environmental defence
INSPIRING CHANGE

Canada Revenue Agency
Charities Directorate
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Submission to the Canada Revenue Agency Consultation on Charities' Political Activity

Environmental Defence thanks the Canada Revenue Agency and the Government of Canada for their commitment to reform and modernize the rules related to charities' political activity. We welcome these consultations as a chance to establish clear legislative protection of charities' free speech and the critical role they play in public policy development in Canadian society.

Request for In-Person Participation

At the outset of this submission, we request participation in the upcoming in-person consultations with the Canada Revenue Agency. As an organization that participates actively in public policy development, Environmental Defence is well placed to contribute constructively to this consultation.

Request for Transparency

In keeping with the federal government's commitment to transparency and accountability, we request the following:

- that the summary and notes of the CRA facilitator to the expert panel be made public
- that the report of the expert panel to government be publicly released when it is submitted to the Minister

Request for Suspension of Audits

In light of this consultation and in order for organizations to participate freely in this process, we request that all political activities audits currently underway be suspended until the government's new legislative framework is in place, including a suspension of the CRA's power to revoke an organization's charitable status.

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Introduction

In mandate letters to the Minister of Finance and Minister of National Revenue the Prime Minister made a strong commitment to consult with the charitable sector, clarify rules regarding political activities and move to introduce a new legislative framework for the sector. The mandate letters read:

> "Allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors, working with the Minister of Finance. This will include clarifying the rules governing "political activity," with an understanding that charities make an important contribution to public debate and public policy. A new legislative framework to strengthen the sector will emerge from this process."

Our view is that if the charitable sector is to operate in a free and open atmosphere and contribute fully to public dialogue and public policy development, a new legislative framework must include amendments to the *Income Tax Act*. For this reason, while we will address the first two questions, the majority of our submission will focus on the third question. These suggested amendments would not address all aspects of a reformed and modernized legislative framework for the sector, but would act as a necessary and positive first step.

1. Carrying out political activities

Are charities generally aware of what the rules are on political activities? What issues or challenges do charities encounter with the existing policies on charities' political activities? Do these policies help or hinder charities in advocating for their causes or for the people they serve?

Environmental Defence is aware of the rules concerning political activity and abides by them. However, it is our experience within the sector that many charities do not understand the rules. For example, research by Imagine Canada has shown that 90% of organizations that engage in political activity do not report it. We believe this figure is a result of both misunderstanding of what constitutes political activity and a fear within the sector that reporting any activity will precipitate a costly and time-consuming political activity audit. This fear was exacerbated by the public attacks on portions of the sector undertaken by Cabinet Ministers in the previous federal government. In addition to strong rhetoric, their statements played on the public's lack of

understanding of the term "political activity" to insinuate that charities were in fact participating in partisan support of particular political parties. We have also heard from many that charity Boards and staff wrongly classify charitable activity as political. They mistakenly believe, for example, that any oral or written contact with an elected official must be classified as political activity. They also believe that contact with the public, even if it is related to supporting or opposing a change of law, is not political activity.

There are several additional issues that charities encounter when trying to comply with the existing policies. One challenge is the "10% rule" regarding expenditures on political activities. It is time consuming and costly to effectively track the resources a charity expends on political activity. This is because many programs in organizations have a public policy component and it is challenging to correctly identify the small portions of time and money that are "political" versus those that are charitable. In addition, prohibitions on partisan political activity are unclear, and need to be more specifically defined using practical examples that would commonly occur in the day to day operation of a charity that engages in public policy work. To be clear, we agree that charities should not directly support or oppose political parties or candidates, however, charities are well-positioned to comment effectively on policies and legislative proposals, and doing so in a manner that is consistent with charitable objectives and reflects defensible policy views should not be able to be classified as partisan. For example, if an organization has a long standing view that smoking in public spaces should be banned then they should be free to comment favourably on the policy commitment or legislative initiative of a party or MP that brings forward action to achieve this outcome.

There is no question that fear of being seen to cross the "partisan" line hinders charities in their efforts to achieve their charitable purposes. This is unfortunate and undesirable because, as the CRA's policy document states, "charities have expert knowledge about the issue they work on that government lacks". This means charities should contribute to, praise or criticize government policy initiatives that are core to their charitable purpose. When charities are restricted in how much they can or cannot say to government, or to the public about whether a law is working or how it should be changed, their expert views and the voices of their supporters are lost. This directly limits their ability to achieve their charitable purpose.

The current rules also reduce the effectiveness of charities by creating an uneven playing field with corporations. In public policy and public dialogue charities often find that a public interest perspective is overwhelmed by that of self-interested entities. Corporations engage in extensive political activities and receive much more generous tax treatment than citizens who donate to

charities, yet face none of the same restrictions or accountability that the charities themselves do. Corporations are unrestricted in the amount they can spend on lobbying, advertising, or contacting citizens directly and can deduct 100% of these expenses from their gross income. This then reduces their net income and reduces income tax payable. Canadian citizens, through their government, are thus providing a tax subsidy to corporations to encourage them to pursue their self-interest. Citizens donating to charities as a way to have their voice heard on issues they care about are provided with a much less generous tax credit that is only usable when tax is payable. Furthermore, Corporations do not have to act in the public interest or use well-reasoned or even truthful arguments. In contrast, charities must act in the public interest and be research-based, truthful and unbiased in their public dialogue and public policy positions. These requirements should not change for charities but the fact that they do not apply to corporations creates an arena of public policy debate that favours self-interest over the public good. As a result individual citizens are discriminated against by income tax law in their ability to participate with others in the public policy process.

2. The CRA's policy guidance

Is the CRA's policy guidance on political activities clear, useful, and complete? For example, how could the CRA improve its policy guidance on these topics: the description of a political activity; the description of a partisan political activity; charities' accountability for their use of resources.

The CRA's policy guidance contains several problematic and ill-defined interpretations of the *Income Tax Act* that make the policy guidance unrealistic and difficult to follow.

First among these is CRA's interpretation of the *Income Tax Act* stipulation that a charity can undertake political activities so long as "substantially all" of its resources are devoted to charitable activities. As we outline below, the *Income Tax Act* should be amended to remove the "substantially all" provision. The CRA's current interpretation of "substantially all" to mean "90% or more" and therefore that "a charity [can devote] no more than 10% of its total resources a year to political activities" is unduly restrictive. In fact, a strict reading of this rule would mean that 90% of a charity's expenditures must be charitable, leaving only 10% for all other activities, including all administrative costs, fundraising, and political activities. The exception that charities can exceed the 10% rule under "unique one-time conditions" (for example to take out a newspaper advertisement pressuring the government about a specific piece of legislation) is not helpful or realistic. Legislative changes do not occur as a result of one-off

advertisements. Such an expenditure may be impactful, but often only as the culmination of a sustained effort to influence public policy, which can take many months or even years before legislation is tabled. Rules in other countries, notably England and Wales, recognize that a charity must sometimes need to devote *all* of its resources to a political activity for a sustained period of time in order to most effectively pursue its charitable purposes. Furthermore, the "10% rule" is another example of how CRA policy guidance puts charities at a disadvantage to for-profit enterprises in public policy development. For-profit enterprises face no requirement to act in the public benefit or toward any purpose but to further their own economic interest, yet face no restriction on the percentage of their resources that can be spent on political activities.

A further issue with the CRA policy guidance is the emphasis that a charity must present a "well-reasoned position". The guidance defines "well-reasoned" as "a position based on factual information that is methodically, objectively, fully, and fairly analyzed. In addition, a well-reasoned position should present/address serious arguments and relevant facts to the contrary". This definition does not translate readily into real-world examples. In the case of Environmental Defence, we frequently refer to global warming and its impacts and cite scientific articles in support of the reality that burning fossil fuels causes global warming. This is a scientific consensus endorsed by the United Nations and every major national and international science academy. However, according the CRA policy guidance, the scientific fact that the burning of fossil fuels contributes to global warming is a one-sided, subjective and biased argument. The definition of "well-reasoned" should not compel a charity to present both sides of a debate when one side is clearly unscientific and factually wrong. This essentially restricts a charity from publicly stating the truth or having a strong policy position on anything. The policy guidance on this matter seems to be a direct contradiction of the government's *Code of Good Practice on Policy Dialogue* since it limits a charity's ability to share its expert knowledge. As a result, charities cannot contribute effectively to evidenced-based public policy or contribute to well-informed public debate (something which other countries have deemed to be a public benefit and a charitable purpose in and of itself).

Similarly, the restriction on "emotional content" in public awareness campaigns is unrealistic. For-profit enterprises and even governments are allowed to use advertising techniques to capture the imaginations of the public. Charities should have the same ability to make an emotional appeal so long as they have evidence to support their position. Further complicating this point, the policy guidance does not provide the criteria the CRA uses to determine the level of emotional content in a campaign. This stipulation should be removed from the CRA policy guidance.

In section three we make recommendations for legislative amendments that address the definition of partisan. There are two points that make the current definition of partisan activity problematic. Firstly, as currently set forth, there is no clear definition of "candidate" in the *Income Tax Act* or CPS-022. There must be clarity around when a person becomes a candidate. We recommend aligning the definition of "candidate" with the *Elections Act.* Secondly, the reference to "indirect" partisanship is too broad. In our hyper-partisan political environment, almost any reference to a Member of Parliament, Minister, or Government Department could be interpreted as indirectly partisan. Moreover, on social media, it is unrealistic to ask a charity to remove any partisan views from the comments made by the charity's supporters, critics or members of the public. The word "indirect" should be removed and the definition of "partisan" should be clarified (as we set out in section three) so that charities are not punished for non-partisan interactions with public officials, candidates and political parties outside of the writ period.

With respect to a charity's responsibility to account for its use of resources, the lack of a standardized system for tracking resources used means that charities must expend time and energy conceiving of their own tracking system. When evaluating a charity's use of resources, the CRA can call into question the system a charity uses for tracking, which causes unnecessary disagreement. The lack of a standardized system also makes it difficult for organizations to know objectively whether they are expending more or less resources on political activity than other charities with similar purposes. This hinders charities' ability to work together on political activities or assist each other in ensuring accurate reporting. In addition, the CRA policy guidance leaves many practical questions unanswered. For example, how does one quantify use and circulation through social media? How does one calculate volunteer time?

Lastly, the CRA creates a double standard in the way it calculates political activities and charitable activities. If an activity is deemed charitable, the CRA typically considers the preliminary work that led to it (e.g. staff training, negotiating contracts) as non-charitable. However, if the CRA deems an activity to be political (e.g. a public call to action on a charity's website), then every expenditure leading up to that call to action is considered political and calculated under the "10% rule". This double-standard is indicative of the intractability of the current rules, and the CRA's illogical and punitive approach.

3. Future policy development

Should changes be made to the rules governing political activities and, if so, what should those changes be?

Currently, the CRA's rules are out-dated and unrealistic. They contradict both the government's own commitments to an open and transparent relationship with the charitable sector, and the common law rulings of Canadian courts. They also perpetuate a situation in which corporations have an unfair and unreasonable advantage over charities in how they engage with public dialogue and public policy. To address this, Environmental Defence makes the following recommendations:

1. Amend the *Income Tax Act* to focus on charitable purposes rather than charitable activities.

Currently there is a disconnection between how common law treats charities and how they are treated under the *Income Tax Act* and in CRA policy guidance. The common law has found that a charity is defined by its purposes, not by the activities that it undertakes for the fulfillment of those purposes. By focussing on activities, the CRA is judging charities in a way that is inconsistent with how they are judged before the courts. As a result, charities are reluctant to engage in political activities that serve to further their charitable purposes even though the courts have stated they are allowed to do so. To focus on whether or not an activity is charitable without accounting for the purpose it is meant to achieve contradicts the common law understanding of a charity and unduly restricts the work that charities can undertake. The disconnection between the *Income Tax Act* and policy guidance focus on activities, and the common law focus on purposes is the basis for much of the current difficulty. To refocus on purposes would alleviate much confusion.

2. Amend the *Income Tax Act* to define "charity" based on the societal goals an organization seeks to achieve (its charitable purposes) and in a way that reflects modern realities.

In addition to realigning with common law by focussing on purposes rather than activities, we recommend that the definition of a charity be updated and broadened beyond what is currently in the common law. West Coast Environmental Law has suggested a modernized list of charitable purposes, which we support and have included as Appendix A.

3. Amend the *Income Tax Act* to ensure charities are free to choose the most effective approaches to achieve their purposes unless an activity is expressly prohibited by statute.

Also following the example of other countries, this change would allow charities more freedom in terms of the activities they can undertake that fulfill their charitable purposes. The *Income Tax Act* lacks a provision that specifically protects the right of a charity to act in a way that fulfills its charitable purpose, unless specifically directed not to in statute. This way charities and the public will have certainty about what a charity can and cannot do. Essentially, if an activity is not listed in the statute as prohibited, then the charity is allowed to undertake it. In other countries the test for disqualification is often limited to openly partisan activity or unlawful activity.

4. Amend the *Income Tax Act* to end restrictions on charities' participation in public debate and policy development.

This amendment would address the current restriction imposed by the phrase "substantially all" and the CRA's "10% rule". As we have described, the 10% rule is arbitrary, difficult to track, out of step with common law, and unduly restrictive. By removing this restriction charities would have a level playing field with corporations, as mentioned above.

5. Amend the *Income Tax Act* to protect the free speech of charities, by clarifying that charities can be constituted or operated to:

a. raise awareness of, or advocate for, a particular perspective or approach to achieving charitable purposes;

b. advocate for a change in a government decision, policy or law related to achieving charitable purposes;

c. take a position on an issue or policy related to their charitable purposes, regardless of whether a political party or candidate for public office has also done so, and,

d. report or comment on a policy or position, or proposed policy or position, of any level of government related to a charity's purposes, regardless of whether such policy or position is in writing or expressed by a named elected official before or after his or her election to office

These stipulations essentially address the definition of 'partisan' by stating what political activities charities *are* allowed to undertake to achieve their charitable purposes, and clarifying that this should not be restricted through

relation to policies or positions expressed by an elected official, political party, or candidate.

Further to the last recommendation, we affirm that if a new law restricts charities' participation in the electoral process, any prohibition should be limited to *direct* participation by a charity in an electoral campaign on behalf of (or in opposition to) any political party or candidate for public office, and not be used to limit the free speech of charities as set out above. This will ensure that all charities have clear and common sense limits on what sort of political activity they can undertake, and that these rules are not used to restrict free speech.

Sincerely,

Tim Gray

Executive Director

cc.

Prime Minister of Canada
Minister of Finance
Minister of National Revenue

Appendix A: Proposed Statutory Provision

Qualified Donees

149.1 (1) In this section and section 149.2,

charity means an organization that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof.

charitable purposes for the purposes of the administration of this act, means any of the following:

(a) prevention or relief of poverty;
(b) advancement of education;
(c) advancement of religion;
(d) promotion of equality and diversity;
(e) promotion of health, including the prevention or relief of sickness, disease or human suffering,
(f) promotion of reconciliation, mutual respect and tolerance between groups of individuals or communities in Canada and the advancement of conflict resolution;
(g) promotion or protection of human rights;
(h) protection of the natural environment, conservation of natural resources or advancement of environmental sustainability;
(i) prevention or relief of suffering of animals;
(j) advancement of the arts, culture, heritage or sciences;
(k) advancement of citizenship or community development, including rural or urban regeneration;
(l) promotion of civic responsibility or voluntary work;
(m) advancement of community welfare including addressing the needs of those disadvantaged by race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;
(n) prevention and elimination of discrimination based on race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;
(o) promotion of agriculture and industry;
(p) any other purpose of benefit to the community that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (o);
(q) promoting public awareness or public debate regarding the preferred approaches to advancing any of the purposes mentioned in paragraphs (a) to (p);
(r) promoting or opposing a change to any matter established by law, policy or practice of any level of government in Canada, another country or internationally, if the change is in furtherance of one or more of the purposes mentioned in paragraphs (a) to (q); and,
(s) the disbursement of funds to a qualified donee.