

# BLUMBERGS

## **Sunny days for charities and political activities? But lack of transparency results in some clouds.**

By Mark Blumberg (January 28, 2016)

On January 20, 2016, the Minister of National Revenue announced that the political activities audit program of the Charities Directorate, which the Conservative government established in the 2012, will be wound down. This is good news for the charity sector.

The program was a disproportionate overspend by the Harper government to respond to a few Canadian charities conducting allegedly inappropriate political activities. You could say that there was no real need for the program. If people have a problem with five or 10 charities, these charities can be reviewed in the normal course as Canada Revenue Agency (CRA) audits approximately 800 charities per year. However, keep in mind that the political activities audit program, which would have run for about three years, was coming to the end and even the Conservatives had not allocated additional funding for its continuation.

Under the Income Tax Act, Canadian charities are allowed to conduct non-partisan political activities that are connected to their objects and utilize 10% or less of resources. That message, which has been repeated frequently by the Charities Directorate, was lost in many of the discussions of the issue.

While there is lots of blame to be placed on the Harper government for their zealotry and intransigence when it comes to charities and political activities there is also a bit that can be levelled against a small number of registered charities who did not understand the rules (or even read them), who were not transparent about political activities or at times were carried away by partisanship/hatred of the Conservatives. If you want to hate any political party my suggestion is use a base of a non-profit that is not a registered charity and don't misuse a registered charity for that purpose.

It was interesting that this press release from the Minister of National Revenue was essentially announcing/confirming what had been talked about over the last few months but it seems that every major newspaper covered it as a story. I cannot think of any CRA press releases about charities that received so much attention. I guess these are sunny days for the CRA communications department!

## **Independence**

Perhaps the most important paragraph in the release is “The independence of the Charity Directorate's oversight role for charities is a fundamental principle that must be protected. The Minister of National Revenue does not and will not play a role in the selection of charity audits or in the decisions relating to the outcomes of those audits.”

It would set an awful precedent if the Liberal government were to instruct CRA to audit or not to audit certain charities. So I am very pleased that the Liberals have reiterated this principle.

Although some partisans would say that Stephen Harper or the PMO controlled the list of charities to be audited there is no evidence of that. Also one of the best ways of determining whether the choice of charities was fair would be for CRA to release the complete list of charities that were audited under the program, but as I discuss under transparency below CRA is not allowed under the current rules to do so. Those who are concerned that the previous government did not respect the boundaries should be pushing the hardest for greater transparency.

## **Political Activity Audits**

The CRA notes that there was substantial compliance with respect to the political activity rules. “The results of the political activities audit program have shown substantial compliance with the rules regarding charities’ involvement in political activities. In light of these outcomes, the political activities program will be concluded once the remaining audits have been finalized.”

The release says that all of the five charities proposed for revocation "were primarily based on factors that were beyond their involvement in political activities".

As we will discuss below under transparency, I would argue that with the limited information in the public domain it is not possible for anyone to independently verify that there was “substantial compliance” or that the revocations were primarily based on factors other than involvement with political activities.

The rules are quite broad in terms of what they allow charities to do in the political realm but the above statements should be questioned.

The press release confirmed that all the charities have the right to appeal the revocation and presumably the charities are not only aware of that right but also exercising it. In other words, it is probably going to be judges at the Federal Court of Appeal or Supreme Court of Canada, and not the CRA or the Minister of National Revenue, that will be making the decision as to whether those charities will remain registered charities. As is always the case with the Russian roulette of going to court on an issue, it is very

plausible that the FCA or SCC will provide an interpretation that is narrower than what CRA currently provides in its guidance on political activities.

I can only imagine that the five groups that CRA has proposed for revocation will be upset with the content of this press release as at least one of them told me a few months ago that they think the Liberals will prevent CRA from following through with their revocation. Although I assured them that this is not likely to happen, they were pretty confident.

The 24 remaining audits that are already underway will continue.

There are an additional six charities that have been selected for audit that will "not be reviewed under the political activities program". It is not clear what this means. Will they not be audited at all? There is no commitment in the press release from CRA they will not be audited. They may or may not be audited but certainly will not be audited under the political activities program as it no longer exists.

## **Transparency**

I was very pleased to read "Our Government's commitment to openness and transparency includes providing more information on the regulation of charities to the public and the charitable sector in a timely manner and in ensuring the engagement of the sector." I look forward to seeing that greater openness and transparency.

This press release illustrates a number of problems with the charity regulatory system that the Liberals have inherited.

Unfortunately, CRA is forbidden from releasing the audit letters under the confidentiality provisions of the Income Tax Act (ITA) and NONE of the five charities have released the audits letters outlining what alleged non-compliance CRA was concerned with. Without some relatively straightforward changes to the ITA we will all have to be chumps for about the next five or 10 years not actually knowing what the true story is.

As noted above, the press release suggests that the charities were "substantially compliant" with the political activities rules and those 5 organizations slated for revocation were "primarily" being revoked for non-political activity reasons. That raises the questions of 'Who are the five charities?' 'What non-compliance were these five charities involved with that require revocation?' 'Why have none of the five charities released the revocation letters outlining what they've allegedly done wrong?' Why are Canadians not allowed to know the actual reasons why these five charities are being revoked? Ironically by the time the public is aware of the reasons we may be under a Conservative government again!

If you think it is important that there be greater transparency about abuse or alleged abuse of charities or the appropriate use of governmental power in the area of charities and political activities then having a new government operating under the same rules will not provide greater transparency. CRA will only release information that it is legally

allowed to release. I have requested hundreds of documents from CRA and almost always I am provided with the documents. The problem is not the Charities Directorate but the rules that govern them and specifically the confidentiality rules. Donors, funders, charities that care about the reputation of the charity sector should all be pushing for greater transparency.

We need to have greater transparency such that if charities are actually involved with significant non-compliance, the CRA has the ability to identify those charities publicly instead of waiting 5, 10 or 15 years to release some letters to the charity and only after revocation. Here is a recent submission that I wrote to the [Minister of Finance on greater transparency in the non-profit and charity sector](#). Here is a recent example of [disclosure by the Charity Commission of England and Wales when charities were conducting inappropriate political activities](#). Such disclosure is not possible under the current Canadian rules.

I believe that we need more than trust – we need verification. Charities are too important to our country to have such issues hidden behind secrecy provisions of the ITA. As long as the confidentiality provisions of the ITA prevent CRA from releasing information on charities, we will never be able to verify whether that trust is well placed. Unfortunately, unless Finance changes the confidentiality provisions of the ITA there will be no more transparency under the Liberals than there was under the Conservatives and that will be unfortunate.

The Liberals have committed that CRA will provide an annual report. This may provide greater transparency on the operations of the CRA, although I don't think it will provide any further help in relation to transparency around the Charities Directorate. The Charities Directorate already provides lengthy updates to the public with voluminous information.

## **Conclusion**

Charities need to be far more sophisticated in terms of government relations. Charities need to think about structural issues that might limit their flexibility to conduct political activities (as well as foreign activities and business activities). Now is the time to plan and restructure if necessary. The days of 'we will do everything with one structure or vehicle' are numbered for large or complicated organizations that want a high degree of flexibility.

They also need to invest in carrying out appropriate political activities. This means resources must be allocated, people must be hired, board members and staff need to understand the rules, etc. Charities need to be more proactive in political activities and not just lazily sign on to the position of another group.

The biggest test for the charity sector is going to be whether more of them conduct political activities and declare on their T3010 Registered Charity Information Return that they conduct political activities. It will be interesting to see if the 500 registered charities

who say that they conduct political activities will increase and the amounts that charities say they spend on political activities increase.

The news that there will be a process of consultation on the political activities guidance will be welcomed by the sector. I was dreading such a consultation under the previous government but I welcome it now. The sector needs to carefully consider how it wants to deal with political activities and unfortunately the biggest issue is not the “rules” but other more mundane matters such applying resources to political activities.

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Here is the text of the press release:

Minister Leboutheillier announces winding down of the political activities audit program for charities

January 20, 2016 Ottawa, Ontario Canada Revenue Agency

The Honourable Diane Leboutheillier, P.C., M.P., Minister of National Revenue, today announced the winding down of the review by the Canada Revenue Agency (CRA) of registered charities’ political activities.

Our government recognizes the critical role charities play in our society and their valuable contribution to public policy and public debate on behalf of all Canadians. To help them continue this important work, charities must be assured they are operating in a regulatory environment that respects and encourages this contribution.

The results of the political activities audit program have shown substantial compliance with the rules regarding charities’ involvement in political activities. In light of these outcomes, the political activities program will be concluded once the remaining audits have been finalized.

Our Government’s commitment to openness and transparency includes providing more information on the regulation of charities to the public and the charitable sector in a timely manner and in ensuring the engagement of the sector. In order to achieve this, Minister Leboutheillier also announced that the CRA will publish an annual report to provide the public with more information about its activities and its contribution to an effective regulatory framework for registered charities.

Minister LeBouthillier is committed to engaging with key stakeholders and has asked CRA's Charities Directorate to find ways to further clarify the rules governing a registered charity's involvement in political activities. Details of the consultations will be made public as they become available.

#### Quick facts

To date, of the 30 completed political activities audits, only 5 resulted in a determination to revoke registration, all of which were primarily based on factors that were beyond their involvement in political activities. Any charity that has had its registration revoked always has the right to appeal the revocation.

There are 24 more audits already underway and scheduled for completion. These audits will continue so that the CRA can address any serious deficiencies, consistent with the approach used in the regular charities audit program.

The six remaining charities that were selected for audit will not be reviewed under the political activities audit program.

The CRA registers charities under the Income Tax Act and monitors the sector to ensure registered charities continue to comply with the Act's requirements.

Charitable registration comes with privileges, such as issuing official donation receipts, and obligations, such as complying with the Act's requirements related to their involvement in political activities. The Act permits charities to carry out a limited amount of non-partisan political activities in support of their charitable purposes.

The rules regarding the political activities of charities have been in effect since 1985, and are outlined in the CRA's Policy Statement CPS-022, Political Activities, which was published in 2003.

Of the approximately 86,000 charities in Canada, about 500 report carrying out political activities on their annual information returns to the CRA.

As part of its regular audit program, the CRA audits approximately 800 to 900 charities every year.

#### Quotes

"The results of the political activities audit program have shown that the charities audited have been substantially compliant with the rules regarding their involvement in political activities. In light of these outcomes, the program will be concluded."

“The CRA conducts both educational efforts to help charities understand the rules of registration and audit activities to confirm compliance with those rules. This role is critical in ensuring Canadians’ charitable donations are used for charitable purposes.”

“The independence of the Charity Directorate's oversight role for charities is a fundamental principle that must be protected. The Minister of National Revenue does not and will not play a role in the selection of charity audits or in the decisions relating to the outcomes of those audits.”

“Our Government’s commitment to openness and transparency includes providing more information on the regulation of charities to the public and the charitable sector in a timely manner and in ensuring the engagement of the sector.”

- The Honourable Diane LeBouthillier, P.C., M.P., Minister of National Revenue

Associated Links

Policy Statement CPS-022, Political Activities (CRA)

Resources for charities about political activities (CRA)

Video Series: Charities and their participation in political activities (CRA)

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