
ONTARIO DECISION IS A GAME CHANGER FOR CHARITIES AND POLITICAL ACTIVITIES

*By Jennifer M. Leddy and Terrance S. Carter**

A. INTRODUCTION

On July 16, 2018, in a decision, *Canada Without Poverty v AG Canada* (“CWP Decision”),¹ that impacts all Canadian registered charities, the Ontario Superior Court of Justice struck down the provisions of the *Income Tax Act* (“ITA”) restricting the amount of non-partisan political activities that registered charities may undertake on the grounds that the provisions infringed the charity’s right to freedom of expression guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms* (“Charter”).²

The Government has appealed the CWP Decision, citing errors of law. Irrespective of the outcome of the appeal, the decision will have a significant impact on the public advocacy of charities for changes in law and policy because the Government has indicated in a joint statement by the Minister of Revenue and the Minister of Finance on August 15, 2018 that the appeal will “not change the policy decision the Government intends to take with respect to the removal of quantitative limits on political activities.”³

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¹ 2018 ONSC 4147 [“CWP Decision”].

² Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

³ Department of Finance Canada, “Statement by the Minister of National Revenue and Minister of Finance on the Government’s Commitment to Clarifying the Rules Governing the Political Activities of Charities” online: Government of Canada <<https://www.fin.gc.ca/n18/18-072-eng.asp>>.

Although a full review of the court's *Charter* analysis is beyond the scope of this *Charity & NFP Law Bulletin*, what follows is a brief summary of the court's findings in the CWP Decision, as well as the Government's undertaking to amend the legislation and policy on political activities.

B. BACKGROUND

The charitable purpose of the applicant charity, Canada Without Poverty ("CWP"), is to relieve poverty. It achieves this through activities such as non-partisan public advocacy, civic engagement and public dialogue in order to bring about changes in the law and policy, as well as a general attitudinal shift towards poverty.

Subsection 149.1(6.2) of the ITA states:

For the purposes of the definition charitable organization in subsection 149.1(1), where an organization devotes substantially all of its resources to charitable activities carried on by it and

- (a) it devotes part of its resources to political activities,
- (b) those political activities are ancillary and incidental to its charitable activities, and
- (c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

The Canada Revenue Agency ("CRA") policy on the interpretation and enforcement of the political activities rules generally divides political activities into two subcategories: communicating with elected representatives or public officials, and calls to the public for political action to change laws and policies.⁴ The CRA considers activities under the first category to be charitable and therefore not subject to the political activities restrictions under subsection 149.1(6.2) of the ITA, provided that they are connected to and subordinate to the charity's purpose. On the other hand, calls for political action are subject to the "substantially all" rule under paragraph 149.1(6.2),⁵ which the CRA interprets to mean that charities cannot devote more than 10% of their resources to political activities, such as public advocacy.

⁴ Canada Revenue Agency, "CPS-022, Political Activities", online: Government of Canada <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html>>.

⁵ *Supra* note 1 at paras 6-7.

In the course of an audit of CWP, the CRA took the position that virtually all of CWP's resources were dedicated to political advocacy of law and policy changes to alleviate poverty, meaning that their resources were not substantially all devoted to charitable activities. CWP's constitutional challenge arose out of this audit.

CWP argued that the CRA's interpretation of "substantially all" created an arbitrary 10% ceiling that restricted CWP's freedom of expression under section 2(b) of the *Charter*, and made it impossible to achieve its charitable purpose of relieving poverty. It also argued that paragraphs 149.1(6.2)(a) and (b) created an "artificial distinction ... between charitable activity and non-partisan political activity in support of the charitable purpose."⁶

The Attorney General, as respondent, argued that subsection 149.1(6.2) did not infringe upon CWP's freedom of expression because charitable status was a tax benefit akin to a government subsidy. Denying a tax exemption to an organization advocating for certain opinions, it argued, was not equivalent to denying freedom of expression, as organizations would continue to have rights to free speech but not to subsidized speech.

C. THE COURT'S DECISION

The court found that non-partisan public advocacy for legislative and policy change was *prima facie* protected by freedom of expression in accordance with the test set out by the Supreme Court of Canada in *R v Keegstra*⁷ – it contained expressive content and was not violent in form. The court therefore found that CWP had a right to free speech, but that its pursuit of its charitable purposes through expression was undermined by the ITA and the CRA's interpretation thereof, stating that "[t]he shortcomings of a legislative regime undermine or burden the exercise of a *Charter* right. This burden prevents or impairs the right holder from taking advantage of a state-supplied platform that it could otherwise freely access were it not for its insistence on exercising that right."⁸ The court therefore found that CWP's freedom of expression was infringed.

Further, the court found that the infringement could not be reasonably justified under section 1 of the *Charter*. The court found that the objective of subsection 149.1(6.2) was to limit political expression;

⁶ *Ibid* at para 58.

⁷ *R v Keegstra*, [1990] 3 SCR 397.

⁸ *Supra* note 1 at para 48.

rather than permitting charities to devote 10% of their resources to political activities, it prohibited them from devoting 90% of their resources to political activities.⁹ It also found that the government approached the issue “as though the need to limit the political expression of charitable organizations in this way is self-evident.”¹⁰ The court disagreed, holding that the government restricted free expression for its own sake, with no further goals or policy purposes, and that this endeavour was not a pressing or substantive objective. It therefore held that the infringement of CWP’s right to freedom of expression was not justified.

Significantly, the court found that there is “no justification for an interpretation of s. 149.1(6.2), that draws a distinction between charitable activities and non-partisan ‘political activities’ in the nature of public policy advocacy.”¹¹ It also found that charities could devote substantially all of their resources to non-partisan public policy advocacy and still be considered to be spending substantially all their time on their charitable activities. The court therefore held that “charitable activities” in subsection 149.1(6.2) should be read to include political activities. Given that such an understanding would render paragraphs 149.1(6.2)(a) and (b) meaningless, it ordered a declaration that those paragraphs be of no force and effect.

D. THE FUTURE OF POLITICAL ACTIVITIES

The CWP Decision has again put the issue of charities’ involvement in political activities on the front burner. In its analysis, the court referred to the Minister of National Revenue’s March 31, 2017 *Report of the Consultation Panel on the Political Activities of Charities* (“Consultation Report”).¹² The Consultation Report found that the political activities legislation was outdated, recommending legislative changes to simplify the political activities requirements and further stating that charities’ involvement in public policy dialogue should be seen as “an essential part of the democratic process.”¹³ While the CRA had indicated its intention to respond to the Consultation Report by June 2017, it had not done so at the time of the CWP Decision.

However, as indicated above on August 15, 2018, the Minister of National Revenue and Minister of Finance jointly announced that the government was proceeding with its commitment to clarify the rules

⁹ *Ibid* at paras 56-57.

¹⁰ *Ibid* at para 60.

¹¹ *Ibid* at para 68.

¹² Canada Revenue Agency, *Report of the Consultation Panel on the Political Activities of Charities*, Government of Canada, online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-ctvts/pnlrprt-eng.html>> [the “Consultation Report”]. For further information on the Consultation Report, see Terrance S Carter, Jennifer M Leddy & Ryan M Prendergast, *Charity & NFP Law Bulletin No. 403*, “Sweeping Changes Recommended in Report on Political Activities”, online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2017/chylb403.pdf>>.

¹³ *Supra* note 1 at para 25.

governing charities' participation in political activities. The announcement also stated that the government had "identified significant errors of law" in the CWP Decision and had decided to appeal it to "seek clarification on important issues of constitutional and charity law." Most importantly, as indicated earlier, the announcement promised that the appeal "will not change the policy direction the Government intends to take with respect to the removal of quantitative limits on political activities."¹⁴

This policy direction includes amendments to the ITA to address concerns raised in the Consultation Report, which would allow charities to "pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy."¹⁵ In particular, the legislative amendments will involve changes consistent with recommendation no. 3 of the Consultation Report, which reads as follows:¹⁶

Amend the ITA by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.

The Panel recommends that amendments:

- a. retain the current legal requirement that charities must be constituted and operated exclusively for charitable purposes, and that political purposes are not charitable purposes;
- b. fully support the engagement of charities in non-partisan public policy dialogue and development in furtherance of charitable purposes, retiring the term "political activities" which tends to be understood in common parlance as partisan and is therefore confusing, and clearly articulating the meaning of "public policy dialogue and development" to include: providing information, research, opinions, advocacy, mobilizing others, representation, providing forums and convening discussions; and
- c. retain the prohibition on charities' engaging in "partisan political activities", with the inclusion of "elected officials" (i.e. charities may not directly support "a political party, elected official or candidate for public office"), and the removal of the prohibition on "indirect" support, given its subjectivity."

¹⁴ *Supra* note 3.

¹⁵ *Ibid.*

¹⁶ *Supra* note 12.

While recommendation no. 3 of the Consultation Report is a major improvement to the current situation, it is not as far reaching as the CWP Decision, which has no requirement that such activities be subordinate to and further the charitable purposes of the charity.

The legislation to be introduced in the Fall of 2018 is intended to apply retroactively, and will apply to the currently suspended audits and objections. Additionally, the CRA is expected to provide a guidance document, which will be developed with the charitable sector, and the government intends to provide its response to the Consultation Report when legislation is passed.

E. CONCLUSION

The Government's appeal of the CWP Decision may not be heard for a number of months and so the promised legislation is likely to be introduced before the appeal is heard. If the appeal is dismissed, the CRA may have to do more than implement recommendation no. 3 of the Consultation report, but that remains to be seen.

Whatever happens with the appeal, the needle on the political activities dial has been dramatically moved forward. However, the legislative and policy status quo is maintained pending the disposition of the appeal and the introduction of the legislation promised by the Minister of National Revenue and Minister of Finance in their recent joint statement. Charities engaging in activities that may be deemed to be political activities should continue to operate in compliance with the present regime until further clarification is provided.