

## **CRA DRAFT GUIDANCE ON THE PROTECTION OF HUMAN RIGHTS AND CHARITABLE REGISTRATION**

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*By Terrance S. Carter\**

### **A. INTRODUCTION**

On May 8, 2009, the Charities Directorate of the Canada Revenue Agency (“CRA”) released a draft policy document entitled *Consultation on proposed Guidance on the Protection of Human Rights and Charitable Registration* (the “Draft Guidance”).<sup>1</sup> The purpose of the Draft Guidance is to provide guidelines for determining whether or not an organization that is established to protect human rights can be registered as a charity under the *Income Tax Act (Canada)*.<sup>2</sup> As such, the Draft Guidance is highly relevant to human rights organizations that are considering charitable registration, as well as existing charities that engage in the protection of human rights.

In general terms, organizations that are seeking to become registered charities must have purposes that are considered, at law, to be charitable and for the benefit of the public. At common law, it has been established that there are four categories under which a charitable purpose must fall: the relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community not falling under the

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<sup>1</sup> Canada Revenue Agency, *Consultation on proposed Guidance on the Protection of Human Rights and Charitable Registration* (May 6, 2009), online: <http://www.cra-arc.gc.ca/tx/chrts/cnslttns/ghrg-eng.html>.

<sup>2</sup> R.S.C. 1985, c. 1 (5th Supp.).

first three categories.<sup>3</sup> These categories are commonly known as the four heads of charity, and at common law, a charitable purpose that falls under one of the first three categories is presumed to be for the public benefit, while the fourth category must be demonstrated to be for public benefit.<sup>4</sup>

Previous guidance from CRA on this matter was in the form a brief 2003 Summary Policy on Human Rights,<sup>5</sup> which is to be replaced by the final version of the Draft Guidance. The Summary Policy consisted of only a brief statement explaining that charities cannot promote legislation, which would constitute a political purpose, but could conduct and disseminate research regarding the maintenance and observance of human rights, which would fall solely under the category of advancement of education. The Draft Guidance significantly broadens the scope of acceptable charitable purposes by providing guidelines on how the protection of human rights may be properly characterized as advancing all four heads of charity. Charities that have as one of their purposes the protection of human rights must therefore ensure that such purpose fits within one of the four heads of charity. This *Charity Law Bulletin* summarizes the content of the Draft Guidance and its importance to current and prospective charitable organizations in Canada.

## B. BACKGROUND AND PRELIMINARY ISSUES

The Draft Guidance emphasizes the fact that the protection of human rights is a nationally and internationally significant issue of public policy, as demonstrated by the entrenchment of the *Canadian Charter of Rights and Freedoms*<sup>6</sup> in the Canadian Constitution, numerous provincial and territorial human rights legislation,<sup>7</sup> and various international conventions and treaties.<sup>8</sup> The Draft Guidance also states that Canadian jurisprudence has indicated that the protection of human rights can be a charitable purpose, such as the case of *Action by Christians for the Abolition of Torture (ACAT) v. The Queen*,<sup>9</sup> in which the court stated that an organization with the purpose of abolishing torture is, on its face, a charity.

<sup>3</sup> *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.).

<sup>4</sup> *National Anti-Vivisection Society v. I.R.C.*, [1948] A.C. 31. See also Canada Revenue Agency, *Policy CPS-024, Guidelines for Registering a Charity: Meeting the Public Benefit Test* (March 10, 2006), online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-024-eng.html>.

<sup>5</sup> Canada Revenue Agency, *Summary Policy CSP-H08, Human Rights* (September 3, 2003), online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-h08-eng.html>.

<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>7</sup> See, for example, Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>8</sup> See, for example, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>9</sup> 2002 FCA 499.

The Draft Guidance establishes a clear definition of what constitutes “human rights”, which are those individual rights and freedoms acknowledged, within their prescribed limitations, in the following legal instruments:

- *Canadian Charter of Rights and Freedoms*;
- *Canadian Bill of Rights*;
- *Canadian Human Rights Act*;
- Provincial and territorial human rights legislation;
- Those parts of the United Nations’ *International Bill of Human Rights* that are binding on signatory countries under international law and that Canada has ratified, which includes:
  - The International Covenant on Civil and Political rights (including its First and Second Optional Protocols);
  - The International Covenant on Economic, Social and Cultural Rights; and
- All other multilateral human rights treaties to which Canada is a party,<sup>10</sup> which include:
  - United Nations Conventions, Covenants, and Protocols;
  - International Labour Organization Conventions;
  - Organizations of American States Conventions; and
  - Geneva Conventions and Protocols.

Other human rights instruments may also be included in this definition, provided that the relevant portions of the instruments are “sufficiently similar” to the human rights that are established in this list, but no further explanation is provided regarding what might be considered to be sufficiently similar.

The “protection of human rights” is defined in the Draft Guidance as “activities that seek to encourage, support, and uphold human rights that have been secured by law, internationally or domestically.” It is expressly stated that the protection of human rights does not include advocacy for new legal rights at any level, both nationally and internationally.

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<sup>10</sup> For a complete list of such treaties, see Canadian Heritage, “Multilateral human rights treaties to which Canada is a party”, online: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/treat-trait/index-eng.cfm>.

### **C. DETERMINING ELIGIBILITY FOR CHARITABLE REGISTRATION**

The Draft Guidance outlines a number of general considerations that affect an organization's eligibility for charitable registration. In order to be registered as a charity, an organization must have exclusively charitable purposes, and must describe the activities it will conduct to achieve those purposes. A registered charity must operate to provide a tangible benefit of the public, and any private benefit must be reasonable, necessary and incidental. This requirement is particularly important for charities that are not categorized under any of the first three heads of charity (relief of poverty, advancement of education and religion), which are generally presumed to be for the public benefit. A corollary consideration is whether or not there are any restrictions to the charity's provision of the public benefit, which will generally be permitted if available to a sufficient segment of the public. Lastly, registered charities are reminded that they must comply with Canada's anti-terrorism legislation, which may be pertinent for human rights charities that often work in an international context.

Several of these considerations are particularly tailored to apply to the context of human rights charities. When applying for registration, the Draft Guidance explains that human rights organizations should set out its charitable purposes and activities by specifying (1) the source or concept of human rights that will be applied to their activities; (2) the specific location, country, or range of countries in which each activity will be carried out; and (3) a detailed description of all the present and proposed activities they plan to undertake to fulfill their purposes.

According to the Draft Guidance, the public benefit of protecting human rights may be intangible, but will still be considered to be for the benefit of the public because of the clear general consensus that it is a benefit, as evidenced by the vast array of domestic and international legal instruments that have the purpose of protecting human rights. Moreover, CRA recognizes that the breadth of human rights issues means that a charity's focus on particular issues, geographic regions or vulnerable groups should be acceptable as long as the restriction of the public benefit is justifiable.

### **D. HUMAN RIGHTS AND THE FOUR HEADS OF CHARITY**

The Draft Guidance provides specific examples of how the protection of human rights could further each of the four heads of charity. Although each head of charity is addressed separately, it is certainly possible that a charity's purposes could involve more than one category.

## 1. Relief of Poverty

This category generally involves the provision of the necessities of life, such as food, clothing and shelter, or amenities that are generally taken for granted. According to the Draft Guidance, the relief of poverty also includes the relieving of human suffering and distress, as established in *McGovern and others v. Attorney General*.<sup>11</sup> In this regard, human rights charities can engage in the relief of poverty by providing for the needs of people whose human rights have been infringed upon. The Draft Guidance provides a number of examples of how human rights charities may relieve poverty, such as:

- operating shelters to provide housing and basic necessities for victims of human rights abuses;
- providing psychological counselling for victims of human rights abuses; and
- establishing legal clinics for the poor, to ensure their access to legal protection and remedies as provided by existing human rights legislation.

## 2. Advancement of Education

According to established case law referenced in the Draft Guidance, the advancement of education, as a charitable purpose, means training the mind; advancing the knowledge or abilities of the recipient; raising the artistic taste of the community; or improving a useful branch of human knowledge through research. The basic purpose under this head of charity is to increase human knowledge, which must be achieved through a structured attempt at education, a clear teaching or learning component that is available to students and the general public, and must not be intended to promote a particular point of view. The Draft Guidance provides a number of examples of how human rights charities may advance education, such as:

- conducting research and analyses of laws, institutions, and practices affecting the protection of human rights;
- preparing and disseminating academic reports on issues related to the protection of human rights;
- supporting the development of university courses and educational materials for those courses on human rights, and holding conferences/workshops for students and faculty to further their education as it relates to human rights issues; and
- providing scholarships for students doing graduate work on the subject of human rights.

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<sup>11</sup> [1981] 3 All E.R. 493 at 503.

### 3. Advancement of Religion

The advancement of religion as a charitable purpose involves promoting and manifesting the doctrines, observances, and practices of a religion. Human rights charities may advance religion by clearly establishing the connection between the doctrines of the religion that support human rights, and the purposes/activities of the charity. The Draft Guidance provides a number of examples of how human rights charities may advance education, such as:

- preparing faith-based resources on the protection of human rights for use in places of worship and other religious organizations;
- preaching about the protection of human rights in places of worship;
- preparing worship materials and special liturgies on the protection of human rights;
- holding workshops, seminars, and study sessions on issues related to the protection of human rights as they are expressed in the sacred texts; and
- providing spiritual counseling and pastoral care for victims of torture and other human rights abuses.

### 4. Other Purposes Beneficial to the Community

The fourth head of charity provides for charitable purposes that do not fall under the first three heads, and there are many ways in which human rights organizations may be charitable in this regard. The Draft Guidance identifies that human rights organizations may often have purposes that are already recognized under the fourth head, including: (1) mental and moral development of the community, such as promoting awareness of the protection of human rights; (2) upholding the administration and enforcement of human rights law, such as monitoring and reporting on the fulfillment of human rights obligations by various treaty signatories; and (3) preserving human life and health, such as protecting victims of human rights abuses.

## **E. THE IMPORTANCE OF UNDERSTANDING POLITICAL PURPOSES AND ACTIVITIES**

### 1. Political Purposes

Under the *Income Tax Act* and at common law, organizations cannot be charitable if they are established for a political purpose. As such, the Draft Guidance emphasizes the fact that charities

engaged in protection human rights will often need to work outside of existing political and legal structures, and therefore must ensure that the charitable purposes are not political as well.

The following is a list of examples of political purposes mentioned in the Draft Guidance:

- To further the interests of a particular political party;
- To support a political party or candidate for public office;
- To retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country; and
- To engage in pressure tactics on governments such as swaying public opinion, promoting an attitude of mind, creating a climate of opinion, exercising moral pressure, when the aim of those tactics is to obtain a change or prevent a change in the laws and policies of the legislatures and governments.

Therefore, human rights charities will have political purposes if they undertake purposes such as lobbying governments to amend human rights law or to sign a particular treaty. On the other hand, the purpose will not be political if the charity is simply investigating and reporting human rights violations of existing legislative instruments.

The Draft Guidance provides further guidelines for charities that seek to operate internationally, cautioning that the concept of “political purposes” is not universal. For example, the death penalty is not uniformly accepted or rejected as a human rights abuse in every country, and therefore, advocacy against the death penalty may be political in nature in some countries and non-political in others.

## 2. Political Activities

While political purposes are always impermissible, CRA recognizes that human rights charities may engage in some non-partisan political activities that support that charity’s purposes. A charity may do so only under two conditions. Firstly, the charity must devote substantially all of its resources to its charitable activities. This means that no more than 10% of a charity’s resources can be used for political activities (this is extended to 20% for smaller charities). Secondly, the political activities must be connected and subordinate to the charity’s purposes.

These parameters indicate that a human rights charity can actually engage in activities, such as pressuring governments towards legislative change, if the activity falls within the said acceptable limits. For example, an allowable political activity could involve placing an advertisement in a newspaper to pressure the government on a particular human rights law, provided that this is connected and subordinate to the charity's primary activities. On the other hand, publishing advertisements that praise or denounce a certain politician or political party regarding their position on human rights would be unacceptable.

## F. CONCLUDING COMMENTS

The Draft Guidance provides existing charities and applicant organizations with far greater clarification of the relevant issues and considerations in protecting human rights. Although there are obvious difficulties in distinguishing between permissible and impermissible political activities, the examples provided in the Draft Guidance indicate that charities will have a general practical framework to assess the suitability of their activities. Both existing and potential registered charities with an interest in protecting human rights are encouraged to examine the Draft Guidance to ensure that their purposes and activities are considered to be charitable from the perspective of CRA.<sup>12</sup>

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<sup>12</sup> Interested parties of human rights charities should be aware that CRA is currently accepting comments regarding this Draft Guidance, and comments will be accepted until July 31, 2009. Further information on this consultation, as well as the full text of the proposed policy, can be found at <http://www.cra-arc.gc.ca/tx/chrts/cnslttns/ghrg-eng.html>.