



Submission of Voices-Voix
to the
Canada Revenue Agency's
online consultation on charities' political activities

Dec. 13, 2016

This is the submission of the Voices-Voix Coalition following the public invitation of the Canada Revenue Agency (CRA), in collaboration with the Department of Finance, to clarify the rules governing political activities and to provide feedback from charities and the public.

Background

On January 20, 2016, the Minister of National Revenue, Diane Lebouthillier, announced the winding down of the enhanced political activities audit of charities program that had begun in 2012 under the Conservative government. In her January statement, the Minister recognized “the critical role charities play in our society and their valuable contribution to public policy and public debate on behalf of all Canadians” and stated that “charities must be assured they are operating in a regulatory environment that respects and encourages this contribution.” We agree and welcome the chance to participate in this consultation.

The Voices-Voix Coalition was one of many organizations that had expressed concern over the way in which enhanced political activities audits, as well as problematic restrictions on organizations seeking charitable status, had been conducted. Voices-Voix has called on the federal government to halt or suspend the ongoing political activities audits begun under the Conservatives and reform the regulatory environment so that the special or enhanced special political activities audits begun by the previous government would not be used to limit fundamental freedoms. The widespread confusion around what is permissible and what is not led to a chill in the non-profit sector overall. Charities especially began to question what work they could still do, given that well-known organizations with charitable status were now being told by CRA that their work was no longer considered charitable, sometimes after decades, and that their missions suddenly contravened charity regulations. New groups considering application for charitable status either decided not to apply, or were informed that they would need to change their mission to such a degree that it no longer made sense to apply.

A few of the cases we have documented include:

- [Environmental Defense](#)
- [Alternatives](#)
- [PEN Canada](#)

- [United Nations Platform for Action Committee](#)

We have also published an in-depth case study examining the political activities audits, and their impact on charities, here: <http://voices-voix.ca/en/facts/profile/canadian-charities-and-canada-revenue-agency>. Our full list of case studies on the topic can be found [here](#).

We respectfully submit that a new regulatory framework is needed. It should be underpinned by a broader policy objective which we believe is fundamental to the health of the non-profit sector in Canada and of progressive organizations working in the public good. In order to enhance the capacity and contributions of this important sector, Canada should develop an **enabling environment** for civil society organizations, including the charitable sector.

We agree wholeheartedly with the Minister’s message that we must work together “to maintain a fair system that respects and encourages the essential contribution” of charities. We believe that this essential contribution includes charities’ ability to provide in-depth, accurate information to the public on important policy debates as well as carrying out advocacy work that advances policy in the public interest in a manner that aligns with an organization’s charitable objects.

A government-wide policy of fostering an enabling environment

Civil society provides much of the social infrastructure that binds us together, and charitable organizations form a significant part of that infrastructure in this country. Despite the important role played by these organizations in Canada, chronic underfunding, incoherent and restrictive regulatory frameworks, rhetorical attacks from government officials (notably under the previous Conservative government), and new challenges to both the constitutionality of the political activities guidelines and the underpinning legislative framework used by the Charities Directorate in Canada, all point to the need for a new approach.

The idea of an enabling environment and its role in supporting the nonprofit sector is not new. Since the 1990s, the international search for ‘what works’ to support the rule of law, and global governance goals such as sustainable development, has been influenced by the emergence of the idea of an ‘enabling environment.’ It recognizes that policies and programs can fail for reasons other than their merits or the capacity of organizations responsible for delivering them.¹ External factors such as legal and policy frameworks, social attitudes, and shifting political priorities can determine the success or failure of policy interventions. The idea of an “enabling environment” has therefore emerged to provide a shared platform from which we can assess the factors that suppress CSOs’ work as well as those that actively help civil society to thrive.²

¹ Brinkerhoff, D. W. and A. A. Goldsmith “Promoting the Sustainability of Development Institutions: A Framework for Strategy” (1992) *World Development* 20(3) 369.

² See *State of Civil Society 2013: Creating an enabling environment*, CIVICUS World Alliance for Citizen Participation (2013) [CIVICUS], online at <http://socs.civicus.org>

Internationally, organizations like CIVICUS have sought to develop this concept. CSOs have been experiencing significant restrictions on their ability to function and even survive. In 2013, Mr. Maina Kiai, UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, described the "shrinking space" for advocacy and the exercise of basic freedoms around the world for CSOs.³

We believe that the work of civil society organizations, and charitable organizations in particular, can be supported by enabling them to contribute more effectively to the democratic project. The idea of an enabling environment serves as a catalyst to foster public spaces where civil society can fulfil its role as transformative, productive, and innovative, building on an idea that has emerged globally.

A broader and more expansive vision of what civil society can accomplish in a robust democracy that values dissent and protects human rights is a nonpartisan project.

An enabling environment is postulated as one that values diverse voices and gives "breathing space" to CSOs to do their best work, within the framework of the Canadian Charter of Rights and Freedoms and international human rights law. It serves as a platform for the federal government to rebuild relationships with the charitable sector and strengthen the normative framework for CSOs, including the charitable sector.

In Canada, even authors who have limited sympathy for the claims of civil society on government admit that civil society has been exhibiting signs of distress.⁴ While the 'advocacy chill' is associated in the public mind with the enhanced political activities audits under the previous Conservative government, the origins of financial and structural strains have been sustained or exacerbated under successive governments over many decades. The regulatory environment for charities in particular is complex, even incoherent, according to legal experts who have called for reforms since at least the 1990s.⁵ There has been little political will to confront these issues, to clarify the regulatory framework, or – as Kathryn Chan has noted in her recent book on the topic – to resolve the tensions about whether charitable entities should be regulated by private or public law.⁶

³ Interview with Maina Kiai, Special Rapporteur on Freedom of Peaceful Assembly and of Association (McGill University, October 23, 2013), Online: Voices-Voix Video series: YouTube: <https://www.youtube.com/watch?v=FpoaQI5U9Gs>. See Voices-Voix, *Workshop on Civil Society: Dissent, Democracy, and the Law* (Montreal, October 13 2013) < <http://voices-voix.ca/en/document/workshop-civil-society-dissent-democracy-and-law>>.

⁴ See Ramanujam and Gorvie, "Shifting Ground, Solid Foundations: Imagining a New Paradigm for Canadian Civil Society Engagement" (2015) 32 Windsor Y B Access Just 141, 142.

⁵ See, notably, D. Stevens, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1996).

⁶ Kathryn Chan, *The Public-Private Nature of Charity Law*, (Hart Bloomsbury 2016).

Why change?

We believe that there are at least three reasons for changing the current regulatory framework.

First, the current rules are unclear, confusing, and have led to self-censorship among charities active in public policy work. The limit of 10 percent (more in certain cases) related to “political activities” is vague, arbitrary and misleading. The definition of political activities is open to interpretation, as demonstrated in the events between 2012 and today, and subject to the vagaries of political climate, and of perceived political pressures on CRA auditors.

We have seen this play out in cases where audits of organizations, just a few years apart, have resulted in completely contradictory findings. The lack of clarity goes beyond the 10 percent rule, though, as a result of:

- Long-standing, well-known charities were suddenly advised that their mandates are not actually charitable
- Contradictions between what is expected of international development charities by Global Affairs Canada and the CRA (particularly in direction and control)
- Ambiguity and lack of clarity in the rules, resulting in a restrictions on free expression and on the important work of these organizations

Second, the definition of what constitutes a charitable purpose and charitable activities are rooted in the 17th century and the *Pemsel* case; current regulations have not been meaningfully updated since 1985. Much has changed regarding how Canadians view charities and the work that is expected of them in the past three decades, let alone in the past four centuries. Like other jurisdictions – including the UK, Australia and New Zealand, all of which share the same common law roots in their charitable sectors – it is high time that Canada update its legislative framework.

Third, a 2013 survey [showed](#) 94% of Canadians believe charities should speak out on important issues, like the environment and healthcare. And yet, this advocacy work is still viewed as political activities, and is generally prohibited outside the 10 per cent restriction.

Like others, we are calling for a legislative solution to this issue. A new law that creates a framework for charities would allow for more clarity, and would also update the out-dated definitions of charity that persist in the law, but which no longer reflect the opinions of Canadians.

Recommendations

We believe a new legislative framework should promote an enabling environment by:

1. Ending the use of the misleading term “political activities”, which the majority of the public appears to believe means partisan activities in the sense of political parties or

explicitly political activities. Understood this way, it is entirely foreseeable that many people would oppose the elimination of political activities restrictions.

2. Concurrently, expanding the definition of “charity” or, preferably, the introduction of a more modern term that reflects the public good that is performed by charitable organizations in modern society and that recognizes its broader value through additional public good/charitable goals.
 - a. A broader definition would explicitly encompass a wider range of contemporary issues, that include, without limiting the generality of the suggestions, human rights, sustainable development and environmental concerns, public interest litigation, indigenous rights, the relief and alleviation of poverty, economic inequality, capacity building for the non-profit sector, immigration and refugee services, youth, rule of law and crime prevention, and women’s equality, all of which would be considered, understood and implemented within the framework of the Canadian Charter of Rights and Freedoms, human rights legislation, and international law, including international human rights law;
 - b. Permit, without restriction (save for those restrictions that are consistent with constitutional, human rights and International Law), advocacy activities, including public awareness and public litigation activities, provided that they are aligned with the organization’s charitable mission and/or the public interest. In particular, the concept of “political purposes” and charitable purposes should not be mutually exclusive and the blanket exclusion from charitable status due to political purposes in excess of 10 per cent should no longer be valid or enforced. Advocacy, as long as it is for a public good, should not disqualify a group from being a charity.⁷ To ensure that there is no restriction on legitimate expression, any legislative limits on advocacy should be interpreted restrictively; similarly legislative language permitting advocacy should be interpreted in a broad and purposive manner.
3. Consistent with the previous section, ensure charities should be free to choose the most effective approaches to achieve their purposes unless an activity is expressly prohibited by law.

In addition, we believe the following legislative and regulatory changes should be considered as part and parcel of a sectoral review.

4. Develop a new institutional framework including an independent and arm’s-length commission or agency that is responsible for determining which non-profits are charitable/public good organizations. Such determinations and decisions should apply to

⁷ See, e.g. *Re Greenpeace Of New Zealand Inc* (SC 97/2012) [2014] NZSC 105

all of government, including the CRA, subject to administrative reviews or judicial reviews that may be provided for by law. This would effectively remove decision-making regarding charitable status from the CRA, minimizing the opportunity for politicization and misuse. This option would require the engagement of the provinces.

5. Explicitly protect the free speech of charities, by clarifying that charities can be constituted and operated to:
 - a. raise awareness of, or advocate for, a particular perspective or approach to achieving charitable purposes;
 - b. advocate for a change in a government decision, policy or law related to achieving charitable purposes;
 - c. take a position on an issue or policy related to their charitable purposes, regardless of whether a political party or candidate for public office has also done so, and,
 - d. report or comment on a policy or position, or proposed policy or position, of any level of government related to a charity's purposes, regardless of whether such policy or position is in writing or expressed by a named elected official before or after his or her election to office.
6. Any new legislation should continue to restrict charities' participation in partisan politics and electoral processes, including *direct* participation by a charity in an electoral campaign on behalf of (or in opposition to) any political party or candidate for public office, and not be used to limit the free speech of charities as set out above.
7. People should be actively encouraged to make charitable donations as a form of valuable public participation, no less valuable than contributions to political parties. Charitable tax credits for charitable donations should be that same value as tax credits that are offered for partisan political donations.
8. Expand the Mandate of the Federal Business Development Bank to include affordable capacity building, support, business planning and other consultancy services for the not-for-profit and charitable sectors to foster innovation and the sector's contribution to both the public good in Canada's economy.

Finally, if it is true that the enhanced political activities program introduced and promoted by the previous government was politicized, as the Liberals asserted in the 2015 campaign, it is highly problematic that the current audits should continue. We recognize that political interference should be unacceptable in all circumstances, but in cases where regulatory or administrative

proceedings are demonstrably politicized or inappropriate from the outset, there should be little hesitation in at least suspending the ongoing political activities audits on a no prejudice basis.

About Voices-Voix

Voices-Voix is a non-partisan coalition of Canadians and Canadian organizations. We support a strong enabling environment for civil society organizations in Canada, robust democratic traditions, and Canadians' collective and individual rights to debate and dissent.

The coalition was founded in 2010 in response to unprecedented federal funding cuts to CSOs and measures that targeted progressive organizations and eroded our democratic foundations.

More than 230 organizations [subscribed](#) to the Voices-Voix Coalition by endorsing our first [Declaration](#). [Over 5,000 Canadians signed on as well](#).

In May 2016, we launched an updated declaration following the general election, renewing our call for government action to protect dissent and strengthen democracy in Canada and for the Liberal government to fulfill its campaign promises.

Voices-Voix is stewarded by a small group of volunteers including human rights lawyers and representatives of the [organizations in the coalition](#).

We curate and publish case studies and reports published at www.voices-voix.ca by the national Research Network on Dissent Democracy & the Law (DDL), bringing together noted scholars and practitioners from several disciplines, publishing peer-reviewed case studies and reports that can be found on the Voices-Voix Documentation Project. The [Editorial Board](#) peer reviews submissions and case studies, which can be seen at <http://voices-voix.ca/en/facts>.

Voices-Voix works closely with both charitable and non-charitable organizations, and have witnessed firsthand the significant impact that the special political activities audits have had on a variety of organizations.

We welcome any follow-up questions or comments. You can reach the Voices-Voix Coalition at communications@voices-voix.ca.