

CRA RELEASES FINAL GUIDANCE ON UPHOLDING HUMAN RIGHTS AND CHARITABLE REGISTRATION

*By Terrance S. Carter**

A. INTRODUCTION

On May 17, 2010, Canada Revenue Agency (“CRA”) released in final form its guidance on registering and operating a charity to uphold human rights entitled *Upholding Human Rights and Charitable Registration* (“the Guidance”).¹ On May 28, 2009, CRA had released its draft guidance as part of the consultation process with the charitable sector (“the Draft Guidance”). The Guidance replaces CRA’s Summary Policy CSP-HO8, *Human Rights*, released on September 2, 2003. While the Guidance does not contain substantial amendments from the Draft Guidance, CRA has provided additional information with respect to political activities and anti-terrorism issues, as well as a helpful appendix containing questions and answers for both applicant and registered charities that wish to pursue charitable purposes that uphold human rights. This *Charity Law Bulletin* summarizes the highlights of the Guidance, particularly what has been added since the release of the Draft Guidance for charities considering registering for the purpose of upholding human rights, or those already involved in such activities. For commentary on the Draft Guidance see “CRA Draft Guidance on the Protection of Human Rights and Charitable Registration” *Charity Law Bulletin* No. 166 (May 28, 2009) available online at: <http://www.carters.ca/pub/bulletin/charity/2009/chylb166.htm>.

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¹ The Guidance can be found online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cgd/hmn-rghts-eng.html>.

1. What's New in the Guidance?

Whereas the Draft Guidance had referred to “protecting human rights” in the context of charitable registration and activities, CRA has made a terminology shift in that the Guidance now references “upholding human rights.” CRA also clarifies that the Guidance will be used as a reference tool for CRA officials reviewing applications for charitable status as well as auditing registered charities which conduct activities upholding human rights.

The Guidance defines “upholding human rights” as, “activities that seek to encourage, support or defend human rights that have been secured by law, both in Canada and abroad.” CRA has not substantially changed the documents which are referred to in defining human rights from the Draft Guidance, which documents include:

Canadian law, including:

- the Canadian Charter of Rights and Freedoms
- the Canadian Bill of Rights
- the Canadian Human Rights Act
- provincial and territorial human rights legislation

International treaties to which Canada is a party that come within the following categories:

- United Nations human rights covenants, conventions, and protocols
- International Labour Organization conventions
- Geneva conventions and protocols

However, with regard to human rights not contained within the above recognized documents, CRA adds the caveat that such additional area of human rights may serve as the basis for the charity's work if the relevant parts of their content are sufficiently similar to the human rights and freedoms recognized by Canada. As well, CRA reminds readers that while seeking to uphold the enforcement of already existing law is a well recognized charitable purpose, “attempting to change the law in Canada or another country is not a charitable purpose.” In this regard, CRA refers the reader to Policy Statement CPS-022, *Political Activities* (“the Political Activities Policy”)².

Another new addition to the Guidance is the inclusion of a paragraph outlining approaches taken in other jurisdictions in recognizing upholding human rights as a charitable purpose. CRA refers to the

² The Political Activities Policy can be reviewed online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>. For commentary see Jennifer M. Leddy in “The Parameters of Political Activities for Registered Charities” *Charity Law Bulletin* No. 206 (April 28, 2010) online at: <http://www.carters.ca/pub/bulletin/charity/2010/chylb206.htm>.

position of the Internal Revenue Service in the United States which recognizes “defending human and civil rights secured by law” as a charitable purpose. CRA also makes reference to charities legislation in the United Kingdom as well as a policy document released by the Charities Commission of England and Wales entitled RR12 *The Promotion of Human Rights*.³

2. Eligibility for charitable registration

CRA has maintained that in order to show that the purposes and activities of a charity comply with the Guidance, the charity must include in their application the specific source or concept of human rights that will be applied; a detailed description of all the current and proposed activities; and the specific location, country or range of countries in which each activity will be carried out. The Guidance reiterates CRA’s position noted in its foreign activities draft guidance that, “purposes that are illegal in Canada and purposes that are contrary to public policy are prohibited.”

With respect to public benefit, CRA has also added that an intangible public benefit may be acceptable where there is a clear general consensus that the benefit exists. In this regard, the Guidance states that securing human rights or providing relief for those whose human rights have been violated achieves an intangible benefit by allowing the public to know that the fundamental rights of all members of the community are being protected.

3. Upholding Human Rights under the Four Heads of Charity

The Guidance confirms that there are many potential charitable purposes and activities which can uphold human rights. However, the Guidance further notes that the Charities Directorate may examine an organization’s practices to determine whether all the legal requirements relating to registration have been satisfied, either by considering the information from the applicants themselves or through, “other reliable sources for this purpose.”

As *Charity Law Bulletin* No. 166 reviewed the Draft Guidance with respect to the examples provided by CRA as permissible purposes and activities, and the Guidance is little changed in this respect, this *Bulletin* will continue to summarize the new content in the Guidance.

³ See RR12 *The Promotion of Human Rights*, Charity Commission of England and Wales (January, 2005) online at: <http://www.charity-commission.gov.uk/publications/rr12.aspx>.

4. Special Considerations: Political Activities and Anti-terrorism measures

a) Political Purposes and Activities

CRA emphasizes throughout the Guidance that an organization which undertakes political activities will not be registered, and encourages the reader to review the Political Activities Policy. The Guidance repeats the definition of political purposes found in the Political Activities Policy as those that seek to:

- Further the interests of a particular political party or support a political party or candidate for public office; or
- Retain, oppose or change the law, policy, or decision of any level of government in Canada or a foreign country.

CRA provides the following as unacceptable purposes for human rights organizations to use as a charitable purpose:

- To pressure the nations of the world to change the body of international human rights;
- To focus on one particular country and pressure its legislature or government to sign an international human rights agreement;
- To focus on one particular country and pressure its legislature or government to enact or alter domestic human rights legislation in that country;
- To attempt to persuade a number of countries or countries in a region to enact or amend legislation on human rights.

The Guidance states that CRA will examine a combination of factors when considering whether a purpose of a charity will be considered political, such as the national or international focus of the charity's purposes; the specific legal context of the country or countries in which it wishes to operate; and the nature of its proposed activities to pursue that purpose.

However, registered charities are permitted involvement in non-partisan political activities provided that no more than 10% of the charities resources are used for political activities and the political activities are connected and subordinate to the charity's purposes⁴. The Guidance states that lobbying a particular government to adopt human rights legislation or policies would be an allowable political activity where:

⁴ See section 9 of the Political Activities Policy online: http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html#P263_26553.

- The charity uses no more than the allowable limit of its resources under the *Income Tax Act* (“ITA”)
- The activity relates to and supports the charity’s purpose(s) and represents a reasonable way to achieve them (connected to);
- Is subservient to the charity’s dominant charitable purpose or is a minor focus of the charity (subordinate to); and
- Does not express support for or criticism of any political party or candidate (non-partisan).

The Guidance also makes reference to the fact that political activities do not count toward a charity’s disbursement quota. Given the recent 2010 Federal Budget⁵ however, this reference is unclear, since only the requirement that charities spend an amount equal to 3.5 per cent of their assets that are not used directly in its charitable activities or administration each year remains with respect to the disbursement quota.

b) Anti-Terrorism Measures

With respect to compliance with anti-terrorism legislation in Canada, the Draft Guidance contained only a reminder that charities must bear in mind their obligations under Canada's anti-terrorism legislation and a link to CRA’s webpage *Charities in the International Context*.⁶ The Guidance now references both the *Charities Registration (Securities Information) Act* and ITA with regard to a charity’s registration being revoked where the charity operates in such a way as to directly or indirectly make its resources available to a “listed entity” defined in the *Criminal Code* under section 83.01(1), or to any other entity that engages in terrorist activities or supports them.⁷ The Guidance also references CRA’s *Checklist for Charities* to help Canadian charities ensure they are not exposed to terrorist abuse.⁸

5. Appendix Q & A

The Guidance also contains answers to seven questions with regard to registering a charity to uphold human rights and operating a charity which upholds human rights. The first question addresses

⁵ For more information, see Karen J. Cooper and Terrance S. Carter in “Significant Benefit for Charities in 2010 Federal Budget DQ Reform” Charity Law Bulletin No. 197 (March 8, 2010) online at: <http://www.carters.ca/pub/bulletin/charity/2010/chylb197.pdf>.

⁶ Online at: <http://www.cra-arc.gc.ca/tx/chrts/ntrntnl-eng.html>.

⁷ The Guidance provides a link to a listing of “listed entities” at: http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?DetailID=525.

⁸ Online at: <http://www.cra-arc.gc.ca/tx/chrts/chcklsts/vtb-eng.html>. For commentary see Terrance S. Carter and Nancy E. Claridge in “CRA’s New Anti-Terrorism Checklist – A Step in the Right Direction” Anti-terrorism and Charity Law Alert No. 17 (April 29, 2009) online at: <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>.

whether United Nations (“U.N. Declarations”) can be accepted as human rights instruments for the purposes of charitable registration in Canada. CRA states that depending on the specific purposes and activities of the charity, a U.N. declaration may be accepted. In this regard, the Guidance states that non-legally binding declarations, such as the *Universal Declaration of Human Rights*, can be used as a basis for a charity’s work in upholding the administration or enforcement of human rights, but the charity must be able to show how it is going to uphold the principals in the declaration by identifying the legally binding protocol, statute or treaty, and the jurisdiction in which it will be operating. CRA notes that other U.N. declarations will be considered on a case by case basis.

The second question asks whether customary international law is accepted as a source of human rights law for the purposes of charitable registration in Canada. In answer, the Guidance points out that for the purposes of registration, customary international law may be accepted as a source of human rights law if the applicant organization provides sufficient detail regarding those aspects of customary international law that have been codified. Therefore, a purpose to only uphold the administration and enforcement of customary international law will be considered too vague and the CRA will deny registration. However, CRA does indicate that education or research in the use of customary international law in international litigation is consistent with the charitable purpose of upholding human rights.

The third question responds to why human rights organizations are required to specify where they are working. In this regard, CRA indicates that they will look at a number of different factors when evaluating an application for charitable status, including the specific legal context in which the charity is operating. By way of example, the Guidance notes that many countries still have laws imposing the death penalty for certain crimes, and therefore an organization which has as one of its purposes the abolition of the death penalty in one such country could not be registered, as this would be a political purpose.

The fourth question addresses the situation where a charity wishes to assist a government or collection of governments in establishing a new declaration or treaty that does not make new law but is based substantially on existing law. The Guidance states that a charity can help undertake such an activity in a number of ways, such as by “providing expertise on the subject matter through well-reasoned

research, sitting on advisory committees or working groups, or providing technical support or expertise in the drafting of documents for consideration.” However, even where a government or collection of governments makes the initial policy decision to establish a new declaration or treaty, if that decision is a result of either indirect or direct pressure from a charity, the CRA will interpret those activities as political since the charity is seeking to change the law or government policy.

The fifth question is broken into three parts, and examines what action a charity can take when it thinks a government policy is inconsistent with established human rights law. In this regard, CRA answers positively with regard to permitting a charity to challenge such policy in court, bringing the matter to the government’s attention or encouraging people to write to politicians to change the policy. With respect to bringing the matter to the government’s attention, a charity may uphold the law when the government is under a legal obligation to follow established human rights law. However, CRA distinguishes this scenario from when such obligation permits a range of policy options and the government has simply chosen one of many. In that case, CRA will consider activities that seek to oppose, change or retain the government’s policy decision as political activity. Also, while encouraging people to write to the government can be charitable, it must be subject to the limitations outlined in the ITA and the Political Activities Policy.

The sixth and seventh questions relate to whether or not a charity can seek a court or tribunal interpretation of already existing law, or seek intervener status in an important human rights case. In both cases the Guidance would consider these to be charitable activities since in the first case the charity is not attempting to change the law, and in the second case it is in the discretion of the court as to who may be granted intervener status.

B. CONCLUSION

The Guidance provides important clarification for those organizations wishing to register as charities with purposes to uphold human rights law, or those human rights organizations that are registered charities already operating activities to uphold human rights. The Guidance also provides answers to specific questions with respect to charitable purposes and activities for applicant or registered charities. While the Draft Guidance was less clear on what were permissible or impermissible political activities, CRA has taken steps to provide direction with respect to which purposes and activities charities should avoid regarding

upholding human rights. The Guidance will be essential reading for both boards of directors of charities and their professional advisors to consult before registering a charity that plan to conduct activities to uphold human rights.