



2012 Federal Budget Features Tighter Reporting on Charities' Political Activities

Peter Broder

Now charities provisions in the 2012 federal Budget generated more attention than any measures relating to the sector have in a very long time. The government announced that it was tightening rules around charities' political activities. The focus of the new requirements was mostly on enhanced reporting; however, embedded in the announcement was a crucial substantive change.

The catalyst for the new measures seems to have been involvement of some environmental charities in the regulatory processes and public debates over pipelines.

The legislative move – accompanied by an \$8 million boost in Canada Revenue Agency (CRA) resources over two years to amend its T3010 charity reporting form and enhance its compliance capability in dealing with political activities – drew both praise and criticism, with some commentators welcoming it as potentially reining in bad actors and others as stifling legitimate disagreement on policy matters. Unfortunately some of this commentary repeated and reinforced common misperceptions about the rules governing registered charities' political activities.

Historically, foundations and other registered charities have enjoyed scope under the *Income Tax Act (ITA)* to make gifts to qualified donees. Specifically, the *ITA* provided “charitable purposes” includes the disbursement of funds to qualified donees”. This language allowed the making of gifts

to certain organizations, enumerated in the *ITA*, beyond registered charities, and – perhaps more importantly – meant that the charity making the gift did not have to enquire into its eventual use.

The flexibility this afforded was important. It meant that a foundation could, for example, provide a grant designed entirely to cover the grantee's administrative costs, rather than one that would be spent proportionately or exclusively on the group's delivery of its charitable programs. With many funders and donors now earmarking their support for specific programs or projects, a foundation's ability under the old rules to fully underwrite less popular aspects of a charity's operations has become increasingly valuable. The new provisions will remove this flexibility with respect to funding of political activity.

Under the new rules, foundations (or other registered charities) making transfers to qualified donees, where "it can reasonably be considered that a purpose of the gift is to support the political activities of a qualified donee," will have to report the expenditure as having been made on its political activities. This imposes a difficult new administrative burden on funder charities to monitor their aggregate granting potentially devoted to political activities.

Pending the actual legislation and administrative guidance from the Canada Revenue Agency (CRA), it is unclear what the test will be for "it can reasonably be considered," or what due diligence may be expected of granting charities in enquiring into the eventual use of funds they transfer to other qualified donees. However, the existence of this additional monitoring and reporting requirement is likely to cause some charities to not grant to groups engaged in high profile campaigns.

The new rules will likely add to the already significant confusion in the sector and among the public about the permissible political activities of charities. Many funders and operating charities already refrain from work that might be considered political activity (or policy work that advances their charitable purposes) because they don't want to risk non-compliance and possible de-registration. However, there is frequently more scope within the law (and within public opinion) to be assertive in this area than charities may realize.

As to public opinion, the Muttart Foundation's 2008 Talking About Charities survey found that 64% of respondents agreed that "opinions that charities express on issues of public concern have value because they represent a public interest perspective" and shows 80% or higher backing for charities speaking out on issues like the environment, poverty or healthcare; meeting with government officials; using research results to support a message; or, placing advertisements in the media.

Legally, it is well established that charities cannot be constituted – i.e., have a stated object or purpose – to advance a political end. In the case law, political purposes have been defined as supporting a political party or candidate for public office or seeking to retain, oppose, or change the law or policy or decisions of any level of government in Canada or a foreign country.

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This prohibition is framed in terms of purposes, however, and there is recognition both in the case law and in the *ITA* that charities may, within certain limitations, engage in non-partisan political activities. The *ITA*, for example, includes provisions that where a registered charity meets a substantially all test based on its purposes or activities, its nonpartisan political activities are deemed charitable.

As well, the courts have long held that charities may undertake a wide range of public policy work in furtherance of their charitable objects. Such work is not considered political activity and is not subject to limitations (other than not becoming so significant that it becomes a collateral purpose of the organization). Indeed, given what apparently generated the Budget provisions, this may give rise to a minor irony. Depending on an organization's objects, participating in an environmental assessment hearing or public awareness campaign might well be considered to advance a charity's purposes – meaning that the new political activity rules wouldn't apply.

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