

12 October, 2018

Tax Policy Branch  
Department of Finance Canada  
90 Elgin Street  
Ottawa, ON K1A 0G5

To Whom It May Concern:

Re: Draft Legislative Proposals Regarding Political Activities of Charities

We are writing to express our concern that the package of proposed *Income Tax Act* amendments combined with the proposed guidance recently released by the Canada Revenue Agency, are inadequate to keep the public commitment made by the federal government. Taken together, we believe they are also inconsistent with the recommendations made by the Consultation Panel on charities' political activities, nor do they provide the relief ordered by the recent Ontario Superior Court decision in the Canada Without Poverty case.

The proposed *ITA* amendments themselves represent a significant and positive step towards meaningful modernization of the regulatory regime for registered charities. That said – the subsequent release by the Canada Revenue Agency of a proposed new guidance raises concerns that the positive results arising from the proposed *Income Tax Act* amendments could be diminished through administrative policy. We realize this is a separate issue from the legislative proposals themselves, and we will provide comments to the CRA on the proposed guidance, but we note this concern to provide context to our comments below.

We look forward to engaging further with the Department, the Canada Revenue Agency, and other departments in pursuit of the broader modernization highlighted in the mandate letters issued to the Ministers of Finance, National Revenue, and Justice and by the Consultation Panel on the Political Activities of Charities. As you are aware, the Consultation Panel appointed by the Minister of National Revenue recommended that “[t]he Government of Canada, in consultation with the charitable sector, should proceed, as soon as possible, to

modernize the rules governing the charitable sector through the development of a new legislative framework.” The proposed *ITA* amendments respond in part to the government’s commitment in the mandate letters to legislative modernization and to the Consultation Panel’s recommendations. We see this as an initial step toward a broader review.

Having studied the current proposals, while we are generally supportive of what the Department of Finance and government are trying to achieve, we do have two areas of concern with the current draft, to which we would like to draw your attention.

*Proposed paragraph (a.1) in the definition of a charitable organization*

Our first concern relates to the continued presence in subsection 149.1(1) of the *Income Tax Act*, of a reference to a charitable organization as one “...all the resources of which are devoted to charitable activities carried on by the organization itself[.]”

According to the guidance provided by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* (1999) 1 S.C.R. 10, a charitable activity can only be characterized as such by reference to the purposes which it intends to achieve. If this case is indeed good law, this would make the proposed requirement superfluous. Defining a charitable organization as one “constituted and operated exclusively for charitable purposes” means that a charity can *only* engage in activities that advance those purposes.

We understand that the continued presence of this provision is intended as a way of ensuring that registered charities maintain direction and control over the charitable expenditures they make through intermediaries. But if we accept that this requirement properly follows the decision in the *Vancouver* case noted above, and hence that all of an organization’s activities are inherently charitable as long as they further its charitable purpose, then the provision immediately conflicts with the use of the term “charitable activities” elsewhere in section 149.1 which imply a distinction between an organization’s “charitable” activities and its presumably non-charitable ones.

We submit that the provisions in paragraphs 149.1 (2), (3) and (4) are sufficient to control any leakage of funds to inappropriate recipients of tax assisted funds, and that any reference to “charitable activities carried on by the organization itself” is superfluous, especially since no such requirement exists in the definition of a public foundation or a private foundation.

In addition, if the proposed wording is maintained together with the removal of any reference to political activities elsewhere in section 149.1, this potentially places the sector in the situation in which it was prior to the 1985 amendments on political activity. The logic at the time was that since political activities were not inherently charitable in and of themselves, any organization pursuing any amount of political activity was ipso facto not qualified for registration. Again the analysis seemed to suggest that activities can have a character of their own distinct from the purpose they further. We realize that the thinking

has evolved since the 1980s, but a Court can feel bound by the literal wording of the Act, and notwithstanding any informal assurances to the contrary, this persistent inconsistency in the wording remains unsettling and risks causing future interpretive problems.

This concern is further enhanced by the language of the draft guidance recently published by the CRA. At no time did the Consultation Panel suggest an “incidental and ancillary” type quantification of public policy dialogue and development. The Consultation Panel’s recommendation is to “[a]mend the ITA 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.”

We suggest that a charitable organization be defined as one “constituted and operated exclusively for charitable purposes,” and that clarification language be added to both the definition of charitable organization and charitable foundation which says....”and for greater certainty, non-partisan public policy dialogue and development pursued by an organization in furtherance of an otherwise stated charitable purpose can be pursued without limitation.”

#### *Prohibition against direct and indirect partisan political activity*

Our second concern relates to the absence of a clear definition of direct or indirect partisan political activity.

The overwhelming consensus in the charitable sector is that no charity wishes to be involved in partisan political activity. However, leaving the current prohibition against partisan political activity ‘as is’ raises some legitimate issues.

For any reasonable person, there is little doubt as to what constitutes a “direct” partisan political activity. The questions arise however with regard to an “indirect” partisan political activity. If the proposed amendments will allow charities to publicly comment within reason on government legislation or policy, at what point does such behavior cross into indirect support for or opposition to the party in power? Does support for or opposition to a bill before Parliament implicitly become a “partisan” activity? Indeed, after receiving anecdotal evidence that some auditors were questioning the legitimacy of charities commenting on legislative or regulatory proposals at all, Imagine Canada in 2015 requested clarification from the CRA on a number of questions raised by registered charities with regard to the notion of “indirect” partisan activities. Three years later, no reply to that request has been received. While the proposed guidance recently published by the CRA provides examples that address some of these questions, the continued reference to “indirect” partisan activities is concerning.

We believe that the Consultation Panel made a valuable contribution to the discussion around partisan activity, specifically in Recommendation 3 (c) of its report:

*retain the prohibition on charities' engaging in "partisan political activities", with the inclusion of "elected officials" (i.e. charities may not directly support "a political party, elected official or candidate for public office"), and the removal of the prohibition on "indirect" support, given its subjectivity.*

We encourage the Department to rephrase the prohibition on partisan activity to better reflect the Consultation Panel's recommendation.

A further concern with the provision on partisanship is that it is not clear how a "candidate for public office" is defined. Does an individual, either an incumbent MP or a challenger to an incumbent MP, become a "candidate for public office" when he or she secures a nomination from a party constituency association and does this mean that any support or criticism by charities of policies espoused by that individual will be examined through a different lens? Or, as we would recommend, does said individual become a "candidate for public office" once Elections Canada's requirements to register as such have been met? This is a crucial distinction that we do not believe should be left up in the air.

We do not believe that the issues outlined above are insurmountable, and we stand prepared to work with the Department of Finance and the Canada Revenue Agency to ensure that the *Income Tax Act* and the necessary guidance successfully implement the principles and policies announced on 15 August and 14 September, 2018. We are very encouraged at the progress the current draft represents, and we are confident that charities want to achieve the same outcome as the Department in this case.

Thank you for the opportunity to contribute to this process. Should you have any questions, please do not hesitate to be in touch.

Yours truly,

A handwritten signature in black ink, appearing to be 'Bruce MacDonald', with a long horizontal line extending to the right.

Bruce MacDonald  
President & CEO

Co-signatories



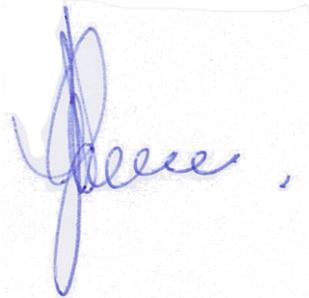
Cathy Taylor, Executive Director  
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Hilary Pearson, President  
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