

February 5, 2003

The Honourable Elinor Caplan - PC, MP
Minister of National Revenue
Connaught Building
7th Floor , 555 MacKenzie Avenue
Ottawa, ON
K1A 0L5

Dear Minister Caplan,

Re: 2002 Concept Draft – Registered Charities – Political Activities

We are writing in response to Canada Customs and Revenue Agency's invitation to comment on the above-cited draft recently posted on the CCRA Web site. We appreciate the opportunity to provide comments on the very significant issues addressed in the draft.

A. Background

IMPACS - the Institute for Media, Policy and Civil Society, and the Canadian Centre for Philanthropy, view Canada's existing restrictions on the participation of charities in public debate and public policy development as substantial impediments to the health of Canadian democracy.

With help from leading academics and charity lawyers from across Canada, we have examined the existing restrictions very carefully. We have also consulted with nearly 2000 charitable organizations and individuals active in the voluntary sector from all parts of Canada on this subject. Consequently, we feel very well-placed and well-informed to provide you and your staff with input on the draft.

B. Summary of Our Views:

The draft represents an incremental improvement over the present administrative guidelines published by the CCRA. However, it is fundamentally flawed because it must comply with the poorly drafted and unworkable language in sections 149.1(6.1) and 149.1(6.2) of the *Income Tax Act*. In our view, amendment of these troublesome provisions is essential in order to resolve the current problems faced by Canadian charities in this field.

C. The Critical Problem

The critical problem with the new draft is that it contains an irreconcilable contradiction. It recognises the importance and value of public policy input by charities, yet the new draft continues to substantially restrict charities in ways that are not justified in a modern participatory democracy.

The reason for this contradiction appears to be that the CCRA cannot, through administrative policy, overcome the ill-conceived language in the *Income Tax Act* that is the source of the problems in this field. The best the CCRA appears to be able to do is make incremental administrative changes that leave the basic restrictions intact.

The essential flaw with the *Income Tax Act* language is that it moves away from the established common law focus on charitable purposes, and shifts the focus instead to the concept of charitable activities. In England, where the common law principles prevail, it is an organization's purposes that determine whether it is a charity. Once registered, a charity may advance its purposes through lawful, non-partisan activities that are in its view, most efficient. The limitation on non-partisan "political" activity is that it must not become a charity's dominant activity.

Without the flawed language in the *Act*, this more sensible and workable approach would apply to Canadian charities. The common law approach would be a substantial improvement over the gymnastics of reasoning imposed on Canadian charities and their regulator by the *Act*. It would also be a move away from micro-management of charities by the CCRA, which carries out audits in search of violations of arcane requirements arising from the *Act*.

D. Incremental Improvements:

The draft contains modest improvements and clarifications, specifically:

1. **Greater Clarity:** The draft is more clearly written and better organized than earlier administrative guidance from the CCRA. The use of examples to illustrate points and distinctions is effective and helpful. The use of some new terms and definitions and the inclusion of the relevant provisions of the *Act* and extracts from the most recent case law are improvements. The draft removes some of the vagueness and uncertainty that have plagued charities. While areas of imprecision remain, this general increase in clarity is helpful.
2. **Expense averaging:** Allowing the averaging of restricted expenditures over 3 years clarifies a practical matter that is treated inconsistently in existing CCRA materials.
3. **Initiating contact with government:** The draft states that charities need not be invited by elected representatives or government officials before communicating with them about a needed change in law, policy or government decision. Expressly clarifying this point is helpful to charities.
4. **Releasing the text of representations:** Similarly, enabling charities, if certain conditions are met, to release to the public submissions made to government, is a step in the right direction.

E. Additional Problems:

In addition to the fundamental flaw described above, the new draft contains other problems:

1. “Calls to Political Action”:

The draft proposes that “calls to political action”(campaigns to pressure elected and public officials) by charities should be subject to limitation. It is clear from the draft that, at the end of the day, this is the perceived “problem” that the new guidelines and the relevant provisions of the *Income Tax Act* attempt to address.

Our view is that calls to political action by charities are not problems requiring limitations. Instead, they are an important and essential part of the public policy development process in an advanced participatory democracy. There is no principled justification or need to place limits on charities in this regard.

2. Communication:

The reference to “calls to political action” appears to be an attempt to narrow the category of activities by charities that are subject to limitation, and thereby increase the latitude for charities to contribute to public policy debate. Unfortunately, the way the draft is currently composed, it would limit much more than “calls to political action.”

Part 8 b) of the draft restricts an action by a charity that “explicitly communicates to the public that the law or policy or decision of any level of government, in Canada or a foreign country, should be retained, opposed or changed...”

In our view, communications of this type are substantially different from calls to political action, and should certainly not be restricted.

3. Retroactive Penalties:

We are very concerned about the provisions in section 9.2.1 of the draft that describe how the CCRA may unilaterally reclassify as “political” a charity’s earlier research, writing and public awareness activity on an issue. Section 9.2.1 provides that the CCRA might determine, for example, in the case of a charity’s purchase of a single billboard supporting a particular law or international treaty obligation, that all of the research, analysis, and report writing in the 12 months prior to the billboard purchase were also “political.” Activities that are clearly charitable could be tainted and reclassified as political well after the fact.

This approach would be arbitrary, subjective and punitive. Section 9.2.1 of the draft leaves too much discretion with the CCRA, and leaves charities with continued uncertainty and vulnerability to serious retroactive harm that is disproportionate to the transgression. This approach is not acceptable.

4. Definition of “Well-reasoned Position”:

The draft provides that communication by a charity with the public will be charitable if the charity’s position is “well reasoned.” The definition of this concept in the draft

places an excessive and unnecessary burden on charities and illustrates how the CCRA will descend into the minutia of a charity's activities in search of inconsequential transgressions.

Charities will be required to “present (i.e. address) serious arguments to the contrary...” and must not use “merely emotive language.” These requirements should not be imposed on charities. A well-reasoned position should not require the presentation of opposing views, nor should the writing style and choice of language be adjudicated by the CCRA. Charities do not need this level of direction or scrutiny. The definition of “well-reasoned” should end after requiring “factual information that is methodically, objectively, fully and fairly analysed.”

5. New Expenditure Limit Formula:

Part 11 of the draft creates a formula that defines the words “substantially all” from the Act differently depending upon the amount of resources a charity possesses. “Substantially all” will remain 90 percent for large charities, but will fall in steps to 88 percent, 85 percent or 80 percent for small charities.

This may appear to be an incremental improvement, but it is potentially complex and is clearly arbitrary, with no rational justification for these new steps or quantifications. We are also concerned that inconsistent administrative treatment of “substantially all” by the CCRA in different contexts may not withstand judicial scrutiny. A much better approach would be to treat all charities consistently by allowing them to engage in public policy debate and the policy making process so long as it is undertaken to advance their charitable purposes and does not become their dominant activity.

F: Conclusion

The draft includes some improvements over the present administrative guidelines published by the CCRA. But these modest improvements require contortions of reasoning in order to comply with the provisions of the *Income Tax Act*. Indeed, the draftpersons have done quite well under these circumstances.

The draft is fundamentally flawed because it was written to comply with the poorly drafted and unworkable language in Sections 149.1(6.1) and 149.1(6.2) of the *Act*. While the draft recognises the value of the voices of charities, it continues to restrict those voices on grounds that do not withstand close scrutiny.

We have attached to this letter a copy of a paper that identifies the weakness of the reasoning underlying the restrictions and examines the far more powerful reasons for change.¹ In addition to the fundamental flaw, the draft contains several specific lesser but important shortcomings.

In our considered opinion, amendments must be made to section 149.1 of the *Income Tax Act*. Proposed new language is also attached to this letter. These minor legislative corrections would

¹ The attached paper examines the tax policy and fiscal impact justifications for the existing restrictions on charities, and shows their inadequacy. It also addresses the principled and more compelling arguments for greater latitude for charities, organized under six headings: 1) Problem-solving and Innovation; 2) Civic Engagement; 3) Public Interest Voices; 4) Voices from the Margin; 5) Freedom of Expression; and 6) Public Opinion. Reference is also made to practices in other countries, for most other advanced democracies provide greater latitude or are undertaking reforms that will remove existing impediments.

allow the new policy to be redrafted in a way that is genuinely consistent with the values and principles of modern participatory democracy.

Amendment of the *Act* would also be consistent with the views expressed by the majority of the approximately 700 charities and other participants in our National Dialogue on this issue in the fall of 2001. Eighty-seven percent of the participants who completed an opinion survey were of the view that legislative correction was the way to resolve the current problems.

Charities should be encouraged to contribute their knowledge and passion to help solve problems and improve public policy decisions. So long as “political activity” of this kind is related to a charity’s purposes and does not become a charity’s dominant activity, it should be part of what a charity may do to strengthen communities and democracy in Canada.

Finally, we encourage you to consider creating a new, modern legislative definition of “charity” to replace the existing categories of charity that flow from the *Statute of Elizabeth, 1601*, and case law from Victorian England. Australia and England are moving in this direction, and similar improvements are long over due in Canada.

Should you have any questions, please do not hesitate to contact us at (604) 682 – 1953. Many thanks for your consideration to our letter. We are looking forward to hearing from you.

Sincerely yours,

Shauna Sylvester
Executive Director
IMPACS

Gordon Floyd
Vice-President of Public Affairs
Canadian Centre for Philanthropy

Cc: Maureen Kidd, Director General, Charities Directorate, CCRA
Stephen Richardson, Sr. Assistant Deputy Minister, Tax Policy, Dept. of Finance