

Freedom to give

DANIEL FRAJMAN EXPLORES THE NEW RULES CONCERNING THE POLITICAL AND PUBLIC-POLICY ACTIVITY OF CHARITIES IN CANADA

CHARITIES HAVE HAD difficulty carrying out political activity¹ in Canada because the common law has raised doubt as to whether the public benefit of political activity can be measured.² After legislation on the matter was introduced in the jurisdiction in the mid-1980s, the Canada Revenue Agency (CRA) attempted to resolve the issue by taking the administrative position that a charity could devote up to 10 per cent of its resources to political activities, as long as none of its activities were politically partisan.³

However, in mid-2018, the Ontario Superior Court of Justice held that 10 per cent was an unreasonable limit on the freedom of expression.⁴ This resulted in new federal legislation implemented in December 2018 to amend the *Income Tax Act*⁵ to, in essence, permit charities to use as much of their resources as they want in order to carry out non-partisan political activities in pursuit of their charitable purposes.

A BRAND-NEW WORLD

While some have embraced this development, others have questioned whether charities and political activity are a good mix.

For example, one commentator has noted that the new rules may compromise the investigative freedom of researchers, who may now have to toe a political line; promote foreign funding of political advocacy that may be a concern to some and create situations where it is unclear as to whether impermissible partisanship has occurred.⁶

Whether positive or negative, these new rules bring with them a brand-new world of political activity and lobbying for Canadian charities and their supporters and beneficiaries worldwide. Interestingly, as part of the generally permissive nature of the new rules, the CRA has dropped its previous specific requirement that charities quantify in charity status applications and annual returns how much of their funding is meant for and spent on political or public-policy activity.⁷ In fact, the term 'political activity' has been dropped from the rules and replaced with the term 'public policy dialogue and development activity', which seems to have a more positive connotation.

On balance, the new rules increase the scope of charitable activity and appear welcome. For example, a foundation researching a cure to a disease can now also advocate for changes in the law or in government policy or decisions that facilitate research into, or improve, medical treatment.

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In this respect, the changes to the political activity rules for Canadian charities are a step forward, but the following are among the major caveats to keep in mind:

- Charities will have to review and, if necessary, tighten up their formal purposes to avoid vague and non-charitable content, given that the political activity must be in furtherance of otherwise charitable purposes of the organisation.
- Partisan political activity by charities remains banned.
- The CRA's draft guidance on the new rules⁸ is quite clear that other legal requirements outside of charity law must be respected, such as federal and provincial lobbying and election legislation.
- As regards lobbying, requirements for registration and transparency must be met; notably, unpaid lobbying work and the making of submissions on the public record are not subject to the registration requirements.
- For Canadian federal election rules, an organisation must register with Elections Canada if it will spend more than a minimum limit of CAD500 on election 'advertising'.

Indeed, it is an exciting and challenging time in Canadian philanthropy due to the new rules concerning the political and public-policy activity of charities.

SIG SPOTLIGHT 2019: MEETING THE CHALLENGES OF CROSS-BORDER GIVING

The Philanthropy Advisors Special Interest Group's Spotlight Session will be held on 22 November 2019, at the Hilton Bankside in London, UK. The breakfast session will explore the key issues and possible solutions related to cross-border giving, with particular reference to Canada, the EU, Hong Kong, Switzerland, the UK and the US. For more information, visit www.step.org/sigs

¹ Defined generally in Canada as seeking to influence the laws, policies or decisions of a government in Canada or anywhere else in the world; Department of Finance Canada, explanatory notes to 25 October 2018 legislation, clause 17, regarding 'public policy activities'. ² See *Bowman v Secular Society Ltd* [1917] AC 406 (HL) and *McGovern v AG* [1982] Ch 321. ³ Partisan in the sense of directly or indirectly supporting or opposing a political party or candidate for public office. ⁴ *Canada Without Poverty v AG Canada*, 2018 ONSC 4147. ⁵ Especially ss.149.1(6.1) and (6.2). ⁶ Jack Mintz, 'Alberta Panel Studying Foreign Funding of Environmentalists is Necessary', 11 July 2019, bit.ly/2m8e2Ve. ⁷ 'What's New' (CRA charities), 15 March 2019, at www.canada.ca. ⁸ 'Public Policy Dialogue and Development Activities by Charities', CRA draft charities guidance 27, 21 January 2019, at www.canada.ca.