODUCTION

The Muttart Foundation has been involved in issues related to the regulation of charities for some two decades. In some cases, it works with the Charities Directorate of the Canada Revenue Agency (CRA) to create a forum for discussion of regulatory issues. In other cases, it convenes sector organizations to discuss issues related to regulations. It has also helped support litigation that deals with issues of charity law, both directly and through grants to the Pemsel Case Foundation.

In the interest of full disclosure, people associated with the Foundation, who also served on the Joint Regulatory Table of the Voluntary Sector Initiative, were involved in development of the current guidance on political activities, CPS-022.

Given this background, the Foundation welcomes the opportunity to participate in the consultation on the law and policies related to political activities carried on by registered charities.

The Foundation believes that changes are needed. Some might be accomplished administratively, but others will require legislative change. Whatever routes are chosen, it is imperative that they be made with the active involvement of the sector. As was the case with the current policy, it will not be enough for the sector to be asked to respond to something that has been drafted entirely within government. Drafting needs to be done with sector representatives at the table, both to ensure that the policy reflects the reality faced by charities and to ensure that those in government of how language will be received and perceived by charities.

CONTEXT

Our submission is made within several contexts that have sometimes been ignored in the four years since "political activities" became a huge issue within the charitable sector:

- From 2003, when CPS-022 was released, until January 2012 when ill-conceived (and sometimes demonstrably false) statements began to be made within government, there was almost no issue regarding political activities by registered charities. This suggests that the guidance (while obviously not perfect) was not the problem that led to the current state of affairs.

- There seems to be clear agreement that charities have an important part to play in the development of public policy. History has made that clear, it is reiterated in the preamble to CPS-022 and it has been clearly enunciated by the current government, both before and since the last federal election.

- The world has changed since CPS-022 was first published. Government funding of charities has changed, the terms of engagement between government and the sector have changed, and both government and the sector are seeking more systemic responses to challenging issues.

- Canada lags behind other common-law countries in examining the whole question of whether charities should be able to have political purposes that are supportive of a primary charitable purpose. We are "odd man out" amongst countries that have similar systems of charity regulation.

- The Income Tax Act (ITA) does not define "political activities" other than a deeming provision that states that funding political activities is, itself, a political activity. This means that an interpretation of the phrase is left to CRA and the courts, with the latter sometimes extending the phrase to include activities that the mythical "reasonable person" would be unlikely to consider as "political."

- As the Supreme Court of Canada pointed out in the Vancouver Society case, there has been a tendency, in the courts as well as within CRA, to conflate the concepts of purposes and activities. The Supreme Court clearly stated that they are different things, and went on to say that the nature of an activity is determined by reference to the purpose it seeks to further. Notwithstanding what seems to be a clear statement of the law, the conflation continues and, if anything, has become even more pronounced, particularly in the registration process of CRA.

These contextual pieces must underpin any changes to law or policy. Bearing them in mind, we now turn to the questions posed.

AWARENESS & UNDERSTANDING

One can safely assume that the awareness of the issue of "political activities" as a concept in charity law and operation has increased since 2012. It has been the topic of more articles, seminars, symposia and commentary than probably any other aspect of charity law.

But research such as the Imagine Canada Sector Monitor study and anecdotal evidence would suggest that there is not a commensurate level of understanding. Some of this is the result of things outside CRA's control – most notably, uninformed and/or inaccurate comments (both from the sector and from elected officials and other commentators) that are taken as "gospel" by some.

Some of the disconnect is, we suggest, due to a combination of other factors, among them:

- CPS-022 is counter-intuitive and potentially an inaccurate description of the law;
- disconnect between the concept of political activities and lobbying;
- examples that do not reflect real-life situations faced by charities; and
- definitions of what constitutes partisan political activities that lack judicial authority.

We address each of these points in turn.

CPS-022 is counter-intuitive and perhaps wrong in law

In a well-intentioned desire to provide assurance to charities, the differences between charitable activities and political activities may have been lost. Even worse, anecdotal evidence suggests that many people interpret "charitable activities" described in CPS-022 as "permitted political activities" when, in fact, they should be considered only as charitable activities.

In addressing things that charities cannot do, or can do only within prescribed limits, a significant portion of the policy talks about things that charities can do without any limits because they are not political activities at all.

These differentiations are subtle and the policy is written for an audience that understands the differences. Our experience suggests that is the minority of charities.

Moreover, it is not at all clear that the policy reflects accurate statements of the law. As noted previously, the Vancouver Society case clearly held that the nature of an activity is determined by the purpose it is meant to further; if something is intended to further a charitable purpose, it is, according to the Supreme Court of Canada, a charitable activity. The view contained in the guidance is intended to be simple, but it may be simply wrong as a matter of law. The guidance treats activities as if they were purposes, doing exactly what the Supreme Court suggested must not be done. We will return to this theme below in talking about how the phrase "political activities" is defined.

Similarly, the interpretation of "substantially all" as contained in the ITA provisions related to political activities is a "rule of thumb" that is sometimes espoused as having the force of law. There are no Canadian court cases in the charity-law field that equate "substantially all" to mean 90%. While CPS-022 allows for larger percentages for small charities and allow for the possibility of an "accumulation," the fundamental measurement underpinning the statements may not be good law. And as people in the sector hear the differing views of what the phrase means, they are confused.

Even more confusing is the question of how a charity is to measure the degree to which it is engaged in political activities, whatever that phrase may mean. The guidance suggests that charities have to track all of the resources that are put to use in political activities, but provides no measurement of how to do that. We accept that CRA may be trying to recognize the vast differences between charities and wishes to accommodate those differences, but the failure of any guidance on this matter – other than the need to be consistent – is problematic for charities of all sizes.

The lack of certainty – and the virtual inability of even well-experienced legal advisors to provide advice that could provide certainty – is clearly a hindrance to charities. In exercising their fiduciary responsibilities, the directors and senior staff of charities must assess risk of any course of action. The inability to measure that risk because of the vagueness of the policy statement and the uninformed views of some commentators makes it difficult for charities to make informed decisions on how best to fulfil their charitable purposes.

Disconnect between "political activities" and lobbying

Adding to the confusion faced by charities is the differing treatment of the same activity for the purposes of charity law and compliance with the rules related to lobbying at the federal or provincial level.

Other than a footnote reference, CPS-022 has little to say about lobbying. For federal purposes, some items identified as charitable activities would clearly constitute lobbying. Other actions prohibited or limited by CPS-022 do not engage the Lobbying Act at all. Trying to make sense of this issue is challenging even to experienced people in the sector without even considering the significantly varying provisions of lobbyist legislation in the provinces.

Examples that don't relate

We acknowledge that CRA truly intends to be helpful in providing examples of conduct that may or may not trigger the political activities provisions of the Income Tax Act. Yet, those examples are not helpful if they don't reflect real-life scenarios.

We have heard a number of cases where the examples have added to confusion, rather than clarity. For the sake of brevity, we give only two, one involving something that could be interpreted as partisan, and one that reflects a situation that has confused more than one charity.

- Charities invite candidates of all political parties in a particular riding or city to attend an open house, but one political party takes the position that it will not attend. It is not clear what the charity's position is in this case.

- The examples given regarding the publication of a report and whether or when it has to be considered a political activity are, at best, difficult to decipher. There is confusion over the fact that charities alone are required to ensure that its positions are "based on factual information that is methodically, objectively, fully and fairly analyzed (and contains a) well-reasoned position (that) present(s)/addresses serious arguments and relevant facts to the contrary." But even if a charity meets that test, and the result of the report leads to inevitable conclusions and recommendations, CPS-022 raises the question of whether, in talking about the report to anyone other than an elected or public official, all of the costs of the research must now be treated as expenditures on political activities.

Definitions of partisan political activity

As a supplement to CPS-022, CRA has made available on its website information about how it interprets the prohibition on charities becoming engaged in partisan political activities.

We begin this commentary with the observation that we have never encountered a single call from within the charitable sector that would allow a charity to actively support or oppose a candidate or political party.

But CRA has gone on to develop an expansive view of what constitutes indirect support or opposition. By way of example:

- The CRA document "Partisan political activities" states that it is a partisan political activity to provide direct or indirect support or opposition to any party or candidate, whether during an election period or not. In an earlier iteration of this document, "candidate" was interpreted to mean anyone who indicated he or she might seek a nomination or be a candidate in an election. That phraseology has been removed, but now there is no indication of when CRA considers someone to be a candidate. Election

legislation usually defines those terms, but there is no indication of whether CRA accepts those definitions.

- Much of the material on partisan political activities conflates "political party" with "government." Under the rules that now appear, it would (or might) be a partisan political activity for a charity to say that a government's stated position would be harmful to its beneficiaries, even if that statement was supported by the aforementioned well-reasoned argument. The charity could make that statement in a hearing before a committee, or directly to an elected official or a public official, but could not say that to its members.

- The document on partisan political activities says that it is a partisan activity for a charity to allow a candidate or political party to use a charity's equipment, facilities, volunteer time or other resources. Taken literally, this phrase could mean that a Cabinet minister or opposition critic could not make a statement on a university campus or a hospital, or could not hold up a brochure that was developed by a charity and had no political content in it at all.

- CRA believes it to be a partisan activity for a charity to say how a particular elected official voted on a particular issue, saying that it is only non-partisan if the votes of all elected officials who voted on the matter are revealed.

- In the document "Questions and answers about political activities", question 5 states, in part that "any evaluation of the minister or his or her performance may indicate indirect support for, or opposition to, the minister's political party and could be a partisan political activity." Taken literally, that provision would make it impossible for a professor of political science employed by a university to state evaluative conclusions even if based on legitimate research.

In none of these cases does CRA cite judicial authority for its position. The reason for that is plain: so far as we are aware, there is no judicial authority for these positions. One of the realities of Canadian law is that there is pitifully little judicial consideration of matters related to charities. Surely, it is not a healthy situation in a democracy for issues to be decided because the regulator says that something is so and to have little opportunity to challenge that position in any meaningful way.

IMPROVING THE GUIDANCE

In the Foundation's view, there are two ways in which CRA's guidance can be significantly improved.

The first is to clarify that certain things are not political activities and are not governed by the policy. This needs to be done at the outset of the policy, not hidden several pages into the document. This emphasis on what charities can do without limitation would be consistent with the preamble to the policy that sets out the view that the involvement of charities in public policy discussions is important to the whole country.

The second change is to bring the guidance in line with the Supreme Court of Canada's decision in the Vancouver Society case. As written, the guidance conflates activities with purposes – exactly what the Supreme Court warned against. The guidance relies on the McGovern rules as to prohibited purposes, and automatically assumes that a charity that is engaged in those activities has a political purpose. Again, that is contrary to what the court has said.

It would be better, in our view, if the guidance said that certain purposes were prohibited (assuming, for now, that McGovern remains good law, notwithstanding the views of courts in other common-law jurisdictions) and that if a charity's level of engagement in activities of that nature rose to the level of a purpose, it would be problematic. A necessary by-product of that would be a list of indicia to be used by CRA auditors and others to determine when an activity had risen to the level of a collateral purpose.

This change of mindset – clearly separating purposes from activities – also needs to work its way into the process for handling registrations of organizations as charities. Anecdotal evidence suggests that CRA is spending far more time than is warranted on examining the proposed activities of an organization. That is not the test that the Supreme Court has laid out, and it is well beyond time for CRA to recognize that it is bound by the Vancouver Society decision.

The issue of "substantially all", as described earlier, also needs to be addressed in a rewrite of the guidance, so that charities do not assume that there is some "magic" to the "10% rule." That is not, as we understand it, the current state of the law, and it is no longer appropriate for CRA to pretend that it is.

As stated in the introduction, we believe it is critical that the drafting of revised guidance (and/or the development of new legislation) should include people from the charitable sector as equal partners at the table. We learned from the Voluntary Sector Initiative that good things can happen when the right people from government and the sector work together on a project. Equally, the appointment by the Minister of National Revenue of a committee of sector people to advise her on this matter reflects the importance of engaging the sector at the earliest stages. Being asked to respond to a document in next-to-final form is not going to be seen as satisfactory. And better results will emerge if government and sector people are working together and understanding one another's realities before words are committed to paper.

EDUCATING CHARITIES

For at least the last 15 years, CRA has recognized its obligation to provide charities with sufficient information to allow them to comply with the law. It has also, in a number of instances, recognized that provision of this information can sometimes best be done by sector capacity-building organizations.

In the last few years, CRA has cancelled the "road shows" that had been operated for a number of years, whereby employees from the Charities Directorate held face-to-face meetings with charities across the country. These sessions have been replaced by pre-recorded webinars, but they are a poor substitute. We recognize that the road shows were an expensive undertaking, but, in reality, they were significantly less expensive than special audit projects. They gave charities the chance to meet someone from the Directorate (a benefit in itself) and to pose questions that related directly to that charity's operations. This is not something that can be achieved through a webinar or static material posted on a website.

The Foundation also encourages CRA to consider reintroduction of a program similar to the Charities Partnership Outreach Project (CPOP). Under that program, Charities Directorate was able to make grants to charities to educate other charities. Some of the work done under that program was incredibly useful and, in the Foundation's view, justified the costs involved. Sadly, the reality of sector financing meant that when CRA's financial contributions to those projects came to an end, there was no ability within the charity to continue the initiative. We would encourage the Charities Directorate to examine whether there are ways to ensure sustainability of a similar program aimed particularly at the issue of political activities.

FURTHER CHANGES OR ACTIONS

The Foundation is aware that others making submissions have called for revisions to the Income Tax Act to eliminate references to activities by charities, and to concentrate on purposes. At first blush, the Foundation finds that an attractive concept, but would wish to see a further analysis of the implications of such a change. We believe that assuming there are no unanticipated consequences, the change would be a good one and would bring the Act into conformity with the law as set out by the Supreme Court in the Vancouver Society case.

As described in some of those other submissions, this change also needs to make its way through to the registration process.

We would also encourage CRA and the Department of Finance to consider the implications of amending the Act by including a provision similar to section 5 of the New Zealand Charities Act. That section provides that a charity may have a non-charitable purpose (such as promoting a change in the law) so long as it is ancillary to a charitable purpose of the charity.

This statutory change would resolve many of the issues now being faced and would have the added advantage of overcoming prior court decisions in Canada that might otherwise restrict CRA's ability to deal with the issue administratively.

CONCLUSION

The "status quo" is not an option. It is not a question of *whether* changes need to be made; rather, the question is *what* changes should be made and what process should be used.

Neither is "tweaking" – minor edits to the existing guidance – going to be enough. We have an opportunity here to produce something that reflects 21st-century Canada and the important role that charities play in it. There is an opportunity to produce legislation and guidance that will be seen as empowering while respecting that boundaries must exist.

The Muttart Foundation believes that the right group of government officials and the right group of people from the sector can help resolve a situation that has generated far too much rhetoric, and which will allow the charitable sector to continue to play the important role that it must play in the development of public policy to benefit those served by charities in every corner of the country.

The Foundation would welcome the opportunity to answer any questions or clarify any matters that result from this submission.