



## Finance Changes to Political Activities and Canadian Charities

By Mark Blumberg (October 31, 2018)

If you have not been paying attention over the last month to the charities and political activities file you are a lucky person. If you have been paying closing attention you might have whiplash. On September 14, 2018, Finance announced a return to the common law, allowing charities to do ancillary and incidental political activities. This probably would have narrowed the scope of political activities from the previous 10% allowance. On October 25, 2018 Finance seems to be indicating that Canadian charities can conduct unlimited political activities connected to their objects as long as these activities are non-partisan. These sorts of head spinning changes are disconcerting.

Those who want every activist organization to be a registered charity are rejoicing – but they should be careful because in 2 weeks, 2 months or 2 years the whole thing may unravel. It could be CRA guidance, it could be CRA enforcement, it could be a new government that does not want registered charities spending 90-100 percent of their money on non-partisan “contentious” political issues. It could be the public just giving up on charities because of a few hundred high-profile single agenda groups.

I find this last possibility particularly disconcerting. The potential loss of public confidence in the entire charity sector because of these newly-empowered minority activist groups could have far-reaching negative effects on the vast majority of charities, most of which spend almost no money on political activities. Certainly, these rule changes are not going to give more freedom to 99+% of charities who were not spending any money or not even 1% of their 10% on political activities. But they will allow for a few dozen or hundreds of single agenda political advocacy groups to potentially flourish. As governments tighten controls on political spending by donors to political parties and candidates – the charity sector may become a new frontier for tax subsidized political speech representing the views of a small number of Canadians.

I will provide a little bit of background of how things have unfolded since July 2018 but [here](#) is a much more detailed discussion:

On July 16, 2018 there was the Ontario Superior Court decision in *Canada Without Poverty vs. Attorney General of Canada*, which overturned the restriction on Canadian charities only spending 10% of their resources on non-partisan political activities.

We put in a [submission to the Finance Committee](#) which mainly focused on increasing transparency but stated on the political activity front:

As we have discussed in our article [Canada Without Poverty vs. Attorney General of Canada – a pyrrhic victory for CWP and a disaster for the charity sector](#) the Government of Canada should respond to this problematic Ontario Superior Court decision and limit the ability of registered charities to be political organizations that accept dark money and provide unlimited tax incentives for political activities.

CRA and Finance [announced](#) on August 15, 2018 that would be appealing the CWP decision.

It is worth noting coverage of the issue by Althia Raj [Super PACs In Canada? Liberals Wrestle With Politically-Active Charities After Court Ruling](#).

On Friday, September 14, 2018 at 5:01PM the Department of Finance [released](#) the "Legislative Proposals Notice of Ways and Means Motions" and also the "Explanatory Notes" on their website. Essentially Finance removed all references to a charity being able to spend 10% on political activities. Without such restrictions the normal common law applied of a Canadian charity can carry out non-partisan political activities as long as they were "ancillary and incidental" to their purposes. This brought the charity sector back into the common law and there are some cases could preclude charities from doing much political activity. Finance also put out a very [short consultation period](#).

On October 2, 2018 the CRA released guidance based on the Finance September 14<sup>th</sup> proposals entitled "[Charities and public policy advocacy](#)". We discussed this guidance [here](#) in detail and how narrow such political activities would be and here is our [Submission on Finance's Draft Legislative Proposals Regarding Political Activities of Charities](#).

We noted in our submission:

We were quite surprised with the Proposed Amendments as they may in fact reduce, rather than increase, the ability of registered charities to conduct political activities. By reverting to the common law of "ancillary and incidental" political activities the regulation of charities in Canada has gone back thirty years and this will certainly create tremendous uncertainty as to how much political activities a Canadian registered charity can conduct which may take many years of conflicting court cases to clarify. We understand that the Proposed Amendments at least forestall unlimited partisan political activities by removing the impugned provisions of the Income Tax Act. We would argue that if CRA is successful in its appeal on CWP and the ITA political activity provisions are constitutional then it would be preferable that the 10% rules are reinstated in the ITA to at a minimum retain the legislative "safe harbour" for charities to spend 10% on political activities.

On October 25, 2018 the Department of Finance posted Legislative Proposals Notice of Ways and Means Motions and Explanatory Notes which among other things change the rules for Canadian charities carrying out political activities. Essentially the Income Tax Act is amended to deem that "charitable activities includes public policy dialogue and development activities carried on in furtherance of a charitable purpose;" and that "public policy dialogue and development activities carried on by an organization, corporation or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose."

On October 26, 2018 the CRA withdrew their newly posted guidance of October 2, 2018. It is anticipated that CRA will provide some additional information by the end of December on these changes.

This may be a pyrrhic victory for CWP and other groups caught in the political activities audit program. All these groups may still be revoked because the main reasons, according to CRA, are the violation of other requirements under the Act, but the CRA letters to the charities proposed to be revoked have not been released so we don't know the details. Having a court set aside 1 of say 10 reasons for revocation does not mean that you get to keep your registered charity status. For years, we have been complaining about the fact that the public, (including MPs and Senators), are completely in the dark about the CRA allegations. It might be another 2-3 years before any of the public gets to read those letters. Is this how we run a democracy? It is not the CRA who is withholding information – it is the ITA that prohibits CRA from releasing vital information on charities, in a way that some other charity regulators are not constrained. It will take a change by Finance to the ITA to allow greater transparency.

The Finance changes still do not allow for direct or indirect partisan activities. Some groups that are spending 100% of their funds on "non-partisan" political activities will likely stray into at least some direct or indirect partisan activities and they can therefore be revoked even under this decision. If you are going to do lots of political activities it is a far better strategy to have a non-profit working alongside a registered charity as noted in previous articles and as many charities have done over the last few decades. The non-profit cannot issue official donation receipts and other than lobbyist registration and third-party election advertising there are no other restrictions on their political activities – either in terms of resources or whether it is partisan.

Finance still restricts any political activities to be related to the objects of the charity. As we have noted before if one thinks it is unconstitutional to impair the freedom of expression rights of registered charities then this is a huge impairment. If you have any particular objects then you cannot discuss the vast majority of political topics that are outside of your objects. I guess all impairments are equal but some impairments are more equal than others.

Some of the big future issues that will be interesting to see over the next few years:

- 1) Will there be thousands or tens of thousands more charities as many non-profits move to become registered charities.
- 2) What will CRA's guidance on "public policy dialogue and development activities" be?
- 3)
- 4) Will Finance remove or scale back tax incentives for donating to charity?
- 5) Will governments, especially provincial governments, impose greater restrictions on government funding to preclude it being used for political activities as the Wynn government did?
- 6) How will the public's image of charities change as some of them are doing only public policy dialogue and development activities?
- 7) Will some groups taking advantage of the greater flexibility just plough ahead and do lots of partisan political activities?

Andrew Coyne's article in 2014 "[Problem with charities isn't their politics, it's their generous tax credit](#)" may unfortunately be prescient. He argued that the rules were fine but perhaps if others who argued the whole system of restricting charities and their political activities is just too complicated and that registered charities should have unlimited ability to carry out political activities were to prevail, then registered charities will lose the tax privileges of issuing receipts. Finance has largely removed the restrictions and let us see if Mr. Coyne is correct.

This is going to be a big mess and a distraction for the sector but as with many messes it takes years to see the reactions and counter reactions and the damage. It took the Liberals 3 years to add 55 words to the ITA and it could take another political party a few months to unwind them. Just look at the new Ontario government and how quickly they are unwinding the predecessor Liberal government's changes.

There is a great irony in this whole discussion. In the US there was the case of 2010 Citizens United in which the Supreme Court gave non-profits essentially freedom of speech. Do you think that the US citizens today are more united? In the Canada Without Poverty decision of 2018 it gave registered charities freedom of speech when it comes to political activities. It is very likely that the Canada Without Poverty decision will result over the next ten years in many changes in Canada that are going to see far greater rates of poverty. I hope I am wrong but based on the recent US experience I am quite convinced of this.

I thought I would end trying to find some positivity. It is admittedly hard to say much that is positive but here we go:

- We have been approached by a number of groups in the last few days to change their organizational structure or to establish registered charities that would not have done so under the old rules. New groups will be created, other groups will want to change their objects. I guess I should not complain if people want to hire us to do paid work.
- Groups that will be engaging in greater political activities, and especially contentious activities, will probably attract more public and CRA scrutiny and

therefore they will need to review all their processes (such as fundraising, receipting, business activities, dealing with non-qualified donees, acting with your objects, avoiding undue private benefit, separation from related entities, etc.) to minimize risk of CRA compliance action. I expect that we will be doing some informal risk reviews to help certain groups identify charity law compliance issues and try to resolve them, preferably before they engage in significant political activities.

- I had always thought that the 10% rule was not really inhibiting 99% of charities who could have spent 1% or 2% of resources on political activities but instead chose to spend 0%. It will be an interesting experiment to see how 99% of charities deal with this change and whether the many other obstacles to typical charities conducting political activities are more important than the rules. Such obstacles include attitude, lack of understanding of the ability of charities to conduct political activities, lack of resources for political activities and fear of offending stakeholders.

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