

Canadians' and Canadian Charities' Freedom of Speech

Summary of Équiterre's arguments and recommendations for the Canada Revenue Agency's consultation on charities' political activities

BACKGROUND

- During the last election campaign, the Liberal Party of Canada committed to **allowing charities to “do their work on behalf of Canadians free from political harassment”** by **clarifying the rules** governing political activity, which will lead to the emergence of a **“new legislative framework.”**¹ The mandate letters of the Ministers of Finance and Revenue also reflect this commitment.
- This consultation process, which **aims to clarify the rules for charities' participation in political activities**², is in keeping with the commitment.
- The previous government granted \$13 million to the **Canada Revenue Agency (CRA) to perform a series of audits** on various charities. These audits, targeted at approximately 50 organizations, have been described as **political harassment** and heavily criticized. Some of the charities audited had their charitable status revoked, and at least half a dozen organizations are still being audited, despite the change of government.

¹ <https://www.liberal.ca/realchange/canada-revenue-agency/>

² Government of Canada (2016), Minister Lebouthillier announces consultations with charities to clarify the rules for their participation in political activities, September 27, online, http://news.gc.ca/web/article-en.do?nid=1130449&tp=1&_ga=1.167793445.581425296.1473867334 (last accessed on October 12, 2016).

- Équiterre believes that this situation is due to **several vague provisions in the *Income Tax Act (ITA)* and the common law rules** applicable to charities, which give the CRA **broad interpretive powers**.
- The vagueness of the provisions has often discouraged charities from speaking publicly about issues affecting public policy.
- When under political pressure, **the CRA can misuse these interpretive powers**, creating an unfair imbalance vis-à-vis other very influential interest groups.
- Équiterre believes that **cosmetic changes to the guidelines** governing the political activities of charities to make them clearer and more precise **will not be to enough to prevent another breach of democracy**.

Instead, Équiterre recommends **the amendment of the ITA provisions** on charities and the establishment of a new legislative framework governing charities, as is proposed in the mandate letters of the ministers concerned. Pending the new legislative framework, Équiterre recommends the immediate suspension of the CRA's ability to revoke an organization's charitable status following an audit.

ARGUMENT

Équiterre's position is based on **four main arguments**:

- The *Income Tax Act* provisions and common-law decisions governing charitable activities are obsolete and often vague, giving CRA officials broad interpretive powers when making decisions. Furthermore, their decisions sometimes have serious consequences: for example, revocation of charitable status may force an organization to shut down.

Subsections 149.1 (6.1) and (6.2) of the ITA state that a charity must “devote ‘substantially all’ of its resources to its charitable purpose, but can dedicate part of its resources to political activities,” as long as those activities are ancillary to its charitable purpose and non-partisan. In the absence of clarification, the CRA decided to define ‘substantially all’ as ‘more than 90%.’ This means charities can dedicate less than 10% of their resources to ‘political’ activities.³

³Andrew Kitching (2006), *Charitable Purpose, Advocacy and the Income Tax Act*, Parliament of Canada, Law and Government Division, February 28, 2006, online, <http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0590-f.htm> (last accessed on November 1, 2016).

The definition of permitted political activities is also partly left to the interpretation of CRA officials. If this definition is interpreted in a restrictive way, an organization may be prevented from pursuing its charitable mission as recognized by the ITA.⁴

- The vagueness of the provision introduces an element of risk into political activity, as it raises several questions without clear answers. What exactly do we have the right to do? Are the actions we want to take charitable, political or partisan? Could we be accused of spending too much money on political activities? This risk inhibits many organizations from speaking out in public.
- Also, interpretive powers open the door to political harassment and restrictions on freedom of expression and association.

For example, according to a survey conducted by Imagine Canada, nearly half of the charities that reported negative effects from the previous government's CRA audits have decreased or plan to decrease their activities for fear they will be considered 'political,' in other words, have practised self-censorship.⁵

Finally, in its "Concluding observations on the sixth periodic report of Canada," the UN Human Rights Committee expressed concern about the ambit of section 149.1 of the ITA relating to charities supporting political and social causes.⁶

- The current system unduly restricts the manner in which charities pursue their activities compared to other entities supported by the government, such as corporations. This creates an imbalance between the interests of citizens and the interests of corporations.

For example, corporations, which benefit directly and indirectly from subsidies that cost the federal government much more than charity tax credits, are not subject to restrictions on the proportion of income they can devote to political activities or lobbying. Unlike charities, they are not restricted in the way they manage their business operations and profits.

⁴ Ontario Superior Court of Justice (2016), Canada Without Poverty and Attorney General of Canada, Affidavit of Leilani Farha, August 2016, online, <http://www.cwp-csp.ca/wp-content/uploads/2016/09/CWP-v.-AG-Farha-Affidavit.pdf> (last accessed on October 12, 2016).

⁵ Imagine Canada (2016), Insights into day-to-day Public Policy activities by Charities, Sector Monitor survey, October 4, 2016, online, <http://www.imaginecanada.ca/who-we-are/whats-new/news/insights-day-day-public-policy-activities-charities> (last accessed on October 12, 2016).

⁶ International Covenant on Civil and Political Rights (2015), Concluding observations on the sixth periodic report of Canada, August 13, 2015.

RECOMMENDATIONS

In view of these four arguments, Équiterre recommends that the Government of Canada, in accordance with its statements on the importance of charities in a democracy and the UN Human Rights Committee recommendations:

1) Amend the ITA and create a new legislative framework that meets the following objectives or integrates the following elements:

i) Ensure full freedom of expression for charities. A charity should have the right, like any other corporation, to take a public stand on any matter it considers relevant to the pursuit of its charitable purpose, without restrictions on the manner in which it takes this stand or allocates its resources.

ii) With regard to partisan activities, charities must, like any other corporation, strictly adhere to the federal and provincial laws governing elections and the financing of candidates and political parties.

iii) If the government wishes to maintain an additional restriction regarding partisan activities, it should be the same restriction that is imposed on other corporate entities, and be limited to direct support, in the form of financial and human resources, to a candidate or political party during an election campaign. Furthermore, the consequence of not conforming to this rule should not be revocation of charitable status.

iv) “Charitable purpose” must be interpreted liberally so that modern societal concerns, such as environmental protection and poverty prevention, can be included.

v) The law must ensure consistency between charities’ obligations and those imposed by governments when they award grants, loans or tax credits to other profit or non-profit organizations. It must also explicitly state these rights and obligations to eliminate any potential abuse of power.

vi) Charities should have four obligations:

- a) Strict adherence to provincial and federal laws
- b) Sound fiscal management
- c) Commitment to accountability and transparency
- d) Pursuit of activities related to achieving charitable purpose

vii) The law must introduce a flexible mechanism to reflect changing values in Canadian society (e.g., by having courts fulfil this role or by proposing that the law be reviewed on a fixed date).

2) Immediately suspend the CRA's power to revoke an organization's charitable status following an audit until the new legislative framework has been established.