

Charities

Charities need to tread carefully through new political activity rules

By **Daniel Frajman**

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(January 21, 2019, 9:14 AM EST) -- Imagine a situation where you are consulted by a charitable organization, or even a charitable foundation, that is working to find a cure for a particular genetic disease. That charity now asks you to submit on its behalf a request to the Canada Revenue Agency for permission to carry out additional research to support a change to provincial health care rules so that new experimental medical care for that disease would be covered by provincial health care plans.

You know that the additional research, given it seems meant to influence a governmental decision, will be seen as political by the CRA. Therefore, you know you have to review the rules as to permissible political activity by a registered charity. It is therefore important to be aware of the new political activity rules for charities that were just passed into law federally. This article will briefly review these new rules.

The federal government has been moving to amend (to make more permissive) the provisions of s. 149.1 of the *Income Tax Act* relating to political activity by registered charities, and the CRA's related administrative positions (in part in response to the Ontario Superior Court of Justice decision in *Canada Without Poverty v. Attorney General of Canada* 2018 ONSC 4147, presently under appeal, which held some of the provisions then in force to be unconstitutional).

The federal government did in fact pass new legislation on this on Dec. 13, 2018, but interpretive questions remain pending the future release of new CRA administrative positions.

The new rules have dropped the rule that a charity cannot use more than about 10 per cent of its resources on ancillary and incidental (i.e., secondary) non-partisan political activity, which is quite welcome.

The government had received a number of comments on earlier September 2018 draft legislation to the effect that the earlier draft appeared to be applying a common law (rather than statutory) definition as regards what actually constitutes political activity, and that this perhaps would give the CRA too much discretion in applying the definition. The government seems to have responded in the final legislation just enacted by dropping the common law definition of political activity and instead renaming the concept of political activity in this area as something called "public policy dialogue and development activity" of registered charities.

Although we do not yet have new CRA administrative guidance on what exactly public policy activity is and when it is permissible (although the CRA had promised new administrative guidance by the end of 2018), public policy activity does seem similar to political activity, given the following brief statement from the government in the explanatory notes to the bill that set out the December 2018 legislation: "Public policy dialogue and development activities of an organization generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country."

In a nutshell, a current reading of s. 149.1 of the *Income Tax Act*, as just amended, shows that the concept of charitable activity is replaced by public policy dialogue and development activity; the

abovementioned 10 per cent quantitative limit is gone; politically partisan activity remains prohibited; and, as mentioned three times or so in the newly amended s. 149.1, a charity's public policy activity is not a charitable activity per se but rather must further or support (i.e., presumably, must be ancillary, incidental or secondary to) one or more of a charity's other stated charitable purposes. Apparently imminent new CRA guidance should flesh this out to a greater or lesser extent.

The new legislation is therefore more welcoming to political (now called public policy dialogue and development) activity, but one must still tread carefully to assure the public policy activity remains supporting/in furtherance of/ancillary/incidental/secondary to another stated purpose in the corporate charter that is charitable. In other words, is the charity's public policy activity in support of one of its charitable purposes (acceptable), or is the public policy activity itself a purpose of the charity (unacceptable)?

As to whether the abovementioned hypothetical client's potential additional research is acceptable or not as public policy activity, it will have to be in support of the charity's other charitable purposes, and hopefully future CRA guidance will shed some additional light on how that is determined.

Daniel Frajman, dfrajman@spiegelsohmer.com, is a partner at Spiegel Sohmer Attorneys in Montreal. He practises corporate, business and tax law including the law of non-profit organizations and charities.

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