

December 14, 2016

DELIVERED BY EMAIL TO: consultation-policy-politique@cra-arc.gc.ca

Canada Revenue Agency

Attention: Charities' Political Activities Consultation Committee

Dear Consultation Committee,

Re: Canada Revenue Agency's Online Consultation on Charities' Political Activities
Submissions by Iler Campbell LLP

Iler Campbell is a Toronto-based law firm that has served non-profit and charitable organizations for more than 35 years. Our firm has assisted many organizations in obtaining charitable registration and in complying with the rules, regulations and guidelines established by Canada Revenue Agency (the **CRA**) and its predecessors. In particular, we have provided advice to registered charities on the scope of permissible political and advocacy activities.

With this experience and understanding, we offer these submissions on the CRA's consultation on the rules relating to the political activities of Canadian charities.

1. Introduction

Canadian charities are exclusively engaged in doing good works in communities across Canada. They know from grass-roots experience what needs to be done. Many are experts in their fields.

Those good works involve charities in major public policy files (for example, environment or poverty), and are carried out in the context of government policies and programs which can enhance or inhibit them. Government policies and programs that are formulated in the absence of effective input from Canada's charities, those experts with community-level knowledge and experience, will necessarily be inadequate.

It is an essential component of good government policy-making that the public interest be a dominant consideration. As charities have no owners and are funded by the voluntary contributions of Canadians, they are uniquely positioned to advocate for the public interest. This is particularly important because the well-funded voices of private interests can dominate government policy-making if public interest advocacy is absent or ineffective.

We submit that the current rules limiting the political activities of charities limit the advocacy by charities in areas of public policy where the public interest demands it most. We further submit that charities, as advocates for the public interest, be at least as unfettered as the voices of private interests are when engaging in advocacy that advances their charitable purposes.

2. The CRA's Current Rules on Political Activities of Canadian Charities

There are significant benefits to acquiring the status of a registered Canadian charity. All income earned by registered charities is exempt from income tax under Part I of the Income

Tax Act, (the **ITA**).ⁱ Charities may also issue donation receipts to donors that individual donors can claim as tax credits and corporate donors can treat as tax deductions.ⁱⁱ

These benefits reflect the commitment of the Canadian government, and the Canadian people, to the good works charitable organizations do in their communities.

Canadian charitable organizations are obliged to devote all their resources to their charitable activities.ⁱⁱⁱ However, a small portion of a charitable organization's resources may be devoted to non-partisan political activities that are ancillary and incidental to the organization's charitable activities.^{iv} Failing to meet these obligations could result in a charity's status being revoked.^v

In its *Policy Statement* CPS-022 "Political Activities" (the **Policy Statement**) the CRA outlines that charitable activities can be carried out on an unlimited basis as long as those activities are neither political activities nor partisan political activities. Political activities, according to section 6.2 of the Policy Statement, are those that:

1. explicitly communicate a call to political action (i.e., encourage the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
2. explicitly communicate to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or
3. explicitly indicate in materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

3. **The Current Rules Do Not Reflect Charities' Essential Role**

Part of the rationale for restricting political activities of charities appears to relate to the rationale for prohibiting charities with political purposes: accepting charities whose main purposes are political inherently requires passing some judgement that certain political changes are for the public benefit.^{vi}

We submit that this rationale reflects an out-dated view of how charities should contribute to discussions surrounding public policy. Permitting charitable organizations to engage in advocacy that advances their charitable purposes facilitates public discourse and policy development. To the extent that this advocacy advances the organization's charitable purposes, it has a public benefit.

Many charitable organizations have developed significant expertise in understanding the policy frameworks that help or hinder their charitable objects. They bring perspectives informed by their practical and hands-on experience of how changes can be made.

Registered charities are recognized by the CRA as having purposes that advance the public benefit. Therefore, all activities that directly relate to a charity's purposes and that can be

reasonably expected to contribute to achieving those purposes should be permitted without quantitative limits.

The definition of “political activities” in the Policy Statement assumes that these activities have a political purpose. This is a false assumption. In many cases, these are activities with a political character because of the context in which they are carried out, yet there is a reasonable prospect that they will advance a charity’s purposes.

The key question should be: what is the organization trying to achieve?

As the Supreme Court of Canada stated in *Vancouver Society of Immigrant and Visible Minority Women*, it is really the purpose or object in furtherance of which activities are carried out, and not the character of the activities themselves, that determines whether it is charitable in nature.^{vii}

Furthermore, the Supreme Court of New Zealand affirmed in *Re Greenpeace of New Zealand Incorporated* that the distinction between political and charitable purposes “are not mutually exclusive in all cases; a blanket exclusion is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit within the sense the law recognizes as charitable.”^{viii}

Last, it should be noted that the High Court of Australia, in a majority decision in *Aid Watch Incorporated v Commissioner of Taxation*, recognized that a charity’s political activities can have a public benefit. Prior to this decision, Australian law restricted organizations with charitable purposes from engaging in social advocacy or political activities. However, in this decision, the High Court recognized that the work of Aid Watch, in lawfully generating public debate on the efficiency of foreign aid on poverty relief, was beneficial to the community within the fourth head of *Pemsel*.^{ix}

4. The Current Rules Render Charities’ Political Role Ineffective

Since it is desirable for charities to contribute their expertise and communicate the interests of their communities on matters of public interest, including public policy issues related to their charitable purposes, the rules relating to permissible charitable activities must allow for this communication.

The current rules restricting the political activities of charities, particularly the definition of “political activities” in the Policy Statement, discourage them from influencing government policy.

This, from the Policy Statement, puts CRA in the position of second-guessing every activity a charity undertakes in providing the public with knowledge and information about issues that reflect a public interest and relate to government policies, creating an uncertain environment in which charities must work (at 7.1 of the Policy Statement):

“When a registered charity seeks to foster public awareness about its work or an issue related to that work, it is presumed to be taking part in a charitable activity as long as the activity is connected and subordinate to the charity’s purpose. In addition, the activity should be based on a position that is well-reasoned, rather than information the charity knows or ought to know is false, inaccurate, or misleading. Finally, although the CRA acknowledges that material produced in support of a

public awareness campaign may have some emotional content, it would be unacceptable for a charity to undertake an activity using primarily emotive material.”

Charities are quite capable of determining what approaches for their political activities are effective, and which are not.

Forcing charities to justify, after the fact, how their activities fit within the narrow views of CRA means charities are much more reluctant to embark upon political activities at all.

5. **Public Policy Formation is Dominated by Private Interests**

From a public policy perspective, government policymaking is dominated by corporate interests and lobbying.

Recent experience with federal policymaking in relation to climate change and the fossil-fuel industry illustrates the problem. The voice of the fossil-fuel industry advocating in its own interest drowned out the public interest voice coming from Canada’s environmental charities.

The fossil-fuel industry and its supporters in government, are prepared to risk catastrophic climate change to preserve the industry’s short-term gain. The problem is, virtually all the science and all the public-interest voices point to the need for an urgent transition to renewable energy, leaving the vast bulk of known fossil fuel resources in the ground.

A recent report in *Nature* concludes that meeting a modest target of restraining global warming to two degrees Celsius requires the curtailing of coal burning to the extent that 82 per cent of current re-known global reserves must stay in the ground.^x

In the past decade, there has been a massive shift in federal government policy to adopt Alberta tar-sands development as Canada’s prime path for economic development. This shift in policy occurred in the absence of any significant public discussion as to whether it was in the public interest to pursue that shift, given the enormity of the climate change challenge.

The oil and gas industry had its private meetings with government, and that policy shift followed.

A recent study of lobbying efforts, [Big Oil’s Oily Grasp](#), prepared by the Polaris Institute, found:

Heavy lobbying by the oil and gas industry has far outstripped any other interest group seeking to influence the Harper government over the last four years.

... More than 2,700 meetings between oil and gas lobbyists and federal office holders since 2008 have helped turn Canada into a "petro state." [page 3]

Environmental non-governmental organizations (ENGOS), the groups most likely to question and oppose the fossil fuel industry, are almost completely invisible on the lobbyist registry compared to the companies profiled here.

Only eleven ENGOS were registered as lobbyists in the last four years, and only seven have logged communications in the last twelve months. Since July 2008, these

eleven ENGOs have collectively logged 485 communications reports, of which 116 were in the last year.

Only one of the eleven ENGOs has recorded communications with a minister in the last twelve months.

One way of quantifying the huge gap between the oil and ENGO lobby is to compare the lobby records of one of the largest environmental coalitions in Canada, the Climate Action Network (CAN), with that of the Canadian Association of Petroleum Producers (CAPP). Over the past four years, CAN has only logged six communications with DPOHs while CAPP logged 536.

The financial realities of these two organizations are in a different league with CAPP's membership including the richest companies in the world. [page 4]

This study was made possible only because lobbyists are now required to report some of their activities to the Federal Commissioner of Lobbying^{xi}

The limited public interest perspective that was brought to bear as a counter-point to private interests advanced by the oil and gas lobby was carried out in large part by charitable organizations.

In a similar situation, the private interests of the tobacco companies dominated public policymaking on tobacco control issues for many years. The tobacco industry nurtured a close relationship with government officials over decades^{xii} to forestall efforts led by health charities to reduce the health hazards of smoking.

On these issues, and many more, the public interest was, and is, overwhelmed by private interests' influence on government.

To begin to ensure the public interest is a prime consideration in government policy, charities should be allowed and encouraged to express themselves on matters of public interest, and to encourage public support for their views. And this should be without the constraints of the "10% rule," which at most is a confusing benchmark and at worst serves to muzzle charities.

6. Private Interests' Political Activities Are Virtually Unrestrained

Canadian businesses are encouraged to engage in political activities. Private businesses can deduct their advertising and lobbying expenses from their taxable income – a tax benefit roughly equivalent to the benefit given donors to charities. The Supreme Court of Canada [confirmed in 2002](#) that any expenditure by a tax-paying business that meets a two-part test is deductible from its income for tax purposes. The court stated^{xiii}:

Where the nature of an activity is clearly commercial, there is no need to analyze the taxpayer's business decisions. Such endeavours necessarily involve the pursuit of profit. As such, a source of income by definition exists, and there is no need to take the inquiry any further.

The rationale underlying this conclusion is that the purpose of a business is the pursuit of profit. In other words, as long as political advocacy by a business is in pursuit of profit, it is permitted to do anything, without further constraint or consideration by CRA.

On the other hand, the current narrow limits on charities' political activities (which flow from the CRA's oversight of charities for income tax purposes), severely constrain their ability to effectively advocate with governments for public policies that advance their charitable purposes.

We submit that political activities by charities should be treated in the same way that political activities by corporations are treated. Political advocacy by a charity related to its charitable purposes should be permitted without limit.

7. Recommendations

7.1 Allow political activities that advance charitable purposes

Activities that are related to a charitable organization's charitable purposes and can reasonably be expected to advance those purposes should be permitted without any quantitative limitations as to the expenditure of resources.

The relevant inquiry should be: is there a reasonable expectation that the political activities will further the charity's objects?

Charities should be free to influence government or public opinion insofar as the issues relate to the realization of the charity's own objects.

Charities should be able to advocate and oppose changes in law and public policy, including changes to legislation, provided that its advocacy is related to its charitable purposes.

Charities should be permitted to organize, promote or participate in a demonstration or direct action provided that it is part of a campaign that may reasonably be expected to further the charity's own purposes. Permitting such activities acknowledges that charities are involved in organizing and that these are legitimate forms of expression for charities in Canadian society.

7.2 Maintain the Prohibition on Partisan Political Activities

The prohibition of charities engaging in partisan political activities (direct or indirect support of, or opposition to any political party or candidate for public office) should be maintained.

However, charities should be allowed to analyze and comment on the proposals of political parties that relate to the charity's objects and purposes. Furthermore, a charity should be able to raise with all candidates issues that relate to the charity's own purposes, to seek the candidates' views on those issues.

7.3 Administration of Charities Shall Never Be Influenced by Partisan Politics

The Harper Government's abuse of CRA's authority to target charities should never be allowed to happen again. In the Mandate Letter to the Minister of National Revenue, Prime Minister Trudeau clearly recognized that charities should be free of partisan political influence:

“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. This will include clarifying the rules governing “political activity,” with an understanding that charities make an important contribution to public debate and public policy.”^{xiv}

It is apparent that the safeguards against political interference were insufficient to protect CRA from political influence. Those safeguards need to be reviewed and strengthened

This concludes our submissions. Thank you for the opportunity to comment on changes to the rules regulating the political activities of Canadian charities.

Yours truly,
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i ITA, para 149(1)(f)

ii *ibid*, s. 118.1

iii *ibid*, 149.1(1)(a).

iv *ibid*, 149.1(6.1) and 6.2

v *ibid* 149.1(2)(b), 149.1(3)(b), 149.1(4)(b)

vi *Bowman v Secular Society Ltd* [1917] AC 406

vii [1999] 1 SCR para 152

viii [2014] NZSC 106, para 3

ix [2010] HCA 42, para 47

x See [Oil sands must remain largely unexploited to meet climate target, study finds](#) Globe and Mail January 7, 2015

Acknowledging that, the Governor of the Bank of England has expressed concern that necessary action to curtail greenhouse gas emissions will lead to stranded fossil fuel assets:

As part of my opening remarks at a World Bank seminar on Integrated Reporting, I made reference to analysis suggesting that the majority of proven coal, oil and gas reserves may be considered 'unburnable' if global

temperatures increases are to be limited to 2 degrees Celsius. I also referenced, on the basis of this analysis, how this may lead to 'stranded carbon'.

xi The Polaris Institute report describes some of the loopholes in the Lobbying Act, starting at page nine

xii See [History of Tobacco Control in Canada](#), published by Physicians for a Smoke-Free Canada in 2009

This appears, at page 29:

Thus the Canadian Tobacco Manufacturers' Council was born in 1963. ... Throughout the next 40 years, the CTMC companies would employ as their senior officials or contractors people who had been or currently were strategically placed officials in the government, thus maintaining ready access to influence government policy in their favour.

At page 34:

Industry lobbying was so effective, they even managed to convince the Prime Minister to oblige his Health Minister to publicly apologize for unnecessarily harassing the tobacco industry

xiii *Stewart v Canada* [2002] SCC 46 at para 53

xiv <http://pm.gc.ca/eng/minister-national-revenue-mandate-letter>