Bill S-216 – 'Resource Accountability' and the Vulnerable Sector

Presented by The Honourable Ratna Omidvar, C.M., O. Ont, Senator for Ontario

at the 2022 Ottawa Region Charity & Not-for-Profit Law Webinar

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Editor's Note: On February 17, 2022, the Honourable Ratna Omidvar, C.M., O. Ont, Senator for Ontario, delivered a presentation explaining the context of Bill S-216 *An Act to amend the Income Tax Act (use of resources of a registered charity).* The Senator explained why the Bill is necessary and how it addresses the needs and lives of vulnerable communities. The presentation, given at the *2022 Ottawa Region Charity & Not-for-Profit Law Webinar*, includes helpful information about the domestic and international context of resource accountability in the charitable sector and points towards a better alternative.

The following is a transcript of the presentation. Select questions raised at the conclusion of Senator Omidvar's presentation have also been included.

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Introduction:

Terrance S. Carter: We are now going to move over to our special speaker, the Honourable Ratna Omidvar. As I mentioned in the opening comments, the Senator was the Deputy Chair of the Special Senate Committee on the charitable sector. Some of you may recall that the Senator presented at last year's Ottawa Webinar t about her work dealing with the Special Senate Committee.

Today we have asked the Senator to give us an update on what's happening with the initiative for Bill S-216, dealing with resource accountability and the vulnerable sector. We're delighted to have you Senator. We look forward to your comments, and at the end we'll be able to ask questions as they come in.

Presentation:

Hon. Ratna Omidvar: Thank you so much, Terry. It is wonderful to be able to speak to so many people. There is an upside and a downside to not speaking directly before an audience, but the upside is that I can connect to so many more.

I'm going to talk to you about Bill S-216: why I think it is necessary, and how it addresses, in particular, the needs and lives of vulnerable communities. I'll give you an update of where it is at.

The Bill amends the language in the *Income Tax Act*, which as it is currently written, limits registered activities to expending their charitable dollars on their own activity. Charites can, of course, make gifts or grants to other charities. The Act, as it is currently worded, limits that. Otherwise they're expending their charitable dollars on activities that they undertake themselves.

There are only two ways that you are able to spend charitable dollars: 1), on your own activities, or 2) by granting to other charities.

However, I think we will all recognize that there are times when the best way for a charity to pursue its charitable purpose is to work with or through non-charities, such as not-for-profit groups, social enterprises, co-ops, civil society groups, businesses and others who are on the ground and may well be the best partners for the charity to achieve its impact. This is true for both charities working domestically or internationally.

Let me give you an example of the YWCA. The YWCA receives charitable dollars from Canadians and foundations. The YWCA operates its own programs, and it may give grants to a few other charities. The policy rationale is sensible because the Canadian public should be assured that charitable dollars are being spent in an accountable way. No one can, or should, argue with that accountability.

What happens when the YWCA, or the YMCA, or the Girl Guides, etc., want to work with Afghan women who speak little or no English, to help them become financially literate? The best way to do this is to work with the local Afghan women's group, which might not be a charity but instead a not-for-profit that may or may not be incorporated. In this case, because the Act stipulates that charities must spend charitable dollars on their "own activities", the CRA's guidance kicks in. The CRA's guidance says that when charities work with non-charities, they must exercise direction and control over any such work so that the activities carried out by the non-charity technically become the activities of the sponsoring charity. This is the CRA's way of ensuring compliance with the *Income Tax Act.*

Even though these facts may sound largely technical, let me assure you that they have an outsized impact on charities. You will hear me refer to the language of "own activities" and "direction of control" many times. It impacts not only charities, it impacts who they work with and how they work with them and, as a result, how much charitable benefit can be provided.

The report by the Special Senate Committee on the Charitable Sector, which was passed unanimously in the Senate last year, was an attempt to ensure accountability for tax-exemption. It found that this approach, this current law, in an attempt to provide accountability for tax exempt dollars, is costly, inefficient and inconsistent with contemporary values of equal partnership, inclusion and decision-making.

Therefore, the report recommended moving away from this old approach of "own activities," towards a new approach that emphasizes more effective and more efficient processes without sacrificing any measure of accountability.

The charitable sector — and by that, I mean Canada's many charities spread across our country — is squarely behind this recommendation. They include Imagine Canada, Canada's largest sector organization of charities; Cooperation Canada, Canada's umbrella group of charities involved in international development; the Canadian Centre for Christian Charities; the United Way of Canada; as well as 37 of Canada's top charity lawyers who, in an open letter, called for a change to this law. In addition, the Minister's own advisors, in making recommendations on the charitable sector, tabled its own report and they, too, flagged the urgency to remove the language of "own activities" from the Act. In fact, many stakeholders have told me that of the 42 recommendations in the Senate charities report, this is the one that is most important and urgent.

Just to go back a little bit in history – why are we in this position? This particular feature in the *Income Tax Act* was brought to life in the 1950s to ensure that charities and foundations did not simply transfer money from one entity to the other without ever reaching communities. It was to prevent self-dealing, but over time it has had a huge unintended impact — strangling cooperation and collaboration between charities and non-charities. In so doing, it has resulted in a system which either requires charities to behave in a controlling and oppressive manner in order to be in compliance with the law or to engage in complicated, complex, and expensive workarounds, or to walk away from doing good work.

Let me briefly give you a lens into how the law, as it is currently written, impacts vulnerable communities. Let's start with how this law impacts on giving to Indigenous organizations that are not charities. In most cases, Indigenous organizations, if they are not a band council or form of recognized local government, are not registered charities themselves. The only way, therefore, they can receive charitable dollars is to consent to a very complicated and expensive agency or intermediary contract between the charity and the Indigenous organization, under which the funding charity must exercise effective operational control over the activities of the non-charity they are funding. This is how "direction" and "control" expresses itself.

I need not describe to you what the two words "direction" and "control" mean to Indigenous organizations and Indigenous peoples. Any intellectual property which results from this agreement is solely owned by the charity and not the Indigenous organization. All public statements, including press releases — so all expressions of voice — need approval from the funding charity. Every line item in a budget must be approved by the charity. The non-charity may be required to provide receipts, photographs, be subject to on-site inspections, provide minutes of meetings, written records, *etc.* Every legally binding document pertaining to the project must be signed by the charity, including leases, *etc.* At times, they might even be required to change their staff if the charity so wishes. This, colleagues, in my view, is not a partnership. It is tantamount to a takeover.

It is not a surprise, then, that many charities shy away from funding Indigenous causes because of, first, the complexity of these rules and second, not wanting to offend Indigenous peoples. We know that grant-making to Indigenous groups is very low. A recent study showed that Indigenous groups only receive half a percent of all charitable giving in Canada. In other words, they are excluded from the charitable space in this country. It no surprise that many Indigenous partners view the law and its application as yet another form of blatant exclusion and systemic racism. In addition, it signals that Indigenous organizations cannot be trusted to properly spend public money.

This plays out very similarly in organizations that work with racialized communities. I want to give you an example from my own city where there is a significant racial minority community. I have worked in the past with a voluntary organization, a not-for-profit, called the Black Daddies Club. It strives to change the image of the absent Black father that is prevalent in the media. It assists young men to become better fathers, but they are not a charity. They have to deal with the same issues as Indigenous peoples' organizations. They have to create convoluted and expensive intermediary agreements. At times, they have to agree to be hired by the charity. In other words, they too have to agree to be directed and controlled. As with all other organizations in the same situation, they must agree to sign over their intellectual property to the charity. Again, no wonder less than 1% of charitable dollars flow to black organizations and causes.

Finally, let me take you on a tour of Canadian charities overseas, who also serve very vulnerable peoples. We can appreciate Canadian charities working internationally in far places, headquartered in Canada, and bringing in help, education, housing, and many other necessary services to vulnerable people, especially children. Many of us, no doubt, donate to such charities. For international charities, working with local partners is not a choice but a necessity. But in order to comply with the law, they have to contort themselves to stay within it. They need to develop intermediary agreements, then they must prove that they exercise operational direction and control over the implementation of an agreement of an organization thousands of miles away. There are legal costs. There are also costs of education of the parties to the agreement, policy documents, protocols, processes, significant planning and associated costs. No wonder, then, that Canada's approach is viewed — in the international development arena — as neocolonialism or white saviourism.

Just as one example, I know of an international development agency which serves children in Nepal working with seven local partners. Since these local partners in Nepal are not charitable under Canadian law, they have to be directed and controlled. There are seven separate agreements, seven separate financial systems, 22 periodic payments, and 38 separate reports that these organizations must submit to be processed. There are other unintended consequences of this law in the context of international development:

> First: Canadian charities cannot realistically participate in pooled funds with non-Canadian charities. When, let's say, charities from the U.K., the U.S. and Australia are pooling their efforts to address significant international development issues, Canada must stay apart from that. We cannot realistically exercise direction and control over a pooled fund.
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> Second: no international charity will ever locate their headquarters in Canada, bringing reputation and jobs with that. Because, if they did so, then the entire global work would fall under Canadian charity law and force them to also follow this law of direction and control.

One witness before the [Special Senate] Committee used a very apt metaphor. She noted that our peer countries – the U.S, the U.K and others – consistently operate on a yellow light system, which says "Proceed, but with caution". In Canada, for comparison, the light is always red. I hope I made it clear for you that this is a problem. Programing is halted, staff are burdened with additional paperwork, and the situation may very well change once all the paperwork is approved.

There is another important reason why this Bill needs to become law. Currently, the government is looking at raising the disbursement quota of Canadian charities, including foundations. This disbursement quota is a requirement to spend a minimum amount each year on charitable programs and on gifts. Currently, the disbursement quota is set at 3.5%. If the government goes through with increasing the disbursement quota, it will certainly have a desired impact of flowing more money into the community. It will not have the desired impact of flowing money to vulnerable communities unless the "own activities" law is changed.

I have explained the "why" to you. Let me explain the "what" and the "how". I propose an alternative, which would increase efficiency, increase effectiveness, and empower partners without sacrificing accountability.

But before I do so, let me pre-empt a question that you may reasonably have. Why don't all of these organizations simply become charities? The answer is not simple. First, groups overseas will not qualify for Canadian charitable status because they are not resident in Canada. Co-ops and social enterprises do not qualify because they do not have exclusively charitable purposes. Social movements which are organic, like Black Lives Matter, would also not qualify because they're not organizations, only movements. As for not-for-profits, many are not charitable because charitable status with its accountability framework may well be out of their reach or not timely for them. The Black Daddies Club, for instance, is today, a very small organization of mainly volunteers. To manage charitable status, I think, is well out of their reach.

Another reason is that the definition of charity in Canada has not evolved since its inception. There are four heads of charity. They remain what they were decades ago: relief of poverty, advancement of education, advancement of religion and other purposes. Other jurisdictions like Australia, for instance, have modernized their definition of charity and the Senate Charities Report identified the need to allow the definition of charity to evolve as an urgent matter. Until that happens, we are left with the old definition under which many of the organizations that I have talked about would likely not qualify.

So, let me now propose the solution to you. I propose that we amend the *Income Tax Act*, that we move away from the current language of "own activities" to new language of "resource accountability." This proposal does three things:

> First, it replaces the reference to "charitable activities carried out by itself" throughout the Act with simply the words "charitable activities."
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> Next, it amends one section of the Act to expand the definition of what is a "charitable activity" to allow charities to use their resources for charitable purposes by taking reasonable steps.
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> Third, it inserts an important section, outlining what these "reasonable steps" are. Reasonable steps are:
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> a) Before providing resources to a person who is not a qualified donee, the charity collects the information necessary to satisfy a reasonable person that the resources will be used for a charitable purpose by the person who is not a qualified donee, including information on the identity, experience, and activities of the person who is not a qualified donee.
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> b) When providing resources to a person who is not a qualified donee, it establishes measures, imposes restrictions, or conditions, or otherwise state actions necessary to satisfy a reasonable person that the resources are being used exclusively for a charitable purpose by the person who is not a qualified donee.

This approach shifts the focus from ongoing operational control of activities to an approach focused on ensuring that reasonable and appropriate steps are taken to allow for the appropriate accountability of charitable dollars and allow the charity to achieve its charitable purpose.

I will say again, that accountability, for tax exempt dollars, is paramount. As I stated, the charity will engage in full due diligence up front, develop agreements on deliverables, activities, budgets, reporting

and timelines. When these agreements are complete, the non-charity will report to the charity about how the money is spent. However, the non-charity will not be controlled or dictated to by the charity. The project management will rest with the non-charity. In this way, we move away from "direction and control" as the only measure of accountability and replace it with due diligence, financial control and reporting as the measure.

I'm not going to talk too much about the concern of some regarding an amendment to the law — as I have suggested — as somehow enabling flows of charitable money to be directed towards terrorist activities. Suffice to say, we have legislation, we have the RCMP, CSIS, FINTRAC, we also have authority that is provided the Minister of Justice and the CRA who have the power to revoke the charitable status of charities who are engaging in terrorism funding.

In my view, this concern is a bit of a red flag, but I am happy to answer any questions. However, I really want to talk to you about comparisons with other jurisdictions, because when you are making Canadian law it is always important to see what our peers are doing. Let me start with the United States.

The United States is the most security-conscious country in the world. It uses a very a similar model to what I am proposing. In fact, my proposal lifts quite a bit of their structure and ideas. But they use the language of "expenditure responsibility." I'm using the term "resource accountability" because I'm sensitive to the reality of how Canadian charities actually work.

To varying degrees, both the United Kingdom and Australia, permit grant making, or the transfer of funds, to non-charities as long as pre-grant due diligence, along with monitoring and reporting on the use of the funds is assured.

In an analysis comparing the approach of the U.K., U.S., Australia and Canada, Dr. Natalie Silver of the University of Sydney Law School concluded that Canada's control requirements are excessive and onerous.

I want to stress that this proposal was not drawn from thin air by me. As I said, it was a recommendation of the Senate Committee. It was recommended by the Advisory Committee to the Minister of National Revenue. It was urged on the government by Canada's top charity lawyers in the country. Finally, I have worked every step of the way with sector leaders and advisors who have been my counsel every inch of this journey.

Let me now describe to you where this Act now sits in parliament. It was passed in the Senate unanimously without any amendments. It is now in the House of Commons. It is a private members bill, so it is sponsored by the MP from Northumberland, Philip Lawrence who is a member of the Conservative party. He has tabled the Bill and will speak to it at second reading in the coming months. It will then go to a committee in the House of Commons, likely the Finance Committee for witness, review and study. It will come back to the House of Commons with or without amendments, I'm not sure. Then it will get a third reading in the House of Commons. If it is then passed it will be given royal assent. I'm hoping this will happen in the next few months, hopefully by the fall. As we all know in Parliament, there's many a slip between the cup and the lip. And all kinds of things are happening in our country that could throw the parliamentary calendar into disarray. After it receives Royal Assent, the CRA then has carriage of consultations on what the regulations should be, and they will likely consult with a range of

stakeholders on guidelines that will have to be developed and these guidelines will then be put into place. My Bill provides a timeline for these guidelines to be completed, and then everything becomes implemented two years from Royal Assent. It's not an easy project I have launched, but I would really ask for your help in urging this on to your MPs, to your local not-for-profits, sector not-for-profits, or umbrella organizations. But reaching out to your MPs, signing petitions, knocking on MPs doors, if you're willing to do that. We have to make as much noise as possible because the charitable sector is, in my view, not taken seriously by the government. The outcome of that is this disregard for outdated laws that were created in the 1950s and have a huge, deep, negative impact on advancing charitable purpose.

Thank you, colleagues, I am looking forward to your questions. Terry, over to you.

Questions

Terrance S. Carter: Thank you very much Senator. That was an excellent presentation. We've had a request that your remarks, hopefully, will be reduced to writing and be shared at a later time.

Some questions that have come up, and I want to pass onto you. Do your proposals apply to charitable foundations as well as to charities, particularly in being able to disburse to non-charities?

Hon. Ratna Omidvar: Yes, they apply to charites and chairtable foundations. Chairtable foundations will also be able to give grants to non-qualfied donees within the accountabiltiy frame work that I laid out.

Terrance S. Carter: Another question that came through. Should we not have agreements to make sure we have good reviews over these programs? The individual asking the question agrees with direction and control and wants to know "How can we make sure that money is used properly?"

Hon. Ratna Omidvar: I think we can always make sure money is used properly by putting in front, upfront due diligence processes, checking on reputation, checking on past performance, coming to an agreement about stated objectives, outcomes and timelines, and resource expenditure. We can always do that in a reasonable upfront way. Then, the agreement will obviously have a few features of checking in periodically. I don't believe you need to exercise direction and control to make sure that the project is fulfilling its purposes and objectives. It is an overreach in my opinion. One can easily have the very same outcome by using a completely different process, which is what I am suggesting.

Terrance S. Carter: Senator, just to build on what you mentioned about Bill S-216. You have all of the techniques available for resource accountability, so that's not being lessened. Instead of it being the perspective that it is the charity that is doing its activity and telling the other organization what to do, you're advocating that if you get resource accountability right that we don't need to have that legal fiction in place that is "our own activities." I was wondering if you could just comment on that.

Hon. Ratna Omidvar: Thank you, Terry. That term, "legal fiction" has been used quite often to describe the current law, because it does result in the workaround that charities and foundations are using. Some of them have been using workarounds for years, and they are quite comfortable with them. I want to put the question to you. Ask your partner, how do they feel about it? Do they not feel that they are not in an equal partnership? What about the issue of intellectual property? What about the issue of voice? It may work for a foundation, or a charity, but I will submit to you that this proposal that I suggested will work better for

both partners and will therefore result in an empowered relationship. As I noted, 37 of Canada's top charity lawyers have written an open letter to the government. These are charity lawyers who likely have charities and foundations as their clients to develop these pieces of legal fiction that I call "the workaround". They likely have a large number of billable hours around this. They themselves, because they work in the field, in the legal construct, and in the legal interpretation of the current law, have said that this law must be changed.

Terrance S. Carter: Correct, Senator. Just to add in, our law firm would be one of those that would be in support of getting rid of the "own activities" requirement. It just creates "busy work" that is not productive in relation to achieving the charitable purpose of charities.

Hon. Ratna Omidvar: One charity told me that they work internationally. They said they spent one million dollars a year on legal arrangments. So, one million dollars that is not going to the chairtable purpose but to paperwork and oversight of this outdated law.

Terrance S. Carter: Very well said. "Busy work" is not appropriate in achieving charitable purpose. Senator, thank you for being the champion for the sector on this. You have been marvelous in directing the sector on the importance of this matter. We need to rally behind you and I encourage the folks on the webinar today to get behind the Senator. Please send in your comments to your MPs, so that we can get support for this Bill.

Senator, you did a marvellous job. Thank you so much for being with us. We really appreciate your time today. Thank you.